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* This opinion was redacted by the ACBA staff. It is the express policy of the PLJ not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

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* This opinion was redacted by the ACBA staff. It is the express policy of the PLJ not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

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PLJ

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OPINIONS

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Commonwealth of Pennsylvania v. Robert D. Reinhart

Criminal Appeal—DUI—Suppression—Speedy Trial—No Expectation of Privacy

Defendant had no expectation of privacy in a home in which he was a visitor.

No. CC 2016 00 724. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, J.—August 3, 2017.

OPINION

Mr. Reinhart was convicted of driving under the influence and some traffic related offenses. He was sentenced in March of this year. He feels this should have never happened to him. Why? Because the evidence should have been suppressed or his right to a speedy trial should have been vindicated by all charges being dismissed. These two matters are the core of his appeal.

On April 5, 2016, Mr. Reinhart filed an omnibus pre-trial motion. He sought habeas corpus relief and suppression of “any and all evidence” because the police officer “acted outside of his jurisdiction”, Omnibus Pretrial Motion (“OPM”), paragraph 29 (April 5, 2016). He also sought the remedy of suppression because there was no search warrant. *Id.*, at ¶ 31.

A suppression hearing was held. Upon the record being closed, the Court denied suppression. A few months later, a non-jury trial resulted in his conviction. Sentencing took place on March 9, 2017 and Mr. Reinhart’s appeal followed shortly thereafter.

The *Concise Statement* is the antithesis of its label. His pleading is 36 paragraphs and runs 7 pages long. Despite its length, it does narrow the claims he seeks appellate review upon. As mentioned earlier, there were two bones of contention at the suppression hearing – action outside the officer’s jurisdiction and a warrantless seizure and search. His *Concise Statement*, after setting forth an unnecessary procedural history, finally makes his point in paragraph 36. It says this Court erred by “failing to suppress evidence...as the result of [officer’s] warrantless search...”, 36(a), “failing to suppress evidence...obtained through the warrantless entry by [the officer]... “refusing to suppress the evidence...as the result...[of] illegal warrantless search...”. 36(h). Notably absent from the *Concise Statement* is any accusation that this Court was wrong when it ruled the officer acted properly even though he was outside his primary jurisdiction. As such, the only suppression related claim this Court will address is the officer’s action without a warrant.

The quintessential issues in any search and seizure matter are standing and expectation of privacy. Without both, the world’s best argument never gets heard.

“The concept of standing in a criminal search and seizure context empowers a defendant to assert a constitutional violation and thus seek to exclude or suppress the government’s evidence pursuant to the exclusionary rules under the Fourth Amendment of the United States Constitution or Article 1, Section 8 of the Pennsylvania Constitution.” *Commonwealth v. Hawkins*, 718 A.2d 265, 266 (Pa: 1998). “A defendant moving to suppress evidence has the preliminary burden of establishing standing *and* a legitimate expectation of privacy.

Standing requires a defendant to demonstrate one of the following: (1) his presence on the premises at the time of the search and seizure; (2) a possessory interest in the evidence improperly seized; (3) that the offense charged includes as an essential element the element of possession; or (4) a proprietary or possessory interest in the searched premises.” *Commonwealth v. Powell*, 994 A.2d 1096, 1103 (Pa.Super.2010), *citing*, *Hawkins*, *supra*; *Commonwealth v. Black*, 758 A.2d 1253, 1256-1258 (Pa. Super. 2000); *Commonwealth v. Torres*, 764 A.2d 532, 542 (Pa. 2001); and, *Commonwealth v. Perea*, 791 A.2d 427, 429 (Pa. Super. 2002).

Standing is an issue for Reinhart. While it is axiomatic that Reinhart was present when the law enforcement officer enforcement officer was in Mr. Johnson’s house, the record shows no search of the Johnson house took place. It is also clear that seizure of Reinhart did not take place inside the house. Reinhart was getting a bit confrontational and Officer Kimmell asked him to step outside. Suppression Hearing Transcript (“SHT”), pg. 48 (September 8, 2016). It was there that Reinhart was taken into custody. The Court was not made aware of any item having evidentiary value that was seized from inside the house of Reinhart’s friend. Also absent was any articulation from Reinhart that he had a possessory interest in these unidentified items.¹ The *Information* charged him with three misdemeanor offenses. Not one is a possessory based offense. He was also charged with several, summary level motor vehicle code violations. None are possessory based offenses. Finally, since there was no search of the Johnson house, the 4th predicate for standing has no application.

The aforementioned focused upon the inside of Johnson’s house and Reinhart’s connection to it from a standing perspective. But, we must also examine Reinhart’s standing as it relates to the events which took place outside the house. Reinhart left the house at law enforcement’s invitation and once outside, he was taken into custody. He was seized. On the premises, not far from where he was seized, was a vehicle - the quad - the government accused him of driving in violation of several laws. This collection of events demonstrates his standing through application of the first predicate of standing – presence on the premises where a seizure take place.

The “essential effect” of this standing conclusion is to entitle a defendant to an adjudication of the merits of his suppression motion. Reinhart has not satisfied the requirements of showing an expectation of privacy.

In order to prevail on a suppression motion, each “defendant is required to separately demonstrate a personal privacy interest in the area searched or effects seized, and that such interest was “actual, societally sanctioned as reasonable, and justifiable.” *Commonwealth v. Hawkins*, 718 A.2d 265, 267 (Pa. 1998). “Specific allegations in a motion will usually be sufficient to require the Commonwealth to proceed with evidence of the legality of the search, but will not relieve the defendant of showing a basis for a reasonable expectation of privacy, either through cross-examination of the Commonwealth’s witnesses or by the defendant’s own evidence.” Rudovsky, *The Law of Arrest, Search, and Seizure in Pennsylvania 5th Ed.*, pg. 17 (PBI Press 2009). Reinhart’s *Omnibus Motion* is 5 pages long. While he provides a nice factual overview, his motion fails to provide what the law requires. Reinhart’s pleadings do not address this matter. In fact, the phrase reasonable expectation of privacy or, any of its many derivatives, is never mentioned. OPM, (April 5, 2016).

As barren as Reinhart’s written pleadings were, so too was his evidence gathering or production at the hearing. He did not testify. Instead, the owner of the home, Scott Johnson, did. SHT, 54-67. His evidence centered on his friendship with Reinhart, his interaction with Reinhart on the night in question, and his interaction with law enforcement. From these broad areas of discussion, we learned that Reinhart was a guest, who had called earlier that evening and asked if he could park his quad at Johnson’s house. SHT, 55, 61. Upon arriving, Reinhart joined Johnson in the kitchen and drank some beer. SHT, 56. This evidence shows Reinhart

was nothing more than a visitor. As such, Reinhart has failed to demonstrate a subjectively and objectively reasonable expectation of privacy in the Johnson' home. *See, Commonwealth v. Peterson*, 636 A.2d 615, 619 (Pa. 1993) (holding that appellant was not entitled to suppression of evidence seized from premises where "he has made no averment of possessory interest, legitimate presence, or indeed any factor from which a reasonable and justifiable expectation of privacy could be deduced"); *Commonwealth v. Tucker*, 883 A.2d 625,631 (Pa. Super. 2005) ("[Defendant], however, made no attempt to establish his privacy interest in the area searched or effects seized from the 804 Madison Street residence.").

As was done for determining standing, expectation of privacy once Reinhart was outside needs examined. The hearing revealed nothing that law enforcement obtained that Reinhart showed he had an expectation of privacy in that thing or item. Because Reinhart was unable to demonstrate he had an expectation of privacy outside Johnson's house, the remedy of suppression was simply not applicable to him.

While lacking an expectation of privacy, the Court will nevertheless address some issues which still seem to be troubling to Reinhart. The officer's initial observation of Reinhart was him driving a quad on a road where quads are not allowed. The officer noticed a very distinguishable characteristic on the front of the quad – a fishing rod. Within minutes of that initial observation, followed by losing track of the vehicle, the officer saw that very same quad parked alongside a house in a neighboring jurisdiction, maybe 15 yards from the road. SHT, 36, 38-39. He approached the quad. He touched it. It was warm. SHT, 40. The grass between the road and its resting place gave every appearance of it having recently been driven over that patch of grass. He then went to the front door and knocked. He interacted with Scott Johnson. After some dialogue at the door, which included Johnson telling the officer that the quad was "Bob's", home owner Johnson, allowed the officer to enter his house. SHT, 57, 45-46. From that lawful vantage point, the Officer saw "the male that [was riding] on the quad." SHT, 29. He recognized the camouflage hat and the glasses. He asked Reinhart for identification. He eventually got it. Reinhart then became confrontational. The officer asked if the discussion could continue outside. Reinhart complied and walked outside. Soon thereafter, Reinhart was arrested.

These facts allow for certain conclusions of law to be drawn. Officer Kimmell had consent to enter the home of Mr. Johnston. He was armed with an admission from the home owner that Reinhart was the driver of the quad. From the officer's lawful vantage point inside the home, he saw the driver of the quad. Upon exiting the home, Reinhart was arrested. There was sufficient reasonable suspicion for the officer to follow the physical evidence wherever it sent him. In the course of following that trail, the officer procured additional evidence that created probable cause for Reinhart's arrest.²

Rule 600

Mr. Reinhart's second issue concerns his right to a speedy trial. The genesis of this alleged error begins at the lunch recess of the suppression hearing on September 8, 2016. The government's only witness – Officer Garrett Kimmell – finished his testimony and the Court recessed for lunch. SHT, 53. Upon reconvening, the government's lawyer notified the Court that it had no more evidence regarding the suppression issues and that Officer Kimmell "was released". SHT, 54. The defense then solicited testimony from homeowner, Scott Johnson. SHT, 54-67. When Mr. Johnson was done, the Court denied the suppression motion. SHT, 67. The Court then inquired of both parties as to the next event. When told by the government's lawyer that "Office Kimmell has left for the day", the Court directed both counsel to "pick a new date." Both counsel interacted with the courtroom clerk to select the next available jury trial date. December 12, 2016 was selected.

On November 10, 2016, Reinhart filed a motion to dismiss. He made the global claim that his right to a speedy trial was compromised. According to him, he should have been brought to trial no later than October 11, 2016. *Motion to Dismiss*, ¶ 11 (Nov. 10, 2016). He clings to that position on appeal.

Any Rule 600 analysis must begin with the basics. Reinhart was charged through a criminal complaint which was filed at the magistrate's office on October 11, 2015. A preliminary hearing was scheduled and held on December 5, 2015. Formal arraignment followed on January 25, 2016. A pre-trial conference was held on March 11, 2016. At that conference, a trial date of June 7, 2016 was set.

On April 5, 2016, a tardy, omnibus pretrial motion was filed. Its contents prompted the Court to meet with counsel on April 27, 2016. The topic of that conference was discovery issues concerning a dash cam video and a body cam video.

On June 7, 2016, a hearing on his pretrial motion and, if necessary, the previously scheduled trial did not take place. The government was not in a position to move forward as its key witness, the arresting officer, was not available. *See, Motion for Continuance* (May 17, 2016). A new date of September 8, 2016 was set. On that September day, testimony was taken on the suppression motion and eventually the Court denied the request to suppress. The Court then inquired of counsel on the next step. The Court was clearly anticipating moving to the next event – that being a trial.³ SHT, 67. "Your Honor, Officer Kimmell has left for the day. I would not be able to proceed today" said government counsel. "Pick a date. Whatever you want" was the Court's reply. Both parties agreed on December 12, 2016,

Before the new trial date rolled around, Reinhart claimed a speedy trial violation. *See, Motion to Dismiss Under Rule 600(D)(1)*, (Nov. 10, 2016). The government responded and the Court denied the dismissal request through an order of December 7, 2016.

"The crux of the issue concerns the Court calling the matter to be tried immediately upon the pretrial motions being ruled upon but the Commonwealth not being prepared to go. The Court finds [the] defense had just as much participation in the witness being absent as did the government. It is simply not fair to allow a party to acquiesce in the government releasing a witness but then capitalize on that event."

Order, (Dec. 7, 2016).

On appeal, Reinhart makes the following assertions of error: (1) failing to have a hearing on his Rule 600 motion; (2) attributing the delay in trial to the defense; (3) failing to allow Reinhart to call certain witnesses; (4) failing to grant dismissal when all the delay was attributable to the government. *Concise Statement*, paragraph 36 (c, d, f, and g).

Rule 600(D) states, in its last sentence, that the "judge shall conduct a hearing on the motion." Pa.R.Crim.P. 600(D)(1). But, hearings are held when there are facts to be decided. Here, there were no facts which needed to be decided. Thus, a hearing - as contemplated by the rule - was not held.

This analysis also applies to Reinhart's 3rd claim about not having the opportunity to have witnesses testify. When facts are not in dispute, a hearing, and all that traditionally accompanies a hearing, is not necessary.

Reinhart's 2nd and 4th claims are cut from the same cloth. He claims the Court was wrong when it attributed the delay to the

defense and not to the government. The mechanical run date was October 11, 2016. The non-jury trial took place on December 12, 2016. So, we are talking about 62 days past the mechanical run date. Seemingly lost on the defense camp is that Reinhart wanted a jury trial upon the resolution of the suppression hearing. While that is certainly his right, the exercise of that right is sometimes compromised by other factors - the court being available to conduct a jury trial - being an important one. A jury trial requires the scheduling of that event to take place a little bit down the road in comparison to a non-jury trial. In addition, the selected date was also accommodating to both lawyers schedules. Conspicuous by its absence is any objection by Reinhart - at the time the December 12th date was selected. No one was informed that this date would be past the mechanical run date of October 11, 2016. Counsel acquiesced in the setting of that date and should not be allowed to capitalize on it. Our rules of procedure require prompt objections to events which counsel believe are wrong or otherwise claims associated with that supposed error are deemed waived, Pa.R.A.P. 302(a); Pa.R.Crim.P. 647(C). The Court draws some strength in its thinking from the spirit behind those provisions.

On balance, Reinhart's right to a speedy trial was not compromised. While the government was not ready to go when the case was called on September 8th, it still had more than a month to try the case as the run date was October 11th. But, the defendant wanted a jury trial. The first available jury trial that was good for all three parties - the prosecutor, the defense and the court - was December 12, 2016.

With publication of this opinion and distribution to counsel, our Clerk of Courts can now deliver the certified record to our Superior Court of Pennsylvania.

BY THE COURT:
/s/Williams, J.

¹ Reinhart's motion fails to specify what item(s) of evidence the Court should suppress. In paragraph 33, he seeks "any and all evidence obtained by Officer Kimmell...be suppressed". This blanket call for suppression is repeated in the WHEREFORE clause following paragraph 29. Our rules of procedure require more. Pa.R.Crim.P. 575(A)(2)(c) demands "particularity" for the relief being sought. The phrase "any and all evidence" is far from "particular".

² Perhaps, more perplexing than counsel's failure to discuss expectation of privacy in his motion, is the failure to address "reasonable suspicion" or "probable cause". Another head scratcher is the absence of any argument on the government's inability to satisfy an exception to the warrant requirement.

³ It appears from the written words of both counsel that one or both of them believed that the September 8th day was a motions hearing only. That may very well have been their expectation but that was not this Court's mindset to just handle pretrial motions that day.

Commonwealth of Pennsylvania v. Michael Molina

Criminal Appeal—Homicide—Prior Bad Acts—Mistrial—Jury Instruction—Consciousness of Guilt—Accomplice Liability

Multiple issues after the retrial and conviction in third-degree homicide case.

No. CC 200407403; 200407611. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—August 28, 2017.

OPINION

The appellant, Michael Molina, (hereinafter referred to as "Molina"), was charged with the crime of criminal homicide on April 13, 2004, as a result of the death of the victim, Melissa Snodgrass. On April 28, 2004, Molina was also charged with the crimes of criminal conspiracy and unlawful restraint. On December 20, 2006, following a jury trial, Molina was convicted of third-degree murder and unlawful restraint. A presentence report was ordered and on March 15, 2007, Molina was sentenced to two hundred forty to four hundred eighty months for his conviction of third-degree murder and a concurrent sentence of forty-eight to ninety-six months for his conviction of unlawful restraint.

Molina filed a timely appeal to the Superior Court which vacated his judgment of sentence and remanded his case to this Court for a new trial on August 13, 2010. The Commonwealth filed a motion to reargue Molina's case in front of the Court En Banc, which motion was granted and on November 9, 2011, the Superior Court once again vacated the judgment of sentence and remanded Molina's case to this Court. The Commonwealth filed a petition for allocatur with the Supreme Court which was granted and that Court issued a stay of Molina's case until such time as the United States Supreme Court decided the case of *Salinas v. Texas*, S.Ct., 2013 W.L. 135534 (2013). Following the United States Supreme Court's decision in *Salinas*, *supra*., the Supreme Court affirmed the decision reached by the Superior Court and remanded this case for trial.

The second jury trial was held on March 25, 2015, which ended in a hung jury on April 1, 2015. The third jury trial commenced on October 19, 2015, which resulted in the verdict of guilty of third-degree murder and unlawful restraint on October 28, 2015. On January 26, 2016, Molina was sentenced to two hundred forty to four hundred eighty months for his conviction of third-degree murder and a consecutive sentence of thirty to sixty months for his conviction of unlawful restraint. Molina filed timely post-sentence motions which, following a hearing on April 26, 2016, were denied. Molina then filed a timely appeal to the Superior Court and was directed, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), to file a concise statement of matters complained of on appeal. Molina then filed several requests for an extension of time to file his concise statement of matters complained of on appeal and in finally filing that statement, has raised seven claims of error.

The facts of Molina's case have been previously set forth in this Court's initial Opinion regarding his first appeal as follows:

On September 7, 2003, Melissa Snodgrass, (hereinafter referred to as "Snodgrass"), was twenty-one years old, single and living with her mother and her pet dog, Baby, in the Northside Section of the City of Pittsburgh. On that

day at approximately 11:00 a.m., she left her residence with her dog and told her mother she was off to do some errands. That was the last time any individual saw her alive. On March 9, 2004, her mummified remains were found in the basement of a house located at 1004 Spring Garden Avenue, by two individuals who had been hired to clean up that building.

Pittsburgh Homicide Detectives, during the course of their investigation, determined that Michael Benintend, (hereinafter referred to as "Benintend"), also known as "White Mike", was residing in that residence at the time of Snodgrass' disappearance. Benintend was arrested by police in Key West, Florida, on a warrant charging him with criminal homicide, unlawful restraint, aggravated assault and criminal conspiracy. During his second interview with a Pittsburgh Homicide Detective, Benintend told him that Michael Molina, (hereinafter referred to as "Molina"), had viciously beaten Snodgrass and he presumed that Molina had killed her.

Snodgrass, who was unemployed and a drug user, supported herself by being a drug seller. One of her regular customers was Benintend. Benintend worked odd jobs for the owner of the property located at 1004 Spring Garden Avenue, generally doing painting work for him. As a result of the money he earned on these construction jobs, Benintend usually purchased crack cocaine from Snodgrass two or three times a week. Benintend called Snodgrass early in the morning of September 7, 2003, and told her that he wanted to purchase two pieces of crack cocaine, a fifty-dollar piece and a twenty-dollar piece. Snodgrass advised him that she had to do an errand first and that she would be there shortly thereafter.

At approximately 11:00 a.m., Snodgrass left her residence with her pet Chihuahua/terrier, named Baby, who was on a red leash, and told her mother that she had to do some errands. Snodgrass was dressed in the clothing in which she had slept the previous evening, which consisted of pajama bottoms and a blouse. Waiting at 1004 Spring Garden Avenue for Snodgrass were Benintend and Molina, who had instructed Benintend to call Snodgrass and tell her that he wanted to purchase some crack cocaine. Molina had driven to this address with Pam Deloe, another drug user. Molina hid his car so that someone walking down Spring Garden Avenue would not see that he was there. Benintend and Molina waited inside the house until Snodgrass arrived and Deloe waited outside. Snodgrass went into the house and was confronted by Molina who demanded to know where his money was from a previous heroin transaction that he had with Snodgrass. Snodgrass told Molina that she did not have the money but that she would get it. Molina became enraged and then struck Snodgrass in the face with a gun and continued to savagely beat her with this gun and when she attempted to go out the front door, Benintend stepped in front of her so as to block her escape. Deloe, who was outside looking in, screamed for Molina to stop but he continued until he had knocked Snodgrass onto the ground and then he pulled out what appeared to be a sawed-off bat and continued to savagely beat her in and about the head area. Benintend then went to the back door and ran from the building away from Molina. Molina subsequently came out of the building and told Deloe to get in the car and later when she asked Molina what he had done with Snodgrass he told her, "Nothing happened, you didn't see shit."

Benintend, after leaving the house, went to several bars in the Southside and proceeded to get drunk. He did not return to the Spring Garden Avenue residence until the next day and stayed there for approximately ten days, at which time he left that residence since he had taken a job with a competitor of his former employer. In early January of 2004, Benintend decided to go to Florida because of the cold temperatures in the Pittsburgh area and the fact that he knew that there was an arrest warrant out for him since he failed to show up to meet with his probation officer because he knew that he would fail any of the drug tests that would have been given to him because of his repeated and continuous use of crack cocaine. Benintend went to Key West, Florida and lived in a homeless shelter while attempting to obtain employment in the construction industry.

On March 9, 2004, Snodgrass' mummified remains were found under a pile of garbage and debris located in the basement of 1004 Spring Garden Avenue. Next to Snodgrass was a red leash to which the mummified remains of her dog, Baby, were attached. Snodgrass was identified through dental records and a tattoo that she had on her body in addition to the clothing that she was wearing matching the description that her mother had given the police when she filed her missing person report the day after Snodgrass' disappearance. An autopsy was done on her remains and those remains showed extensive, advanced decomposition since all of her internal organs were gone; however, from a review of her skeletal remains, it was determined that she had multiple fractures of her skull which consisted of comminuted fractures of both orbits and the frontal plate and five fractures of her mandible. It was the opinion of Dr. Shawn Latham, who performed the autopsy, that Snodgrass had died as a result of multiple blunt force trauma to her head.

The investigation of the homicide scene revealed that Snodgrass' blood was on the rug in the living room where Deloe and Benintend had seen Molina striking Snodgrass and also on the walls of the hallway leading to the stairs to the basement and also on numerous steps of the basement stairs.

From the time of Snodgrass' disappearance on September 7, 2003, until her mummified remains were found on March 9, 2004, Snodgrass' disappearance was handled by the Missing Persons Unit of the Pittsburgh Police Department. Detective Stacey Hawthorne-Bey initially received information that Snodgrass might be being held against her will in Molina's house on Perrysville Avenue in the City of Pittsburgh. Detective Hawthorne-Bey went to that address to talk to Molina and was told that he was not present. She was told by Pamela Deloe that Snodgrass was not there. Detective Hawthorne-Bey asked Deloe to tell Molina to call her and she gave Deloe her number. Later that day Molina did, in fact, call her and before she could ask him if he was aware that Snodgrass was missing, Molina told her that he did not know where she was but it was out on the street that he was somehow involved in her being missing and that was not true. When she asked him when was the last time that he had seen Snodgrass, he initially told her a year and a half earlier and then, moments later, said it was approximately three months earlier. Detective Hawthorne-Bey asked Molina to come down to the police headquarters so that she could further interview him and he refused.

After Benintend was arrested by the police in Key West, Florida, the Pittsburgh Police Homicide Unit was notified of Benintend's arrest and Detective Dennis Logan flew to Florida to interview Benintend. The initial interview took place on April 25, 2004, in an interview room in the police station in Key West and Benintend denied any knowledge with regard to Snodgrass and her disappearance. Detective Logan decided to conduct a second interview the next day to see if, in fact, he could obtain any information from Benintend. Benintend, while he was in jail in Florida, read a newspaper article which indicated that he was being charged with Snodgrass' murder and when he was interviewed on the second day by Detective Logan, he told Logan that Molina had instructed him to call Snodgrass and get her to come to 1004 Spring Garden Avenue. When she arrived and told Molina that she did not have the money that she owed Molina for drugs, that Molina became irate and then began to beat her in the head with a revolver and when he got her on the ground, he pulled out a sawed-off baseball bat and continued to beat her. Benintend gave Logan a statement and after Logan had reduced it to writing and Benintend had reviewed that statement, he signed it. Benintend also agreed to be a witness against Molina when he came to trial. Benintend had originally been charged with criminal homicide, unlawful restraint, aggravated assault and criminal conspiracy to commit criminal homicide. A plea agreement was reached with the District Attorney's Office, in exchange for his testimony, and Benintend plead guilty to aggravated assault, criminal conspiracy to commit aggravated assault and unlawful restraint. For his pleas of guilty Benintend was to receive a sentence of not less than five and one-half nor more than eleven years.

During the course of the missing person investigation and subsequent homicide investigation, the police learned that Pam Deloe was in a relationship with Molina and that she lived at his house on Perrysville Avenue with two other females and seven minors. Deloe indicated initially that she bought crack cocaine from Molina and that she moved in with him to have sexual relations with him in exchange for crack cocaine. Deloe acknowledged that when she was not with Molina, she was engaged in business as a prostitute. On September 7, 2003, she rode with Molina to 1004 Spring Garden Avenue and watched Molina park the car approximately two blocks from that address so that it would not be seen. Molina went into the house where Benintend was and she stayed outside. A short time after they arrived, she saw Snodgrass walk down the street and go into the building. She then heard raised voices and she saw Molina striking Snodgrass in the head. When Snodgrass attempted to run out of the residence, Benintend blocked her escape. She yelled for Molina to stop but he only continued to strike Snodgrass' head. She ran back to the car and subsequently was joined by Molina.

In March of 2004, she and Molina had a fight which caused her to seek medical treatment at Allegheny General Hospital. She was given a prescription for medication and after she left the hospital and was walking down the street, Molina approached in a van, told her to get in and they, together with two other females known only by the names of Star and Jennifer, drove to Waterbury, Connecticut where they stayed in Molina's father's house for approximately one month. On March 30, 2004, Lieutenant Scott Stephenson of the Waterbury, Connecticut Police received information from the Allegheny County Sheriff's Office that Deloe and Molina might be staying at Molina's father's home. Lieutenant Stephenson arrested Molina and brought Deloe to the police station so that he could interview her. Deloe gave him a detailed statement as to what she observed on September 7, 2003 at the Spring Garden residence.

Molina initially claims that this Court erred on three separate occasions by allowing the Commonwealth to present evidence of assaults by Molina against his girlfriend, Pam Deloe, in violation of the Rules of Evidence 403¹ and 404(b)². In *Commonwealth v. Yockey*, 158 A.3d 1246, 1253, 1254 (Pa. Super. 2017), the Court set forth the standard to be employed when reviewing a claim that the Court committed error in its evidentiary rulings.

Appellant first claims that the trial court erred when it allowed the Commonwealth to question one of Appellant's witnesses about the credibility of another one of Appellant's witness. This issue challenges an evidentiary ruling by the trial court. We have explained:

[Our] standard of review for a trial court's evidentiary rulings is narrow. 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. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.

Commonwealth v. Mendez, 74 A.3d 256, 260 (Pa. Super. 2013) (internal quotations and citations omitted). "To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." *Commonwealth v. Lopez*, 57 A.3d 74, 81 (Pa. Super. 2012) (internal quotations and citations omitted). "A party suffers prejudice when the trial court's error could have affected the verdict." *Commonwealth v. Tyack*, 128 A.3d 254, 257 (Pa. Super. 2015) (internal quotations and citations omitted).

Contrariwise, "an erroneous ruling by a trial court on an evidentiary issue does not require us to grant relief where the error was harmless." *Commonwealth v. Chmiel*, 585 Pa. 547, 889 A.2d 501, 521 (2005). Our Supreme Court has held:

Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) 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.

Id. (internal quotations and citations omitted). "An error will be deemed harmless where the appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict." *Id.* at 528. "If there is a reasonable possibility that the error may have contributed to the verdict, it is not harmless. The burden of establishing that the error was harmless rests upon the Commonwealth." *Id.* (internal citations omitted).

Commonwealth v. Yockey, 2017 PA Super 87, 158 A.3d 1246, 1253–54 (2017)

Deloe was a heroin addict and prostitute who had been engaged in a tumultuous relationship with Molina for several years. When Molina would become upset with Deloe, he would beat her up and, according to Deloe, caused her to seek treatment at St. Margaret's Hospital as a result of the injuries that he inflicted upon her during one particular beating. The Commonwealth presented testimony of these prior assaults solely for the purpose of establishing Deloe's fear of Molina which explained her reluctance to tell the police what she knew about the death of Snodgrass.

As a general rule, evidence of prior bad acts is inadmissible in light of the prejudicial value of that testimony unless evidence of those prior bad acts would establish the opportunity, preparation, plan, knowledge, identity, mistake or lack of accident with respect to the underlying crime. In *Commonwealth v. Spruill*, 480 Pa. 601, 391 A.2d 1048, 1050 (1978), the Pennsylvania Supreme Court explained the purpose of excluding testimony of prior bad acts as follows:

“‘It is a fundamental precept of the common law that the prosecution may not introduce evidence of the defendant's prior criminal conduct as substantive evidence of his guilt of the present charge. It has been succinctly stated that (t)he purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes he was more likely to commit that crime for which he is being tried. The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence’

Despite the prohibition upon generally introducing evidence of prior bad acts, that testimony may become relevant if it explains the motivation of the witness in not coming forward with information pertaining to the underlying crime. In *Commonwealth v. Osborn*, 364 Pa. Super. 505, 528 A.2d 623 (1987), the defendant's prior crimes became admissible to explain the victim's delay in reporting a particular crime. This was the precise situation that the Commonwealth found itself in when it was presenting the testimony of Deloe since she had delayed in reporting to the police her knowledge of the death of Snodgrass and Molina's involvement. This information was relevant to the disposition of the underlying charge and also to explain the complex relationship between Molina and Deloe. When the Court charged the jury with respect to the crimes for which Molina had been charged, it also explained to the jury that the information concerning the prior bad acts that Molina committed on Deloe were presented solely for the purpose of demonstrating Deloe's fear of Molina and that that particular evidence was not to be considered on any other point.

Molina next maintains that this Court erred when it did not grant his request for a mistrial based upon what Molina perceived to be the improper remark made by the Commonwealth during its closing about the assaults being committed on Deloe. In *Commonwealth v. Leister*, 712 A.2d 332, 335, 336 (Pa. Super. 1992), the Superior Court set forth the criteria to review a decision by a Trial Court to declare a mistrial sua sponte. That Court acknowledged that there was no mechanical formula to make the determination as to whether or not the Trial Court had a manifest need but, rather, stated that there are often special and unique circumstances which had to be reviewed in making a determination as to whether or not the Trial Court's decision was correct.

Even though the trial judge's decision to declare a mistrial under these circumstances is entitled to great deference, *See Arizona*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), our inquiry does not end there. A judge must still exercise “sound discretion” in declaring a mistrial by considering those factors contributing to the trial problem as well as possible remedies less drastic than a mistrial. *Diehl*, 532 Pa. at 217, 615 A.2d at 691. Indeed, it is when the “... judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling [that] close appellate scrutiny is appropriate.” *Arizona*, 434 U.S. at 510 n. 28, 98 S.Ct. at 832-33 n. 28, 54 L.Ed.2d 717. Appellant argues that the trial judge abandoned the requisite exercise of sound discretion by declaring a mistrial rather than by attempting to defuse matters with a recess. We disagree.

Appellant misconstrues the manifest necessity standard to require the judge to choose, whenever practicable, an alternative less drastic than recusal. However, “manifest necessity” does not require proof that a mistrial was the only option facing a judge. Rather, the United States Supreme Court has indicated that reviewing courts should not assign a strict, literal definition to the term “necessity.” Instead, the courts should simply insist that a trial judge first consider less drastic options before declaring a mistrial. *Arizona*, 434 U.S. at 511, 98 S.Ct. at 833, 54 L.Ed.2d 717. Where the record reveals such consideration, the trial judge allays any fear that he failed to appreciate the gravity of a defendant's valued right to have his fate determined in one tribunal. *See United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *Arizona*, *supra*.

The Commonwealth in its closing made reference to the assaults that Molina had committed on Deloe for the purpose of showing her reluctance to report Snodgrass' disappearance and ultimate death because of her fear of Molina and what he would do to her if he learned that she was cooperating with the police. During this Court's charge, the jury was advised that it could consider the testimony with respect to the assaults on Deloe solely for the purpose of considering whether or not she had a realistic fear of Molina and could not be used to infer his guilt for the commission of the crimes for which he was charged. Since the jury was properly instructed on the issue of the use of prior bad acts, there was no need for this Court to declare a mistrial.

Molina next maintains that this Court erred in not instructing a jury on the issue of consciousness of guilt concerning the testimony of Michael Benintend. Benintend was originally charged as a co-conspirator with Molina in the commission of the crime of criminal homicide. In 2006, Benintend was offered a plea agreement where he would plead guilty to the charges of aggravated assault, criminal conspiracy to commit aggravated assault and unlawful restraint in exchange for his testimony against his co-conspirator, Molina. Pursuant to the plea agreement, Benintend was sentenced to a period of incarceration of not less than six nor more than twelve years. Molina requested that the jury be instructed of Benintend's consciousness of guilt when they would consider his testimony. This Court declined to make that instruction as it pertained to Benintend since Benintend had admitted his responsibility with respect to the assault and restraint of Snodgrass. Accordingly, this Court believed that there was no need for the Court to charge on the issue of consciousness of guilt since he acknowledged that he was, in fact, guilty.

Molina next maintains that this Court erred when it instructed the jury on the issue of consciousness of guilt with respect to Molina's actions from hiding from the police and making a false statement to them when they were investigating the disappearance of Snodgrass. The jury was properly instructed as to the issue of consciousness of guilt with respect to Molina's flight to Connecticut and his false statements to the police. The charges on these issues were proper and did not constitute error.

Molina next maintains that this Court erred when it charged on accomplice liability since it was a change in the Commonwealth's theory of the case. While the Commonwealth maintained that Molina was in fact Snodgrass' killer, it suggested in the third trial that Molina could also be guilty as a result of accomplice liability. This was not a change in the strategy of the Commonwealth but, rather, was a continuation of the theory advanced by the Commonwealth prior to its second trial. In a letter dated April 23, 2015, the Commonwealth indicated that it should not be precluded from advancing the theory of accomplice liability and set forth a number of cases in support of that position. Although this letter was directed to the Trial Court, a copy of the letter was sent to Molina's counsel and he was fully aware that the Commonwealth was proceeding on both theories of responsibility. A copy of the Commonwealth's letter is attached hereto as Exhibit "A".

Molina next maintains that this Court erred when it allowed the Commonwealth to present in its closing the alternative theory of accomplice liability with respect to the issue of causation. In reviewing the charge in its entirety, it is clear that this Court appropriately instructed the jury as to how they could consider the evidence and what the Commonwealth was required to prove in order to establish Molina's guilt.

Molina finally maintains that this Court imposed an excessive sentence as it increased the sentence that was originally imposed upon Molina. At first blush Molina's argument would appear to make sense until one would look at the two different sentences. The sentence imposed following his conviction in March of 2007 was an illegal sentence since the second part of the sentence exceeded the mandatory maximum for a crime of unlawful restraint, which is a misdemeanor in the first degree having a maximum penalty of a period of incarceration of two and one-half to five years. In addition, it was obviously a scrivener's error in recording this sentence because the sentence was not to be a concurrent sentence to the twenty to forty years that he received for his conviction of third-degree murder but, rather, that sentence was to run consecutively. Molina's sentences were never intended to be concurrent since no purpose would have been served to have these sentences run concurrently.

When this Court sentenced Molina for his conviction of the same crimes, it corrected the illegality of the original sentence and the scrivener's error with respect to how those sentences were to be served. From the time that this Court originally sentenced Molina, it was clear that any sentence that he was to serve would be consecutive since there would be no point in running a sentence of forty-eight to ninety-six months concurrent with his sentence of two hundred forty to four hundred eighty months.

BY THE COURT:

/s/Cashman, A.J.

Dated: August 28, 2017

¹ Pa.R.E., Rule 403

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

² Pa.R.E.404(b)

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Commonwealth of Pennsylvania v. Laura Cole

Criminal Appeal—Suppression—POSS/PWID—Sentencing (Legality)—Four Corners—Merger

The lesser included offense of possession merges with PWID for sentencing purposes.

No. CC 00726-2017. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Bicket, J.—August 7, 2017.

OPINION

Appellant, Laura Cole, appeals the Judgement of Sentence imposed by this Court on June 5, 2017. For the reasons set forth below, this Court's Order should be affirmed in part.

BACKGROUND

The salient procedural and factual history is as follows. On or about October 21, 2016, police, pursuant to a search warrant, entered and searched the residence of Laura Cole (hereinafter "Defendant") located at 703 D Drive in West Mifflin, Pennsylvania. As a result of said entry and search, the police found cocaine, marijuana, two digital scales, a marijuana grinder, an elephant shaped pipe for smoking marijuana. As a result, the Defendant was charged with Possession with Intent to Deliver a Controlled Substance (PWID), Possession of a Controlled Substance and Endangering the Welfare of Children (EWOC).

On or about April 18, 2017, Defendant filed a Motion to Suppress alleging probable cause did not exist for the issuance of the search warrant in this matter. A Suppression Hearing was held on or about June 5, 2017, and denied by this Court. The matter then proceeded to a stipulated non-jury trial at the conclusion of which the Defendant was found guilty of the PWID and Possession charges and not guilty on the EWOC charge. The Defendant was sentenced to 12 months' probation on the PWID charge, and a concurrent period of 12 months' probation on the Possession charge. No Post-Trial Motions were filed.

On July 5, 2017, Defendant filed a Notice of Appeal. On July 10, 2017 this Court ordered Defendant to file a Concise Statement of Matters Complained of on Appeal, and on July 31, 2017, Defendant filed same.

Discussion

I. The trial court erred in failing to grant Ms. Cole's Motion to Suppress. The information contained in the four corners of the search warrant affidavit failed to establish probable cause to search Ms. Cole's residence at 703 D Drive, Mifflin Estates, West Mifflin, Pennsylvania 15122. Consequently, the search warrant was not constitutionally valid, in violation of Ms. Cole's rights under the Fourth and Fourteenth Amendments of the United States Constitution, and Article 1, § 8 of the Pennsylvania Constitution. All evidence derived from the search warrant, including all drug-related evidence, should have been suppressed as fruit of the poisonous tree.

The standard for the issuance of a warrant is well-settled under Pennsylvania law:

(b) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.

234 Pa. Code § 203. In reviewing the validity of a search warrant, "due deference will be given to the conclusions of the issuing magistrate." *Com. v. Rega*, 933 A.2d 997, 1013 (Pa. 2007). "A reviewing court is not to conduct a *de novo* review of the issuing authority's probable cause determination, but is simply to determine whether or not there is substantial evidence in the record supporting the decision to issue the warrant." *Com. v. Janda*, 14 A.3d 147, 158 (Pa. Super. 2011)(internal citation omitted).

In determining whether probable cause for issuance of a warrant is present, the 'totality of the circumstances' test set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), was adopted in *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921 (1985). Under such a standard, the task of the issuing authority is to make a practical, common sense assessment whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Com. v. Murphy, 916 A.2d 679, 681-682 (Pa. Super. 2007)(internal citations and quotations omitted).

The law is clear with respect to a suppression hearing and the information which may be considered by the reviewing court in a motion challenging the probable cause for the issuance of a search warrant.

At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (B).

234 Pa. Code § 203. Thus, the Court is limited to the "four corners" of the affidavit in reviewing whether probable cause existed at the time of the issuance of the warrant.

Upon review of the information contained within the four-corners of the Affidavit of Probable Cause for the issuance of the search warrant in this matter, the Court finds that, under the totality of the circumstances, probable cause was established. Specifically, the Court notes as follows:

The warrant specified the description of premises and/or persons to be searched as 703 D Drive, Mifflin Estates, West Mifflin PA 15122. The person was Christopher Cunningham. Christopher Cunningham was a person suspected to be involved in an attempted homicide occurring on October 14, 2016. A witness admitted to being with Cunningham during the alleged attempted homicide. The same witness advised detectives that Cunningham drives a gold sedan. Detectives obtained video surveillance from Homeville Fire Company which showed a light-colored sedan traveling at a high rate of speed on streets surrounding the location of the attempted homicide at the same general time as the shooting. This is consistent with victim and witness statements explaining the incident including the direction of the vehicle and speed of the vehicle following the shooting. The same vehicle was located outside the 700 Building in Mifflin Estates on October 15, 2016, one day following the shooting and attempted homicide. The vehicle was confirmed to be registered to Cunningham and that witness confirmed a photograph of the vehicle to be Cunningham's vehicle. Detectives learned "during the course of this investigation...using various databases and documents" that Cunningham's paramour and mother of his child, Laura Cole (the Defendant herein), resided at 703 D Drive, West Mifflin within the Mifflin Estates Housing Complex. The affidavit further provides that since the incident occurred, Cunningham's vehicle was located in the parking lot directly outside of Cole's apartment and has been observed parked there numerous times since at various times of the day and night. Based upon the information connecting Cunningham to the vehicle and Cunningham to Laura Cole, Detectives believed Cunningham to be residing with his paramour, Laura Cole.

The Court finds that, based upon the totality of the circumstances, giving due deference to the magistrate in issuing the warrant, probable cause existed at the time of the issuance of the warrant to support a reasonable belief that Cunningham or evidence related to the attempted homicide as described in the affidavit might reasonably be found within the residence of Laura Cole.

For the reasons set forth above, this Court should be affirmed on the suppression matter.

II. Ms. Cole's sentence on the charge of Possession is illegal. The record reflects that Ms. Cole was charged with, and subsequently convicted of, PWID and Possession because a large amount of cocaine was found inside her residence. The trial court sentenced Ms. Cole to a period of probation of 12 months for PWID, as well as a concurrent period of probation of 12 months for Possession. However, the crime of Possession is a lesser-included offense of the crime of PWID such that the former merges with the latter for sentencing purposes.

The Court concedes that it was error to sentence Defendant on the Possession charge, as possession is clearly a lesser included offense of Possession with Intent to Deliver in this matter. The Court notes defense counsel was silent at the time of sentencing with respect to this error and that defense counsel filed no post-sentencing motion or motion for reconsideration of the sentence. Had defense counsel followed either of these two avenues, this Court would have promptly corrected the error. The Court further notes, that while it is clear error that Defendant was sentenced on the Possession charge in addition to the PWID, there was no real

harm in this regard in that probation was set concurrent to, and for the same period of time as, the probation set for the PWID charge. Nevertheless, this Court agrees that the charges Defendant was convicted of merge for sentencing purposes and this Court would have corrected this error if provided the opportunity to do so without the need to address this issue on appeal.

BY THE COURT:
/s/Bicket, J.

Commonwealth of Pennsylvania v. Christopher Bushaw

Criminal Appeal—DUI—Guilty Plea—Commonwealth Appeal—Timely Petition—Substantive New Rule of Law

Retroaction application of Burchfield decision is warranted because of the substantive change created by the new rule.

No. CC 201511412. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—September 25, 2017.

OPINION

PROCEDURAL HISTORY

Appellee, Christopher Bushaw, was charged by criminal information (201511412) with one count each of driving under the influence: highest rate of alcohol (BAC .16+);¹ driving under the influence (general impairment);² driving while operating privilege suspended (BAC .02+);³ driving while operating privilege suspended;⁴ and driving unregistered vehicle.⁵

On February 10, 2016, the Commonwealth withdrew counts four and five, and Appellee entered a guilty plea to the remaining charges. That same day, the Trial Court sentenced Appellee as follows:

Count one: driving under the influence (BAC .16+) – one to two years of incarceration, RRRI eligible; followed by two years of probation;

Count three: driving while operating privilege suspended (BAC .02+) – ninety days of incarceration to be served concurrent to the period of incarceration imposed at count one.

Appellee filed a *pro se* PCRA Petition on August 21, 2016. The PCRA Court appointed counsel to represent Appellee; appointed counsel filed an Amended PCRA Petition on January 13, 2017. Appellant, the Commonwealth, filed its Answer on May 15, 2017. On July 12, 2017, following review of the record and relevant case law, the PCRA Court found that *Birchfield* applied retroactively, vacated Appellee's sentence, and granted him a new trial.

This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant filed its Concise Statement on August 22, 2017. Appellant raises the following issue on appeal, and it is presented below exactly as Appellant stated it:

I. The PCRA court erred in determining that *Birchfield v. North Dakota*,⁶ U.S. ___, 136 S.Ct. 2160 (2016), applied retroactively such that Appellant was entitled to the post-conviction relief in the form of vacation of his sentence and withdrawal of his guilty plea.

(A) While the Commonwealth does not dispute that *Birchfield* created a new rule of constitutional law, neither our Supreme Court nor the United States Supreme Court has held that *Birchfield* is to be applied retroactively to cases on collateral review where the judgment of sentence is final. Therefore, it was premature for the PCRA Court to grant relief. The PCRA Act renders relief available only where: “the right asserted is a constitutional right that was recognized by the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.” 42 Pa.C.S.A. § 9545(b)(1)(iii).

(B) The new rule of law created by *Burchfield* does not fall under one of the two exceptions to the rule against retroactivity on collateral review set forth in *Teague v. Lane*, 489 U.S. 288, 307 (1989) (*i.e.*, (1) rules that prohibit a certain category of punishment for a class of defendants because of their status or offense; (2) watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings).

FINDINGS OF FACT

Appellant offered the following recitation of evidence at Appellee's guilty plea proceeding:

Had the Commonwealth proceeded to trial in this matter we would have introduced testimony that on or about June 28th of 2015 Ohio Township police did observe a car with expired registration. They activated their lights and siren and pulled the car over.

The driver, the defendant, had a strong odor of alcohol coming from him. He had slurred speech and glassy eyes. He did eventually admit that he had been drinking. It was confirmed that his license was DUI suspended.

He was unsteady on his feet while given field sobriety tests, which he failed. A PBT was positive for alcohol.

He was taken for a blood draw within 2 hours. That was submitted. At 15- LAB-5634 the defendant had a BAC of .178 at the time of the offense.

Guilty Plea/Sentencing Transcript, February 10, 2016, pp. 5-6.

DISCUSSION

Appellant alleges that the PCRA Court erred in determining that *Birchfield* applied retroactively to Appellee's PCRA Petition. This claim is without merit.

An appellate court's role in reviewing PCRA appeals is "limited to examining whether the PCRA court's determination is supported by the evidence of record and whether it is free of legal error." *Commonwealth v. Ousley*, 21 A.3d 1238, 1242 (Pa. Super. 2011). An appellate court will not disturb findings made by the PCRA court that are supported by the record. *Ousley*, 21 A.3d at 1242.

Here, Appellee consented to a blood draw after the officer informed him of the criminal penalties for refusing to do so. In *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), the Supreme Court held that blood draws cannot be conducted incident to a lawful arrest, and voluntary consent to a blood draw cannot be found where the consent given was on pain of committing a criminal offense. As a result, states can no longer enforce implied consent laws for blood draws that proscribe criminal penalties for refusal to submit to such a test. Accordingly, the question in Appellee's PCRA Petition was whether *Birchfield* applied retroactively to grant him relief.

Notably, Appellant did not argue against the retroactivity of *Birchfield* in its Answer, nor did it set forth any of the arguments now presented in its Concise Statement of Errors. Instead, Appellant responded in its brief Answer that:

14. Based on the *Teague* analysis, *Birchfield* may be retroactive.

15. The Commonwealth defers to this Honorable Court's judgment for this decision since this is an issue of first impression and because of the complexity of the retroactivity analysis.

16. The Commonwealth submits that if this Court determines that *Birchfield* does apply retroactively, the proper remedy would be a new plea and sentencing hearing.

Commonwealth Answer, May 15, 2017, p. 4.

Appellant's Answer to Appellee's PCRA Petition was the proper forum to present any legal arguments to the PCRA Court regarding the retroactivity of *Birchfield*. Had the Commonwealth raised its legal arguments within that context, the PCRA Court could have conducted a hearing and addressed all legal arguments prior to reaching a decision.

However, Appellant chose not to raise its arguments until after filing the instant appeal. Appellant now presents two arguments in support of its allegation that the PCRA Court erred in finding *Birchfield* retroactive. The PCRA Court will address them in turn below.

A.

First, Appellant argues that it was premature for the PCRA Court to grant relief because the PCRA Act only provides relief to petitioners where "the right asserted is a constitutional right that was recognized by the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." Concise Statement of Errors, quoting 42 Pa. C.S. § 9545(b)(1)(iii). This argument misconstrues the PCRA Act; Section 9545(b)(1), which Appellant cites, refers to the time for filing a PCRA petition. It states that any petition, including a second or subsequent petition, must be filed within one year from the date the judgment of sentence becomes final in order to be considered timely. If a petition is filed after such date, then the petitioner must invoke one of the three time-bar exceptions listed in § 9545(b)(1)(i-iii), the third of which Appellant references for support in its Concise Statement of Errors.

Appellee was sentenced on February 10, 2016. He did not file post sentence motions or a direct appeal. Thus, his judgment of sentence became final on March 11, 2016. Appellee had until March 11, 2017, to timely file a PCRA petition. Appellee filed a *pro se* PCRA Petition on August 21, 2016, and appointed counsel filed an Amended PCRA Petition on January 13, 2017. Thus, both Appellee's *pro se* and amended PCRA petitions were timely filed, and the time-bar exceptions listed in 42 Pa. C.S. § 9545(b)(1) do not apply. As such, Appellee's PCRA petition was not limited by 42 Pa. C.S. § 9545(b)(1)(iii), and Appellant's argument here fails.

B.

Second, Appellant argues that the PCRA Court erred in finding *Birchfield* retroactive because it does not fall under either of the two exceptions to the rule against retroactivity on collateral review. This claim is without merit.

In *Birchfield*, the Supreme Court was silent as to whether it was to be applied retroactively, and thus the individual states must determine its retroactivity. As of the date of Appellee's PCRA Petition, Pennsylvania courts had not determined whether *Birchfield* applied retroactively to cases on collateral review. Thus, it fell upon the PCRA Court to determine the retroactivity of *Birchfield*.⁶

The seminal framework for determining the retroactivity of new rules to cases at the post-conviction stage was set forth in *Teague v. Lane*, 489 U.S. 288 (1989). The Pennsylvania Supreme Court recently outlined this framework in determining the retroactivity of another Supreme Court decision:⁷

Under the *Teague* line of cases, a new rule of constitutional law is generally retrospectively applicable only to cases pending on direct appellate review. In other cases, retroactive effect is accorded only to rules deemed substantive in character, and to "watershed rules of criminal procedure" which "alter our understanding of the bedrock procedural elements" of the adjudicatory process.

Commonwealth v. Washington, 142 A.3d 810, 813 (Pa. 2016) (quotations and citations omitted).

The rule announced in *Birchfield* is unquestionably a new constitutional rule, as the result "was not dictated by precedent existing at the time the defendant's conviction became final." *Commonwealth v. Bracey*, 986 A.2d 128, 143-144 (Pa. 2009). The Commonwealth does not dispute this. Thus, *Birchfield* should apply to Petitioner's case only if one of the two exceptions applies. As to the first exception, the Pennsylvania Supreme Court recently explained that:

Concerning the substantive/procedural dichotomy, substantive rules are those that decriminalize conduct or prohibit punishment against a class of persons. Concomitantly, the Supreme Court has made clear that rules that regulate only the manner of determining the defendant's culpability are procedural.

Washington, 142 A.3d at 813 (citations and quotations omitted). The United States Supreme Court offered more guidance in determining the retroactivity of the prohibition of mandatory life without parole sentences for juvenile offenders:

Justice Harlan defined substantive constitutional rules as those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. In *Penry v. Lynaugh*, decided four months after *Teague*, the Court recognized that the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. *Penry* explained that Justice Harlan's first exception spoke in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed. Whether a new rule bars States from proscribing certain conduct or from inflicting a certain punishment, in both cases, the Constitution itself deprives the State of the power to impose a certain penalty.

Montgomery v. Louisiana, 136 S. Ct. 718, 729, (2016) (citations and quotations omitted) (finding that *Miller v. Alabama* announced a new substantive rule that applied retroactively to cases on collateral review).

The PCRA Court found that *Birchfield* announced a new substantive rule because it decriminalized the conduct of refusing to submit to a warrantless blood test.⁸ The PCRA Court found that the first *Teague* exception applied, and *Birchfield* should be applied retroactively to cases on collateral review; this determination was supported by the record and free of legal error.

Appellant's claim is without merit.

CONCLUSION

Based upon the foregoing, the order to grant the PCRA Petition should be affirmed.

BY THE COURT:

/s/Borkowski, J.

Date: September 25, 2017

¹ 75 Pa. C.S. § 3802(c).

² 75 Pa. C.S. § 3802(a)(1).

³ 75 Pa. C.S. § 1543(b)(1.1)(i).

⁴ 75 Pa. C.S. § 1543(b)(1).

⁵ 75 Pa. C.S. § 1301(a).

⁶ See Edward J. Borkowski, *Criminal Law – Retroactivity – Jury Instructions – Consequences of a Verdict of Not Guilty by Reason of Insanity*, 22 Duq. L. Rev. 1121 (1983-1984) (discussing *Commonwealth v. Geschwendt*, 454 A.2d 991 (Pa. 1982) (plurality) and the history, development, and evolution of Pennsylvania's retroactivity jurisprudence for new judicially adopted rules.

⁷ *Alleyne v. United States*, 133 S.Ct. 2151 (2013). The United States Supreme Court held that the rule set forth in *Alleyne* was not to be applied retroactively to cases on collateral review.

⁸ As to the second exception, the Pennsylvania Supreme Court recently explained that:

As to watershed rules, to date, the Supreme Court of the United States has discerned only one, arising out of the sweeping changes to the criminal justice system brought about by the conferral of the right to counsel upon indigent defendants charged with felonies in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Washington, 142 A.3d at 813. *Birchfield* did not announce a new watershed rule, and thus this exception is not applicable.

Commonwealth of Pennsylvania v. Craig Aaron Doswell, Jr.

Criminal Appeal—Sufficiency—Assault by Prisoner—Credibility

Compelling circumstantial evidence supports the conclusion that defendant slammed his cellmate's head into a wall during fight in Allegheny County Jail.

No. CC 2016-1818. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—August 22, 2017.

OPINION

This is a direct appeal from the judgment of sentence entered on April 18, 2017, following a non-jury trial that took place on January 24, 2017. The Defendant was charged in a two (2) count information with Assault by Prisoner (18 Pa. C.S.A. §2703(a)) at Count One (1) and Terroristic Threats (18 Pa. C.S.A. §2706)(a)(1) at Count Two (2). At the conclusion of the non-jury trial, this court found the Defendant guilty of both charges. Sentencing was deferred to allow for the preparation of a Pre-Sentence Report ("PSR"). On April 18, 2017, the Defendant was sentenced to a term of imprisonment of two (2) to four (4) years at Count One (1). He received 71 days of credit for time served. At Count Two (2), the Defendant was sentenced to a two (2) year period of probation, which was ordered to commence upon his release from imprisonment.

On April 21, 2017, trial counsel filed a motion to withdraw from representation. The court granted counsel's motion on April 26, 2017. That same day, the court appointed the Office of the Public Defender to represent the Defendant in connection with any post-sentence matters. On May 2, 2017, the Defendant filed a *pro se* Notice of Appeal. On May 3, 2017, the court ordered the Office of the Public Defender to file a Concise Statement of Errors Complained of on Appeal ("Concise Statement"). On May 4, 2017, the Office of the Public Defender filed a motion seeking leave to withdraw from representation based on a conflict of interest. On May 7, 2017, this court granted the motion and appointed Suzanne Swan, Esquire to represent the Defendant on appeal. On May 25, 2017, appellate counsel filed an Amended Notice of Appeal, as well as a motion for an extension of time to file a Concise Statement.

On June 1, 2017, the court granted counsel's motion and ordered counsel to file a Concise Statement by July 31, 2017.

On July 31, 2017, the Defendant timely filed a Concise Statement. The Defendant's sole challenge on appeal is to the sufficiency of evidence underlying his conviction for Assault by Prisoner (18 Pa. C.S.A. §2703). Specifically, the Defendant argues as follows:

A. The evidence was insufficient as a matter of law to sustain the conviction of Assault by Prisoner under 18 Pa. C.S. §2703 where the Commonwealth failed to prove beyond a reasonable doubt that Mr. Doswell employed force likely to produce serious bodily injury. The Commonwealth's own evidence established that the alleged victim was taking medications causing him to become lightheaded and lose consciousness. The only injuries observed on the alleged victim were some red marks on his neck and forehead, and broken blood vessels near his eye that could have been the result of prolonged straining. Although the alleged victim's injuries indicate that Mr. Doswell may have employed some force against the alleged victim in an effort to scare him, and/or to get him to stay away from Mr. Doswell, which is consistent with Mr. Doswell's testimony, they do not prove that Mr. Doswell intended to inflict serious bodily injury.

(Concise Statement, pp. 1-2).

The Defendant's allegation of error lacks merit. The court respectfully requests that the Defendant's conviction be upheld for the reasons that follow.

I. FACTUAL BACKGROUND

The facts as viewed in the light most favorable to the Commonwealth establish that on January 10, 2016, at approximately 9:50 p.m., Norman Roper was attacked by the Defendant while the two men were inmates at the Allegheny County Jail. (Non-Jury Trial Transcript ("TT"), 1/24/17, pp. 12-16, 20-21, 23, 25, 29-30, 32, 34-35, 37-38, 44). At the time of the attack, Mr. Roper and the Defendant had been alone in a prison cell. (*Id.* at 13). Mr. Roper testified that, as he stood up to use the bathroom, the Defendant suddenly wrapped his hands around Mr. Roper's throat. (*Id.* at 13, 15). The Defendant then "slammed" Mr. Roper's head into a brick wall, telling Mr. Roper that he was going to make him "his bitch" and that Mr. Roper "was going to be sucking his dick." (*Id.* at 13-14, 20). Mr. Roper testified that the Defendant was "choking the shit out of" him and that he could feel the Defendant's hands squeezing his neck. (*Id.* at 15). The Defendant choked Mr. Roper to the point that Mr. Roper eventually lost consciousness. (*Id.* at 15). Mr. Roper was unable to estimate how long he had been unconscious. (*Id.* at 16).

When Mr. Roper regained consciousness, the Defendant was holding him up and had him "bent over his bed." (*Id.* at 15). The Defendant continued to threaten Mr. Roper by stating that he was going to make Mr. Roper "his bitch." (*Id.* at 15-16). The Defendant also told Mr. Roper that, when Mr. Roper's "cellie came in, he was going to make him his bitch" too and that they would "both be sucking his dick." (*Id.* at 15-16). The Defendant was unable to take the attack any further because one of the prison guards approached the cell. (*Id.* at 16). At that point, the Defendant let go of Mr. Roper and walked over to the window while Mr. Roper sat on the bed. (*Id.* at 16).

Correctional Officer ("CO") David Holland and Nurse Julie Ann Rager were distributing medications to the inmates at the time of the attack. They were the first authority figures to have the opportunity to observe Mr. Roper immediately after the attack happened. (*Id.* at 25, 28). CO Holland testified that, when they approached Mr. Roper's cell, Mr. Roper looked "fearful," "distracted" and "panicked." (*Id.* at 25-26). Mr. Roper immediately asked to be removed from the cell. (*Id.* at 25-27). CO Holland then proceeded to alert Captain Vanchieri to the situation. (*Id.* at 26-27, 37). When Nurse Rager made contact with Mr. Roper, she noticed that Mr. Roper's hand was "shaking" when he reached for his medications and that his hands were "very[] clammy." (*Id.* at 29). Nurse Rager also observed that Mr. Roper's face "appeared to be very ashen, pale." (*Id.* at 29). She asked Mr. Roper if he was okay because she did not believe that he looked well. (*Id.* at 29). Mr. Roper "shook his head" in response; he told Nurse Rager that he was not okay and that she had to get him "out of here." (*Id.* at 29).

Mr. Roper's cell door eventually was opened so that Nurse Rager could assess his condition. (*Id.* at 29-30, 32). She noted visible "dark, red marks around his neck," as well as "some petechiae bruising" under his right eye. (*Id.* at 30, 32-33). Nurse Rager testified that the neck marks were caused "from something being around his neck" and that "the marks under his eye [we]re the result of broke blood vessels." (*Id.* at 32). Nurse Rager explained that "[p]etechiae is a type of bruising caused by increased pressure in the capillary beds that explode near the surface of the skin." (*Id.* at 32). She also noted that Mr. Roper had "frontal forehead tenderness with small area of redness" and that the area was "tender to the touch to palpate." (*Id.* at 35).

After Captain Vanchieri was alerted to the situation, he spoke with Mr. Roper and observed that Mr. Roper had "some light scratch marks on his neck." (*Id.* at 37-38). Mr. Roper informed the captain that he had been attacked, and the captain photographed Mr. Roper's neck injuries. (*Id.* at 38-39). Mr. Roper was transported to West Penn Hospital for treatment and observation on the same night as the attack. (*Id.* at 17, 22, 31). Medical personnel examined him for a potential sexual assault, but it was ultimately determined that no sexual assault had occurred while Mr. Roper was unconscious. (*Id.* at 17, 40). Mr. Roper testified that he had a "goose egg" on the back of his head from the Defendant slamming his head into a brick wall and that he suffered some residual aches and pains for a few days following the incident. (*Id.* at 18, 20-21).

II. DISCUSSION

A. The Commonwealth presented evidence sufficient to support the Defendant's conviction for Assault by Prisoner.

The standard of review for challenges to the sufficiency of evidence is well-settled. Our appellate courts have explained the standard as follows:

As a general matter, our standard of review of sufficiency claims requires that we evaluate the record "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. Widmer*, 744 A.2d 745, 751 (Pa. 2000). "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. Brewer*, 876 A.2d 1029, 1032 (Pa. Super. 2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." *Id.*; see also *Commonwealth v. Aguado*, 760 A.2d 1181, 1185 (Pa. Super. 2000) ("[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence"). Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. See *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. 2001).

The Commonwealth may sustain its burden by means of wholly circumstantial evidence. *See Brewer*, 876 A.2d at 1032. Accordingly, “[t]he fact that the evidence establishing a defendant’s participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence.” *Id.* (quoting *Commonwealth v. Murphy*, 795 A.2d 1025, 1038-39 (Pa. Super. 2002:)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant’s crimes beyond a reasonable doubt, the appellant’s convictions will be upheld. *See Brewer*, 876 A.2d at 1032.

Commonwealth v. Rahman, 75 A.3d 497, 500-01 (Pa. Super. 2013) (quoting *Commonwealth v. Pettyjohn*, 64 A.3d 1072 (Pa. Super. 2013)) (citations omitted).

Moreover, “the trier of fact, who determines credibility of witnesses and the weight to give the evidence produced, is free to believe all, part, or none of the evidence.” *Commonwealth v. Brown*, 701 A.2d 252, 254 (Pa. Super. 1997).

The Assault by Prisoner statute, set forth in 18 Pa. C.S.A. §2703(a), provides in relevant part:

(a) Offense defined. A person who is confined in or committed to any ... county detention facility ... located in this Commonwealth is guilty of a felony of the second degree if he, while so confined ... intentionally or knowingly, commits an assault upon another ... by any means or force likely to produce serious bodily injury.

18 Pa. C.S.A. §2703(a).

Contrary to the Defendant’s assertion on appeal, the evidence presented at the non-jury trial was more than sufficient to establish that the Defendant used “force likely to produce serious bodily injury” when he slammed Mr. Roper’s head into a brick wall and strangled Mr. Roper to the point that he rendered him unconscious and caused petechiae bruising to appear under his eye. (TT, pp. 13-14). As the trier-of-fact in this case, this court was able to study the demeanor of the witnesses, and it found Mr. Roper’s account of events to be particularly genuine, consistent, credible, and corroborated by other evidence. To be sure, the fact that Mr. Roper reported the attack immediately after it occurred and the fact that neutral parties observed visible physical injuries in the form of red marks around Mr. Roper’s neck and the petechiae under his eye lent substantial credibility to his testimony. As noted, CO Holland and Nurse Rager observed Mr. Roper’s demeanor following the incident, and both of them noted that he appeared shaken, fearful, distraught, and panicked. (*Id.* at 25-26, 29). Additionally, Mr. Roper was transported to the hospital on the same night of the attack so that his injuries could be assessed, and this court believed him when he testified that his injuries were not self-inflicted. (TT, pp. 22-23).

The court recognizes that the Defendant provided a substantially different account of what transpired in the cell. At trial, the Defendant acknowledged that a confrontation had occurred on the night of the incident, but he claimed that the confrontation occurred because Mr. Roper had been hounding him for marijuana. (TT, pp. 51-52). The Defendant testified that Mr. Roper head-butted him, and that he merely pushed Mr. Roper away and told him to get out of his face. (TT, p. 53). He maintained that he never slammed Mr. Roper’s head into a wall or choked him. (TT, p. 53). The Defendant also testified that *he* was the one who asked CO Holland to be removed from the cell. (TT, p. 53). The Defendant’s statement to police following the incident essentially mirrored his trial testimony. (TT, pp. 44-47). The Defendant claimed that Mr. Roper was making false allegations, and he maintained that he was “not a homosexual in any way, and that he wouldn’t have said those things to him.” (TT, pp. 45-46). The Defendant did concede that there was a verbal altercation between them regarding marijuana, and, though he admitted to pushing Mr. Roper away from him, he denied making any sexual threats. (TT, p. 46).

In an attempt to undermine the credibility of Mr. Roper’s testimony, the Defendant argued that Mr. Roper had been suffering from blackouts prior to the incident due to his medications, and he attempted to suggest that the petechiae observed under Mr. Roper’s eye was the result of “prolonged straining.” (TT, pp. 33, 59-60); (Concise Statement, p. 2). However, after considering the evidence as a whole, and after assessing the tone, demeanor, and credibility of all the witnesses, the court rejected the Defendant’s version of events as not believable and unsupported by any other evidence. The court found that there was compelling circumstantial evidence to support Mr. Roper’s claim that the Defendant slammed his head into a brick wall, choked him to the point of unconsciousness, and made sexually explicit threats. Again, Mr. Roper’s version of events was corroborated by neutral witnesses who observed Mr. Roper’s physical injuries and emotional demeanor immediately following the incident. The court notes that, although no serious bodily injury ultimately occurred, the attack ceased only because CO Holland and Nurse Rager were approaching the cell to distribute medications.

The court also notes that the testimony of CO Holland and Nurse Rager did not support the Defendant’s testimony that he was the one who asked to be removed from the cell. To the contrary, these witnesses both testified that it was Mr. Roper who appeared to be visibly upset and that it was Mr. Roper who asked to be taken out of the cell. (TT, pp. 25-27, 29). CO Holland specifically testified that, if it was not for Mr. Roper’s outward appearance and statement that he wanted to leave the cell, he would not have noticed that anything had transpired between the two (2) men because everything else appeared normal. (TT, pp. 25-26) (“Personally, to me, other than [] inmate Roper [] looking fearful and telling me he wanted to leave his cell, nothing else looked out of the ordinary.”). CO Holland testified that, while Mr. Roper appeared to be “distraught” and “panicked,” the Defendant’s demeanor was “normal.” (TT, p. 26).

It should also be noted that while Mr. Roper was on some medication, his medications were for urinary problems and not for any psychiatric issues. (TT, p. 23). Moreover, the mere fact that Mr. Roper experienced blackouts prior to the incident does not negate a finding that the loss of consciousness he suffered on the night of the incident was caused by the Defendant. To be sure, Mr. Roper specifically testified that he did not cause the injuries that he sustained on the night of January 10, 2016, and the court found his testimony to be worthy of belief. (TT, p. 23).

In sum, although no one witnessed the actual attack take place, there was compelling circumstantial evidence to prove beyond a reasonable doubt that the Defendant choked Mr. Roper to the point of loss of consciousness and slammed his head into a brick wall. In *Commonwealth v. Dailey*, 828 A.2d 356, 361 (Pa. Super. 2003), the trial court found that the evidence was sufficient to sustain the defendant’s conviction for Assault by Prisoner. The trial court supported its finding with the following explanation:

The evidence [] shows that [d]efendant used force that was likely to produce serious bodily injury. Victim testified that [d]efendant delivered the punches with enough force to daze him, and the record shows that punches weakened Victim to such a degree that a correctional officer “had to almost physically carry [Victim] out of [defendant’s] cell.” The punches

were directed at Victim's head and struck him near his eye, one of the most vulnerable areas of the body; and Victim was wearing eyeglasses at the time. Victim sustained injuries from the assault that included swelling around his left eye and bruising, which were attended to at the Westmoreland Hospital emergency room.

Id. at 361.

The appellate court agreed with the trial court's assessment and rejected the Defendant's challenge to the sufficiency of evidence underlying his conviction. Similarly, in *Commonwealth v. Everett*, 596 A.2d 244, 246-47 (Pa. Super. 1991), the evidence was deemed sufficient to sustain a conviction for Assault by Prisoner where the defendant slammed a large, heavy steel door while the victim was standing in the doorway.

Thus, if punching an individual (*Dailey*) and slamming a door on an individual (*Everett*) are sufficient actions to support a conviction for Assault by Prisoner, then surely slamming an individual's head into a brick wall and choking him to the point of rendering him unconscious suffices to sustain a conviction under §2703. The Defendant's actions caused visible physical injuries and caused Mr. Roper to seek medical treatment on the same night of the incident. Thus, there was sufficient evidence to conclude that the Defendant employed force that was likely to produce serious bodily injury and the Defendant's Assault by Prisoner conviction should be upheld.

III. CONCLUSION

The Defendant's allegation of error on appeal is without merit. Based on the foregoing, the evidence presented at the non-jury trial was sufficient to support the Defendant's conviction for Assault by Prisoner. Accordingly, this court respectfully requests that the verdict in this case be upheld.

BY THE COURT:

/s/Lazzara, J.

Date: August 22, 2017

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OPINIONS

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**Commonwealth of Pennsylvania v.
Hilaire Karangwa**

Criminal Appeal—DUI—Sufficiency—Clerical Error on Sentencing Order

In a DUI prosecution, the Commonwealth can prove driving on a public road and intoxication while driving by circumstantial evidence.

No. CC 201504420. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—September 6, 2017.

OPINION

PROCEDURAL HISTORY

Appellant, Hilaire Karangwa, was charged by criminal information (CC 201504420) with one count each of driving under the influence (0.16% or higher),¹ driving under the influence (accident resulting in injury),² driving under the influence (third offense),³ driving while operating privilege is suspended,⁴ and one summary count of public drunkenness.

On November 17, 2016, the Trial Court granted the Commonwealth's motion to withdraw count one and amend count four to driving while operating privilege is suspended as a summary offense.

On November 17, 2016, Appellant proceeded to a nonjury trial, at the conclusion of which the Trial Court took the matter under advisement.

On November 29, 2016, the Trial Court found Appellant guilty of driving under the influence (third offense), driving while operating privilege is suspended, and public drunkenness. The Trial Court found Appellant not guilty of driving under the influence (accident resulting in injury).

On March 9, 2017, Appellant was sentenced by the Trial Court as follows:

Count three: driving under the influence (third offense) – thirty days restrictive intermediate punishment and a concurrent period of probation of eighteen months;

Count four: driving while operating privilege is suspended – sixty days restrictive intermediate punishment to be served concurrent to the sentence imposed at count three.

On March 16, 2017, Appellant filed a post sentence motion, which was denied by the Trial Court on March 20, 2017.

This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant filed his Concise Statement of Errors on June 27, 2017. Appellant raises the following issues on appeal, and they are presented below exactly as Appellant stated them:

- a. Mr. Karangwa's conviction for Driving Under the Influence must be reversed and vacated because there was insufficient evidence to support the verdict of guilty. Mr. Karangwa intends to set forth the following arguments in support of this contention:
 - i. Even if it were conceded that Mr. Karangwa operated a motor vehicle on the day in question, and that Mr. Karangwa was intoxicated at the time that the police encountered him, the Commonwealth presented no evidence to prove, beyond a reasonable doubt, that he was intoxicated while operating the motor vehicle. Thus, the evidence was insufficient to prove, beyond a reasonable doubt, that Mr. Karangwa was guilty of Driving Under the Influence.
 - ii. Alternatively, even if it were conceded that Mr. Karangwa was, at some point, operating a motor vehicle while intoxicated, the Commonwealth presented no evidence to show that Mr. Karangwa was on a public trafficway while so operating the motor vehicle. Thus, the evidence was insufficient to prove, beyond a reasonable doubt, that Mr. Karangwa was guilty of Driving Under the Influence.
- b. Mr. Karangwa's sentencing order erroneously states that he was convicted of Driving while Operating Privilege is Suspended or Revoked under 75 Pa.C.S. § 1543(b)(1)(1.1)(ii). A conviction under that subsection requires that the actor drove with an amount of alcohol equal to or greater than .02% by weight or any amount of a Schedule I or nonprescribed Schedule II or III controlled substance in his blood. The Commonwealth never introduced evidence to meet either of these requirements at trial. Furthermore, the Commonwealth orally amended this charge to a charge of 75 Pa.C.S. § 1543(b)(1) just before trial. The charge as it is listed on Mr. Karangwa's order of sentence thus appears to be a scrivener's error and must be corrected.

FINDINGS OF FACT

On January 21, 2015, Appellant was residing on Decker Lane, Ross Township, Allegheny County. Shortly before 12:15 A.M. on that date, Appellant drove his vehicle into a neighbor's driveway (106 Decker Lane), striking a vehicle that was parked in the driveway of that home. Appellant's vehicle caught fire, Appellant exited his vehicle, and fled the immediate area, leaving the vehicle's engine running and the transmission in gear (reverse). Appellant, however, collapsed in the snow approximately thirty yards away from his vehicle. (T.T. 5-10, 12, 14).⁵

Ross Township Police Officer Dean Chiaramonte was called to 106 Decker Lane for a vehicle fire. (T.T. 5). Upon arrival, Officer Chiaramonte observed a damaged Subaru Forester parked in the driveway of 106 Decker Lane. The front bumper of Appellant's vehicle (a Kia Sedona) had impacted the Forester, and Appellant's vehicle had come to rest parallel to the Forester. Appellant's vehicle was on fire, the engine was running, the transmission was in reverse, and the driver's side door was ajar. Responding officers placed Appellant's vehicle in park, and shut off the engine. (T.T. 5-6, 14).

There were no occupants in Appellant's vehicle, and Officer Chiaramonte followed a fresh set of footprints in the snow from the driver's side open door to Appellant, who was lying in the snow approximately 30 yards away. (T.T. 6-7). It was quickly apparent to Officer Chiaramonte that Appellant was heavily intoxicated. Appellant: (1) had glassy eyes; (2) had a strong odor of alcoholic beverage on his breath; (3) was unable to stand; (4) was extremely difficult to communicate with; and (5) had urinated himself. (T.T. 8-9). Appellant denied that he had been driving, apologized, and stated that someone named James had been driving. However, further inspection of the vehicle and the driveway area revealed trash covering the passenger seat, and there was only the singular set of footprints from the driver's side of the vehicle leading directly to Appellant. (T.T. 6-10).

Based upon his training and experience, Officer Chiaramonte opined that Appellant was intoxicated to the point that he was incapable of safely operating a motor vehicle. (T.T. 10). At the time of the incident, Appellant's license was suspended for previously driving under the influence. (T.T. 11).

Appellant was charged as noted hereinabove.

DISCUSSION

I.

Appellant alleges in his first claim that the evidence was insufficient to sustain his conviction of driving under the influence. Appellant bifurcates this claim into two parts; neither has merit.

The standard of review for sufficiency of the evidence claims has been stated thusly:

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

Commonwealth v. Gray, 867 A.2d 560, 567 (Pa. Super. 2005). The subsection of the DUI statute under which Appellant was convicted provides that:

An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

75 Pa. C.S. § 3802(a)(1).

A.

In the first part of his sufficiency claim, Appellant avers that the Commonwealth failed to prove beyond a reasonable doubt that Appellant was intoxicated while he was operating a motor vehicle. In this regard, the Superior Court has held as follows:

The term "operate" requires evidence of actual physical control of the vehicle to be determined based upon the totality of the circumstances. Our precedent indicates that a combination of the following factors is required in determining whether a person had "actual physical control" of an automobile: the motor running, the location of the vehicle, and additional evidence showing that the defendant had driven the vehicle. The Commonwealth can establish that a defendant had "actual physical control" of a vehicle through wholly circumstantial evidence. Furthermore, a police officer may utilize both his experience and personal observations to render an opinion as to whether a person is intoxicated.

Commonwealth v. Williams, 941 A.2d 14, 27 (Pa. Super. 2008) (citations and quotations omitted).

Contrary to Appellant's claim, the evidence presented at Appellant's trial clearly established beyond a reasonable doubt that Appellant was operating a motor vehicle while he was intoxicated to the degree that it rendered him incapable of safely driving. To-wit: (1) police were emergently summoned to the scene of a recently crashed and burning vehicle; (2) footprints from the driver's door of the burning vehicle led directly to Appellant, laying in the snow approximately 30 yards away; (3) the vehicle's front bumper had struck a vehicle parked in the driveway of 106 Decker Lane, coming to rest parallel to that parked vehicle; (4) Appellant's vehicle was on fire, the keys were in the ignition, the transmission was engaged, and the engine was still running; (5) Appellant had glassy eyes, incoherent speech, he was unable to stand, had urinated himself, and had a strong odor of alcoholic beverage on his breath; and (6) Appellant lived near the site of the accident. (T.T. 5-10, 12, 14). The only logical conclusion from this evidence is that Appellant was intoxicated while operating a motor vehicle, crashed that vehicle, attempted to flee the area but only managed to travel 30 yards before collapsing onto the snow-covered ground.

Thus, there was compelling and overwhelming direct and circumstantial evidence that Appellant was intoxicated while operating a motor vehicle. See *Williams*, 941 A.2d at 28-30 (evidence sufficient to sustain conviction of driving under the influence where officer responded to 911 call for vehicle parked on railroad tracks and observed defendant laying in the ground nearby; a witness notified police that she had found defendant in the vehicle with the engine running, and had put the vehicle in park and pulled defendant out of the vehicle to safety; and that defendant, when awakened, was incoherent, confused, unsteady on her feet, and had a strong odor of alcohol on her breath); *Commonwealth v. Johnson*, 833 A.2d 260, 263-264 (Pa. Super. 2003) (evidence sufficient to sustain conviction of driving under the influence where defendant was leaning against driver's side door when officers responded to accident call, and defendant's vehicle was behind vehicle that it had rear-ended).

Appellant's claim is without merit.

B.

In the second part of his sufficiency claim, Appellant avers that the Commonwealth failed to prove beyond a reasonable doubt that Appellant operated the motor vehicle on a public trafficway. A trafficway is defined as "the entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter of right or custom." 75 Pa. C.S. § 102. Appellant's vehicle came to rest in the private driveway of 106 Decker Lane. While a private driveway is not a public trafficway, Decker Lane, the street adjacent to where Appellant's vehicle came to rest, is unquestionably a public trafficway. 75 Pa. C.S. § 102.

The only logical conclusion based on the evidence presented at Appellant's trial is that Appellant, while heavily intoxicated, traversed Decker Lane immediately before pulling into the private driveway of 106 Decker Lane, striking the vehicle parked there,

and attempted to flee on foot. Based on the evidence presented, a reasonable inference arose that Appellant's vehicle came to rest on the private property of 106 Decker Lane only after it had been on a roadway (Decker Lane), immediately prior to impacting the parked vehicle. This evidence was sufficient to sustain Appellant's conviction of driving under the influence.

Appellant's claim is without merit.

II.

Appellant alleges in his second claim that Appellant's sentencing order contains a clerical error as it erroneously lists his driving while operating privilege is suspended at 75 Pa. C.S. § 1543(b)(1.1)(ii), when the Commonwealth in fact had amended that charge to 75 Pa. C.S. § 1543(b)(1), pursuant to *Birchfield*.⁶ As to clerical errors, the Superior Court has held:

It is well-settled in Pennsylvania that a trial court has the inherent, common-law authority to correct "clear clerical errors" in its orders. A trial court maintains this authority even after the expiration of the 30 day time limitation set forth in 42 Pa.C.S.A. § 5505 for the modification of orders. [. . .] In discussing a trial court's authority to correct illegal sentences, our Supreme Court has stated that it is the obviousness of the illegality, rather than the illegality itself, that triggers the court's inherent power. The High Court has also cautioned that the inherent power to correct errors does not extend to reconsideration of a court's exercise of sentencing discretion. A court may not vacate a sentencing order merely because it later considers a sentence too harsh or too lenient. As a matter of general guidance, our Supreme Court has sanctioned the use of the inherent authority in cases that involve *clear errors* in the imposition of sentences that were incompatible with the record or black letter law.

Commonwealth v. Borrin, 12 A.3d 466, 471, 473 (Pa. Super. 2011) (citations and quotations omitted).

Here, the Commonwealth amended count four to a summary level driving while operating privilege is suspended (75 Pa. C.S. § 1543(b)(1)), which carries a mandatory sentence of imprisonment of not less than 60 days and not more than 90 days. (T.T. 3-4). Appellant was sentenced accordingly to 60 days intermediate punishment. However, the sentencing order incorrectly lists count four as the original charge of a misdemeanor of the third degree (75 Pa. C.S. § 1543(b)(1.1)(ii)). As such, the sentencing order contains a clear clerical error, and Appellant's case should be vacated and remanded to the trial court for the limited purpose of correcting the error on the sentencing order. *See Commonwealth v. Thompson*, 106 A.3d 742, 766 (Pa. Super. 2014) (judgment of sentence vacated and remanded for limited purpose of correcting clear clerical error on sentencing order where trial judge unambiguously stated on the record that the sentences were to run concurrently, but the judgment of sentence ran the imposed sentences consecutively).

CONCLUSION

Based upon the foregoing, the judgment of sentence imposed by this Court at count four should be vacated and remanded to the Trial Court for the limited purpose of correcting the clerical error on the sentencing order, and Appellant's judgment of sentence should be affirmed in all other respects.

BY THE COURT:
/s/Borkowski, J.

Date: September 6, 2017

¹ 75 Pa. C.S. § 3802(c).

² 75 Pa. C.S. § 3802(a)(1).

³ 75 Pa. C.S. § 3802(a)(1).

⁴ 75 Pa. C.S. § 1543(b)(1.1)(ii).

⁵ The designation "T.T." followed by numerals refers to Non-Jury Trial Transcript, November 17 and 29, 2016.

⁶ *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

**Commonwealth of Pennsylvania v.
Ernest Gregory Williams**

Criminal Appeal—Suppression—Homicide—Sufficiency—Waiver—Coordinate Jurisdiction—Traffic Stop

Multiple errors in homicide case asserted, including the failure to suppress evidence, recusal, and the coordinate jurisdiction rule.

No. CC 16085-2013. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Ignelzi, J. and Todd, J.—August 9, 2017.

OPINION

PROCEDURAL HISTORY

By Criminal Information filed at No. CC16085-2013 on November 4, 2013, Ernest Gregory Williams, “Defendant” was charged with Criminal Homicide- 18 Pa.C.S. §2501A; Persons not to Possess a Firearm-18 Pa.C.S. §6105A1; and Carrying a Firearm Without a License-18 Pa.C.S. §6106A1. On July 5, 2016, the Criminal Homicide charge was changed to Murder of the First Degree-18 Pa.C.S. §2502A. Thereafter, the charge of Persons not to Possess a Firearm was severed from this Jury Trial.

On April 4, 2014, the Defendant, through counsel Gary B. Zimmerman, Esquire, filed an Omnibus Pre-Trial Motion. On May 19, a Suppression Hearing was held before The Honorable Randal B. Todd. The Hearing was reconvened on July 9, 2014. Judge Todd set a briefing schedule, indicating he would rule on the Suppression Motion prior to setting a date for trial. On September 18, 2014, Judge Todd filed his Order of Court. After summarizing the testimony from the May 19 and July 9, 2014, Judge Todd concluded as follows:

- a. “Probable cause existed to arrest Defendant at the time his vehicle was stopped at approximately 7:00 a.m. based on the totality of the circumstances known to Detective Mayer. This includes information concerning the Defendant being the sole occupant of the vehicle stopped shortly after the call of shots fired in the area of 19th and McClure Avenue; the location where Defendant’s vehicle was stopped; and, the observations concerning the description of the vehicle which Defendant was driving at that time and observations of the vehicle in the surveillance video which showed the shooting.
- b. Defendant was not properly advised of his Miranda rights prior to being interrogated after his arrest and any statements made by Defendant are inadmissible.
- c. The derivative evidence obtained by Detectives as a result of the statement is admissible. (*See, Commonwealth v. Abbas*, 862 A.2d 606 (2004) and *United States v. Pantane*, 542 U.S. 630 (2004)).
- d. Defendant did not give a valid consent to search the vehicle after it was towed and evidence obtained is not admissible.
- e. Evidence obtained from the observations of the exterior of the vehicle is admissible as Defendant had no expectation of privacy related to the exterior of the vehicle.”

On November 19, 2014, Defendant filed a Motion for Reconsideration of the Defendant’s Motion to Suppress Physical Evidence. On November 21, 2014, Judge Todd issued an Order denying the Motion. On March 26, 2015, Defendant filed a Motion for an Evidentiary Hearing, which was also denied by Judge Todd on March 31, 2015. Thereafter, on April 10, 2015, Defendant filed a Motion for Recusal, which the judge granted on April 16, 2015. The case was then assigned to the Honorable Philip A. Ignelzi.

Defendant, through attorney Zimmerman, requested that Judge Ignelzi reconsider the Defendant’s Motion to Suppress that was denied, in part, by Judge Todd. The Court asked the parties to file briefs on the issue, which they did. On September 2, 2015, this Court conducted an extensive Hearing on the Motion to Reconsider. At the conclusion of the Hearing and counsels’ arguments, Judge Ignelzi DENIED the defense’s Motion and indicated it would not overrule the ruling made by Judge Todd. Motion Transcript, “MT”, dated September 2, 2015, p. 23.

On October 7, 2015 an Order withdrawing Gary B. Zimmerman, Esquire as counsel due to health reasons and appointing Ralph D. Karsh, Esquire was filed. Defendant, through new counsel, filed a Motion for Court Order to Allow Defense Counsel to bring Electronic Equipment into the Allegheny County Jail was filed January 5, 2016. Said Motion was granted on January 7, 2016.

The case proceeded to a jury trial commencing on March 28 and ending on April 6, 2016. Attorney Chris Avetta and Attorney Alicia Werner represented the Commonwealth and Mr. Karsh represented the Defendant. At the conclusion of the jury trial, Defendant was found guilty of Murder of the First Degree and Firearm Not to be Carried Without a License. The Defendant was sentenced on July 7, 2016 to be confined for life for Murder of the First Degree. As to the charge of Firearm Not To Be Carried Without License, this Court instituted no further penalty.

On July 14, 2016, the Allegheny County Public Defender’s Office filed, on behalf of Defendant, a Preliminary Post-Sentence Motion with Motion for Leave to file a Supplemental Post-Sentence Motion. On July 15, 2016, this court filed an Order Permitting the filing of a Supplemental Post-Sentence Motion. On August 30, 2016, this court entered an Order of Court directing a briefing schedule on the Post-Sentence Motions. On September 15, 2016, Defendant filed a Motion to Withdraw the Post-Sentence Motion and the Order granting said Motion was filed the very next day.

On October 14, 2016, Defendant filed a timely Notice of Appeal in the Superior Court of Pennsylvania. By Order dated October 17, 2016, this Court ordered Defendant to file a Statement of Errors Complained of on Appeal pursuant to Pa. R.A.P. 1925(b).

On November 7, 2016, Robert Joseph Perkins, Esquire entered his appearance on behalf of the Defendant and also filed a Motion for Extension of Time to file the Concise Statement, which was granted on the same date. Defendant eventually filed a Concise Statement of Matters Complained of on Appeal on April 7, 2017.

STATEMENT OF ERRORS ON APPEAL

Defendant’s Concise Statement lists the following issues (abbreviated herein) for appellate review:

1. The Honorable Randal B. Todd (hereafter “Suppression Court”) erred when it denied Mr. Williams’ Motion to Suppress all evidence obtained as a result of the 7:00 a.m., November 4, 2013 traffic stop because, among other

reasons, that stop constituted an unlawful seizure unsupported by reasonable suspicion.

2. The Suppression Court likewise erred when it denied Mr. Williams' Motion to Suppress all evidence because the traffic stop constituted an unlawful arrest unsupported by probable cause.
3. While the Suppression Court properly found that evidence obtained during the search of Mr. William's car must be suppressed because Mr. Williams did not give a valid consent to search, it nevertheless erred when it made the contradictory finding that evidence obtained as a result of observations of the car's exterior was admissible.
4. While the Suppression Court properly suppressed all of Mr. Williams' statements to the police on November 4, 2013, it again erred when it found all derivative evidence obtained from those statements was admissible (and to the extent that case law holds otherwise, that precedent should be overruled on state constitutional grounds).
5. The Suppression Court further erred when it failed to grant Mr. Williams' Motion to Reconsider the Court's finding that probable cause supported Mr. William's arrest.
6. The Suppression Court likewise erred when it failed to grant Mr. Williams' request to reopen the record and admit the shooting video in connection with his Motion to Reconsider. According to Mr. Williams the video's poor quality prevented a viewer from being able to identify most of the car's features.
7. The Honorable Philip A. Ignelzi (hereinafter "Trial Court") erred when it failed to review and/or reconsider the Suppression Court's rulings on the Motion to Suppress Evidence and the Motion to Re-Open the Record to introduce the shooting video into evidence.
8. The trial Court erred in failing to *sua sponte* grant a mistrial when both defense counsel and counsel for the Commonwealth, through their respective witnesses, violated the Court Order suppressing items found inside Mr. Williams' car. Jury Trial Transcript ("TT") dated March 28-April 6, 2016, pp. 506-532.
9. The Trial Court erred in failing to grant Mr. Williams' request to strike juror #3, after that juror observed Mr. Williams walking down the courthouse hallway surrounded by seven or eight people, including a uniformed sheriff's deputy. The inflammatory visual undermined Mr. Williams' presumption of innocence. TT, pp. 649-673.
10. The trial Court erred in failing to *sua sponte* strike all members of the jury selected on March 30, 2016. During jury selection that day, a potential juror disclosed that she and other females on the jury pool noticed defense counsel rolling his eyes at a female Assistant District Attorney. This potential juror stated she did not believe she could sit impartially as a juror because her observations triggered a personal dislike of defense counsel. TT, pp. 35-40.
11. The Trial Court likewise erred in failing to take corrective measures to ensure the jury pool wasn't tainted once it learned of the potential juror's disclosure of her negative view of defense counsel on March 30, 2016. *Id.*
12. The evidence was insufficient as a matter of law to establish, beyond a reasonable doubt, Mr. Williams' identity as the perpetrator of the crimes for which he was convicted.

FINDINGS OF FACT

On May 19, 2014, the Suppression Court heard testimony from Commonwealth witnesses regarding the Defendant's Omnibus Pretrial Motions, specifically, the Motion to Suppress Physical Evidence and Statements. The Suppression Hearing was continued on July 9, 2014.

At the May 19, 2014 hearing, Officer James Caterino testified he was working as a patrolman for West Homestead on November 4, 2013. He has been employed as a detective for the Borough of Munhall for eight years and a patrolman for the Borough of West Homestead for two and a half years. On November 4, 2013, at approximately 3:30 a.m., Homestead dispatch put out a call for shots fired in the area of 19th and McClure Street, which Officer Caterino categorized as a high crime area. Suppression Hearing Transcript ("ST"), dated May 19, 2014, pp. 5-6.

Officer Caterino and Lt. Steele responded to the area and, as they were proceeding southbound on McClure coming off the 11th Avenue extension, they encountered a dark colored vehicle driving westbound on 11th Avenue. Since it was obvious to Officer Caterino that this vehicle was travelling at a high rate of speed, he performed a U-turn at the intersection of McClure and 12th to get behind the vehicle. The vehicle further failed to stop at a stop sign at McClure and 11th Avenue. ST, pp 8-10. Officer Caterino initiated a traffic stop, the vehicle continued to make a right turn onto Ann Street, where it was ultimately stopped. The vehicle was a black Ford Five Hundred and Defendant was the sole occupant. When Officer Caterino approached the Defendant, he was sweating profusely, fidgeting in his seat and wearing a red sweatshirt and gray pants. ST, pp. 11-12.

The Defendant was asked to step out of the vehicle, he gave consent to search his person and vehicle, and no evidence was recovered. He was not in custody at this time and freely answered any questions posed to him. Lt. Steele asked the Defendant where he was coming from and he indicated the Trapper's Club in Homewood. ST, pp. 13-14. Officer Caterino became suspicious when he heard Defendant tell Lt. Steele he was coming home from the Trapper's Club to his place on 13th Street. According to Officer Caterino, the East 11th Avenue Extension is not accessible if the Defendant was traveling across the Rankin Bridge to his home on 13th Street. ST, pp. 35-36.

Officer Caterino is familiar with the East 11th Avenue Extension, noted that the area the Defendant had just past was known as Cow's Hill, and, based on his experience as a police officer, Cow's Hill is an area known for discarding guns. ST, pp. 15-18. The Defendant was released and the officers proceeded to 19th and McClure Street, where the call said shots were fired. Upon arriving, Officer Caterino observed that there were video cameras at the business of Hruska's Plumbing, located at the very intersection of the shooting. Officer Caterino and County Detectives viewed the surveillance video at Hruska Plumbing and, Officer Caterino indicated to county detectives that he and Lt. Steele had just stopped the Defendant in a vehicle that looked exactly like the vehicle in the video. ST, pp. 19-20. Officer Caterino recalled the vehicle had a grayish stripe or molding going across horizontally and a ragtop roof. ST., pp. 20-21.

Further, the video depicted the actual shooting and showed the passenger (victim) get out and proceed to the rear of the car,

then stop and go back to the passenger side, opening the door as if looking for something on the side of the seat, then got out again. The victim again walks to the rear of the vehicle, at which time the driver got out of the car and fires multiple shots at him. When the victim attempts to run, the driver fires more shots at the victim. ST, pp. 21-22.

The second angle of the video was a side view of the business and showed the vehicle making a right hand turn and heading in the direction of the 11th Avenue Extension and Cow's Hill. ST, pp. 22 & 31.

The Commonwealth next called Detective Mayer to testify. Detective Mayer has been a detective with the Allegheny County Police for twelve years. ST, p. 40. Detective Mayer was called out to investigate the shooting of Jeremy Fields on November 4, 2013. Upon arriving at the intersection of 19th and McClure Street, Detective Caterino was already on the scene. ST, pp. 40-41. Shortly after his arrival, Detective Caterino indicated there were several video cameras on the exterior of the building. The owner of the building was there to take the detectives to an office where there was a small television for the surveillance system. ST, pp. 41-42.

After viewing the video and Officer Catrino's observations, a Be On the Lookout, or "BOLO", was issued for the vehicle the Defendant was driving. Later that morning Detective Mayer, who had just recently viewed the video, encountered a black Ford 500 sedan with a landau cloth roof traveling across the Rankin Bridge. The car was being driven by a black male, the sole occupant. The Detective got behind the vehicle and determined it was the same vehicle stopped earlier that morning by Officer Caterino. ST, pp. 42-44.

Once marked cars arrived, a traffic stop was initiated and the Defendant stopped his car in the middle of the street; Defendant was removed from the vehicle and placed in handcuffs; and was then transported to the County Headquarters and placed in a locked interview room. ST, pp. 45-49.

According to Detective Mayer, several hours later, he and Detective Dolfi entered the interview room and obtained verbal consent from the Defendant to search and process his vehicle. ST, p. 49. Shortly thereafter, Detective Mayer asked the Defendant what he did yesterday, and he responded he was at a couple of different bars with his buddy, Crime, which was later determined to be a nickname for the victim, Jeremy Fields. ST, pp. 50-51. The Defendant then indicated he and Fields had gone to a private party at Pearl's Bar; they then went to King's Club in Braddock at about 2 a.m.; then onto the Trapper's Club until about 3 a.m.; and finally drove back over the Rankin Bridge where Defendant dropped Fields off at 19th and McClure Street. ST, pp. 51-52.

Immediately thereafter, Detective Mayer provided the Defendant with a written copy and oral presentation of his Miranda rights. ST, p. 52. The Defendant indicated he understood his rights and did not wish to speak to the detectives anymore. ST, pp. 52-53. Detective Mayer informed the Defendant that they obtained video footage from Hruska Plumbing and, in response, Defendant put his head down on the table. ST, p. 53.

The final witness at the Suppression Hearing was Detective Todd Dolfi. Detective Dolfi remained on the scene with Defendant's vehicle awaiting a tow truck and, while there, he walked around the vehicle and observed some red droplets on the rear bumper and driver's side quarter panel. ST, p. 80. Detective Dolfi had also viewed the video earlier that morning from Hruska Plumbing and believed the location of these droplets were consistent with where the victim was observed to have fallen behind the video. ST, pp. 80-81.

As stated earlier under the Procedural History of this Opinion, Judge Todd filed his Order of Court on the Suppression Motions on September 18, 2014. In sum, the Suppression Court concluded probable cause existed to arrest the Defendant; Defendant was not properly advised of his Miranda rights prior to being interrogated and any statements made by the Defendant are inadmissible; the derivative evidence obtained by the detectives as a result of the statement is admissible under *Commonwealth v. Abbas*, 862 A.2d 606 (Pa. 2004) and *United States v. Patane*, 542 U.S. 630 (2004); Defendant did not give a valid consent to search the vehicle after it was towed and any evidence obtained inside the vehicle is, therefore, inadmissible. Evidence obtained from the observations of the exterior of the vehicle is admissible as Defendant had no expectation of privacy related to the exterior of the vehicle.

Defendant thereafter filed a Motion for Recusal, which Judge Todd granted. The case was assigned to Judge Ignelzi. Prior to the trial, upon Defendant's request, Judge Ignelzi held a hearing on the Motion to Reconsider the Motion to Suppress. Judge Ignelzi indicated on the record he thoroughly reviewed the video surveillance of the shooting and the Suppression Hearing Transcript. MT, p.8. Relying upon Judge Ignelzi's review of the video with the distinctive metal stripe on the side of the vehicle, as well as the testimony of Officer Caterino and Detective Maher regarding the description of the vehicle, Judge Ignelzi concluded that probable cause existed and Judge Todd's ruling would not be overturned. MT, pp. 10, 21 & 23.

A jury trial commenced on March 28, 2016. The Commonwealth called Detective Daniel M. Mayer as its first witness. Detective Mayer has been with the Allegheny County Police since July of 1992. TT, p. 68. At the time of this incident, on November 4, 2013, Detective Mayer was assigned to the Homicide Unit. Id. On that night, Detective Mayer, his partner Detective Dolfi, Detectives Langan and McKeel, were informed that there had been a shooting, a homicide, at the intersection of 19th and McClure in Homestead. TT, p. 69. At the scene, he met with Officer Caterino, who indicated there is a plumbing business nearby with video cameras mounted outside. TT, p. 71. Officer Caterino had already contacted the owner to obtain and view the video. Id. The owner arrived, opened the building and was able to cue the video system up to the timeframe of the shooting. TT, p. 84.

Detective Mayer explained in the video, he was able to view the persons exiting the vehicle. Although you cannot make a facial identification of the persons, you are able to see the vehicle and the shooting that transpired. TT, p. 85. Detective Mayer described the vehicle as a dark-colored, four door sedan that is two-toned, had a landau roof and a chrome molding down the side of the car. TT, p. 90. Detective Mayer and Officer Caterino, while viewing the video of the vehicle, would back up the video, pause it and replay it numerous times. TT, p. 181. As they were observing the vehicle, Officer Caterino rather excitedly indicated he knows that car. Id.

Detective Mayer was asked if he investigated anyone else for this murder. He answered no. He felt based on the information they collected, the video they were able to view, Detective Caterino's initial traffic stop, the gunshot residue on Defendant's hand, the test for blood on the bumper, the videos from the clubs and their observations of the vehicle, Mr. Williams was the shooter in this case. TT, p. 199.

Finally, Detective Mayer viewed the video from Pearl's Bar. He identified the victim, Mr. Fields, wearing a sleeveless blue jean sweater and baseball cap. Defendant was wearing a red sweater with an emblem on it. TT, p.281.

The Commonwealth's next witness was Charles Thomas, the owner of Pearl's Café. Mr. Thomas recalls the police coming to his

establishment the morning after the shooting wanting to look at the video from the night before to see if the ones involved in the shooting were there. TT, p. 211. Viewing the video, Mr. Thomas observed both the Defendant and the victim, Jeremy Fields, at his bar. TT, p. 212. He further noted the Defendant was wearing a red shirt with an emblem on it and the victim wore a baseball cap and a coat. TT, p. 215.

The Commonwealth called Officer James Caterino to testify. As he and his partner were responding to a call for shots fired at 19th and McClure, he observed a vehicle at 11th Avenue, almost near McClure, traveling at a high rate of speed. TT, p. 314. Officer Caterino testified that he did not go straight to the area where shots were fired, but rather, felt it was important to stop Defendant's vehicle because he was speeding and it was the only one in the area. TT, pp. 319-320. He again described the vehicle as a black Ford 500, with a silvery molding on the side and a distinctive rag top roof. TT, p. 321. At this initial stop, Mr. Williams was very nervous, sweating profusely and fidgeting in his seat. TT, p. 323. He informed the officers he was coming from the Trapper's Club, which seemed odd to Officer Caterino since the area he was coming from off 11th Avenue Extension, you can't get to 11th from 8th Avenue (the route you would take from the Trapper's Club). TT, p. 325. After a search of his person revealed no evidence, the Defendant was released to go, and the officers headed to the scene of the crime. Id.

At the scene, Officer Caterino observed surveillance cameras at Hruska Plumbing, and eventually obtained the videos to review them. When he initially viewed the video, Lt. Steele was with him. TT, p. 327. Officer Caterino observed the actual shooting take place on the video and further observed that the vehicle in the video matched the description of the vehicle he just previously stopped. Id. He watched the video a second time that morning after the County Detectives Mayer and Dolfi arrived. TT, p. 328. Officer Caterino informed the County Detectives that the vehicle in the video is the same car he stopped earlier with Mr. Williams driving it. Id. As a final matter, he stated that from his initial view of the video, he had no doubt that was the same vehicle he just pulled over. TT, p. 360.

Detective Todd Dolfi, employed with the Allegheny County Police Department's Homicide Unit, was called to testify for the Commonwealth. At trial, Detective Dolfi, stated he was present, with Detective Mayer, Officer Caterino, and Lt. Steele, to view the Hruska Plumbing video. TT, p. 365. While observing the video, Officer Caterino expressed a belief that Ernest Williams was driving the vehicle. Id. He also viewed the actual shooting, and saw two people and one vehicle, and the shooting took place at the rear quarter panel of the driver's side. TT, pp. 365-366.

After he finished viewing the video, he left the scene by himself, but was driving behind Detective Mayer, when Mayer observed a black Ford 500 coming across the Rankin Bridge. TT, p. 366. Detective Mayer turned around to follow the vehicle, as a BOLO was out for that vehicle, and Detective Dolfi followed him. Id. A traffic stop was conducted and the driver (who was identified as Ernest Williams) was detained and transported to Allegheny County Police headquarters. TT, p. 367. Detective Dolfi stayed with the vehicle to wait for the tow truck to arrive. As Detective Dolfi walked around the vehicle to look at the driver's side rear quarter panel he observed what appeared to be red-brown droplets dried on the paint of the vehicle. TT, pp. 367-368.

After the car was towed away, Detective Mayer returned to headquarters performing a GSR, gunshot residue, test on the Defendant. TT, p. 370. He also obtained Defendant's clothing, which included a red sweatshirt that the detective remembered Defendant was wearing at the time of the traffic stop. TT, pp. 372-373. Finally, Detective Dolfi requested information from the State Police as to whether the Defendant was licensed to carry a firearm, and the form indicated he was not. TT, pp. 373-374.

The Commonwealth next called Daniel Wolfe to testify. He has been employed at the Allegheny County Medical Examiner's Office Forensic Laboratory for the past twelve years. TT, p. 414. Mr. Wolfe works in the Trace Evidence Section, the Controlled Substance Department and is a member of the Mobile Crime Unit. Id. Working in the Trace Evidence Section, his main task is to analyze evidence for gunshot residue. Id. Mr. Wolfe explained that when the firing pin springs forward on a gun, it makes contact with a small primer cap and you get a small controllable explosion that ignites the gunpowder which is the propellant that sends the projectile downrange. TT, p. 415. During that event, the vapors inside the gun evacuate through any available port and land on the area around the weapon and follow the projectile. Id. He is looking for those particles that landed on a surface near the weapon, specifically the elements lead, barium and antimony. Id.

For it to be considered gunshot residue, all three of the elements need to be present. TT, p. 419. There are three classes of particles in gunshot residue: (1) single components of just lead, just barium, or just antimony; (2) consistent particles are some combination of the two (lead and barium, barium and antimony or lead and antimony); (3) one characteristic particle that has all three elements. Id. If all three elements are there, it is a characteristic particle, and those are reproduced from discharging a firearm. Id.

Mr. Wolfe examined the GSR kit in the case against Ernest Williams. He found one characteristic particle on the left palm, along with two single component particles. TT, p. 420. Since the characteristic is comprised of all three elements, it is gunshot residue. TT, p. 421. Mr. Wolfe also performed an examination of the red shirt. Id. He described it as a sweatshirt, which in his experience, is more likely to retain gunshot residue. TT, p. 423. On the right cuff and sleeve, Mr. Wolfe found two characteristic particles, two consistent particles, and greater than or equal to five single components. Id. He stated that two of them are definitely gunshot residue. Id.

Anita (Kozy) Lorenz, a scientist in the Allegheny County Office of the Medical Examiner, testified for the Commonwealth. She has been employed there for approximately sixteen years, and her areas of expertise include forensic biology, serology and DNA. TT, p. 496. The Commonwealth and Defense counsel stipulated to Ms. Lorenz as an expert in the field of forensic biology, specifically DNA and latent prints. Id.

With regard to the case of Ernest Williams, Ms. Lorenz analyzed the following items for DNA; a possible saliva stain from a Pall Mall cigarette butt; a possible bloodstain from the rear bumper of the Ford 500; wet/dry swabs from the front passenger controls; wet/dry swabs from rear passenger controls; swab of the mouth of a Niagra water bottle and inside threads of the cap; swab of the mouth of a Nestle water bottle; a whole blood patch of Mr. Fields; and a buccal sample from Ernest Williams. TT, pp. 497-498. She used the whole blood sample from the victim and the buccal swab from the Defendant as reference samples in her DNA analysis. TT, p. 498.

Ms. Lorenz did an analysis of a possible stain from the rear bumper of the Ford 500. TT, p. 534. A single source DNA profile was obtained from that sample and it matched the DNA profile that was obtained from the whole blood patch of Mr. Fields. TT, p. 535. She also analyzed a possible bloodstain from the driver's side rear fender. TT, p. 536. A single source DNA profile was also obtained from that source and again it matched the DNA profile that came from the whole blood patch of Mr. Fields. Id.

Dr. Todd Luckasevic next testified for the Commonwealth. He is a Forensic pathologist, Associate Medical Examiner at the

Allegheny County Medical Examiner's Office. TT, p. 579. Dr. Luckasevic performed the autopsy on Mr. Fields and observed he had a total of six gunshot wounds to the head, upper extremities and trunk. TT, p. 588. To a reasonable degree of medical certainty, Dr. Luckasevic opined that the cause and manner of death was homicide. Id.

Thomas Morgan, an expert in ballistics, firearms and tool marks, testified for the Commonwealth. TT, p. 607-608. He examined evidence that was recovered at the autopsy and the scene of the shooting of Mr. Fields. TT, p. 608. He examined cartridges (a single unit of ammunition that consists of four components). TT, p. 611. A cartridge is known as a live round or live bullet, and is made up of the bullet, the cartridge case, the gunpowder and a primer, a compound that ignites the gunpowder which causes the bullet to be discharged from the firearm. Id. Out of the five items he had to examine, four of them were classified as having the same lands, grooves and caliber. TT, p. 614. All four of them were either a .38 or .357 caliber. Id. To further explain, Mr. Morgan stated that a .357 Magnum can fire a .38 Special cartridge, but a .38 Special can't always fire a .357 cartridge. TT, p. 616. Mr. Morgan also performed a microscopic examination on the four items and they all matched each other and were discharged from the same firearm. TT, p. 614.

DISCUSSION

In light of Judge Randal Todd presiding over the suppression motion and hearing, Judge Todd addresses the suppression issues herein. Judge Philip Ignelzi addresses all other issues.

I

The Defendant's first six matters complained of on appeal all relate to errors by the Court (Judge Todd) on the Suppression Motion.

First, the Defendant argues that all the evidence obtained as a result of the 7:00 am traffic stop on November 4, 2013 should have been suppressed by The Honorable Randal B. Todd, because the stop constituted an unlawful seizure unsupported by reasonable suspicion. Second, Defendant argues the November 4, 2013 arrest lacked probable cause. These allegations lack credence.

The reasonable suspicion standard is "less stringent" than the probable cause standard. *Commonwealth v. Cook*, 735 A.2d 673, 676 (Pa. 1999). In order to demonstrate reasonable suspicion, the police officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts in light of the officer's experience. Id. at 677.

Likewise, probable cause exists if the facts and circumstances within the knowledge of the police officer at the time of the arrest are sufficient to justify a person of reasonable caution in believing the suspect has committed or is committing a crime. *Commonwealth v. Rodriguez*, 666 A.2d 292,295 (Pa. Super. 1995). The Superior Court also noted that, "[we] focus on the circumstances as seen through the eye of a trained police officer, taking into consideration that probable cause does not involve certainties, but rather the factual and practical considerations of everyday life on which reasonable and prudent men act." *Commonwealth v. Santiago*, 736 A.2d 624 (Pa. Super. 1999), citing *Commonwealth v. Romero*, 673 A.2d 374, 376 (Pa. Super. 1996).

Finally, a suppression court's factual findings are binding and may only be reversed "if the legal conclusions drawn therefrom are erroneous." *Commonwealth v. Rosas*, 875 A.2d 341, 346 (Pa. Super. 2005).

In this case, the determination of whether reasonable suspicion and/or probable cause to arrest exists would be based upon the totality of the circumstances as known by Detective Mayer at the time the Defendant was taken into custody. This includes the information provided to Detective Mayer by Officer Caterino and Lt. Steele.

Officer Caterino and Lt. Steele received a call for shots fired at approximately 3:30 am on November 4, 2013, in a primarily residential and high crime area. ST, pp. 5-6. They responded to the area and observed Defendant's dark colored vehicle going westbound on 11th Avenue at a high rate of speed, then failing to stop at a stop sign at McClure and 11th Avenues. ST, pp. 8-10.

Thereafter, Officer Caterino initiated a traffic stop and when he approached the Defendant, he observed him to be sweating profusely and squirming in his seat. Officer Caterino further observed Defendant to be wearing a red sweatshirt and gray sweatpants. ST, pp. 11-12. Upon questioning from the officer, Defendant indicated he was coming from the Trapper's Club in Homewood and proceeding to his home on 13th Street. ST, pp. 13-14. Officer Caterino became suspicious due to the fact that the East 11th Avenue Extension is not accessible if the Defendant was truly traveling across the Rankin Bridge to 13th Street; the most direct route. ST, pp. 35-36. In addition, Officer Caterino, who is familiar with the East 11th Avenue Extension, was aware based upon his experience as a police officer, that the area is called "Cow's Hill" and is known as a place for discarding firearms. ST, pp. 15-18.

After Defendant consented to a search of his person and vehicle, which yielded no evidence, he was released. Officer Caterino and Lt. Steele continued onto the area where shots were fired; 19th and McClure Street. Video surveillance of the shooting was obtained from Hruska Plumbing, near the crime scene and Officer Caterino and Detective Mayer watched it. Officer Caterino immediately told Detective Mayer that he and Lt. Steele had just recently stopped the Defendant in a vehicle that looked just like the car in the video and he described what took place at the initial traffic stop. ST, pp.19-20.

Officer Caterino further informed the detective that the vehicle had a distinctive grayish stripe going horizontally across the car and it had a ragtop roof. ST, pp. 20-21. Additionally, he noted that when the vehicle in the video left the scene, it made a right and headed in the direction of Cow's Hill and the 11th Avenue Extension. ST, pp. 22 & 31.

Using the totality of the circumstances test, Detective Mayer, as a twelve year police veteran, had more than ample reasonable suspicion as well as probable cause to arrest the Defendant during a BOLO traffic stop later the morning of November 4, 2013. As such, the Suppression Court correctly found probable cause existed for the Defendant's arrest. The Suppression Court's ruling on this matter should be affirmed.

The third alleged error is that while the Suppression Court properly found that the evidence obtained during the search of the interior of Defendant's car must be suppressed because Defendant did not give a valid consent to search, it nevertheless erred when it made the contradictory finding that evidence obtained as a result of observations of the car's exterior following Defendant's arrest was admissible. This alleged error has no merit.

Because the Suppression Court found the detective had probable cause to arrest the Defendant, a valid traffic stop was conducted and Defendant was lawfully taken into custody.

However, because the Defendant has parked his car illegally in the middle of the street, it had to be towed after Defendant was removed from the scene. ST, p. 47. Detective Dolfi, a County Detective, remained at the scene with the vehicle awaiting the tow

truck's arrival. As he walked around the vehicle, and observed some red droplets that appeared to be blood on the driver's side rear quarter panel and bumper. ST, pp.80-81.

The Suppression Court properly ordered that the evidence obtained from the observations of the exterior of the vehicle was admissible as Defendant had no expectation of privacy related to the exterior of the vehicle. *See, Commonwealth v. Grabowski*, 306 Pa. Super. 483, 452 A.2d 827 (1982).

Fourth, Defendant alleges that while the Suppression Court properly suppressed all of Defendant's statements to the police on November 4, 2013, after his arrest, it erred when it found that all the evidence derived from those statements was admissible. This allegation has no credibility.

The leading case in the area of derivative evidence is *United States v. Patane*, 542 U.S. 630, 124 S. Ct. 2620 (2004), wherein the United States Supreme Court ruled that the failure to give Miranda warnings does not necessitate the suppression of physical evidence obtained as a result of Defendant's statement.

In *Patane*, the defendant was unlawfully interrogated when the detective asked him about a gun. At first, defendant expressed an unwillingness to discuss the gun, but later told the police the gun was hidden in his bedroom. The Court ruled that despite the illegality of the statement, the physical evidence obtained (the gun) was admissible because the admission did not implicate the Self-Incrimination Clause. The Court went on to explain as follows:

Thus, the police do not violate a suspect's constitutional rights (or even the *Miranda* rule) by negligent or even deliberate failures to provide full *Miranda* warnings. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence. And, at that point, the exclusion of such statements is a complete and sufficient remedy for any perceived *Miranda* violation. Unlike actual violations of the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter and therefore no reason to apply *Wong Sun's* "fruit of the poisonous tree" doctrine.

Patane, *Id.* at 2626.

The holding in *Patane* was adopted by the Pennsylvania Superior Court in *Commonwealth v. Abbas*, with the Superior Court holding that the "fruit of the poisonous tree" doctrine does not apply to non-testimonial or derivative physical evidence absent an actual coerced statement. *Commonwealth v. Abbas*, 862 A.2d 606, 611 (Pa. Super. 2004). In *Abbas*, the Court found that suppressing only the defendant's statement was a "complete and sufficient remedy" for the *Miranda* rights violation. *Id.*

In the case at hand, it is quite apparent the Defendant was in custody at the time he gave his statement. The Suppression Court found, as well as the Commonwealth conceded that prior to Detective Mayer asking the Defendant "What did you do yesterday?", he should have given the Defendant his *Miranda* warnings. ST, pp. 49-50. However, Defendant gave a detailed account of his activities the prior evening, including trips to Pearl's Bar and the Trapper's Club with the victim, Mr. Fields. ST, pp. 51-52. Thereafter, the detectives obtained surveillance videos from Pearl's Bar and the Trapper's Club, as well as a statement from the owner of Pearl's Bar, Charles Thomas.

At that point in time, Detective Mayer read and provided Defendant with a copy of his *Miranda* rights. Defendant then responded he understood his rights and did not wish to speak anymore. Detective Mayer then informed Defendant they obtained video from Hruska Plumbing and, in response, Defendant put his head down on the table. ST, pp. 52-53.

Finally, Defendant's alleged error has no merit. The Suppression Court correctly found that: (1) all of Defendant's statements should be suppressed; and (2) all of the evidence derived from those statements should be admitted pursuant to *Patane and Abbas*, *supra*.

Items five and six address actions by the Suppression Court. The fifth allegation is the Suppression Court erred when it failed to grant Defendant's Motion to Reconsider its position on probable cause. This issue is without merit. The existence of probable cause to arrest the Defendant is addressed by the Suppression Court fully responding to Defendant's second error complained of on appeal and need not be addressed any further.

The sixth contention is that the Suppression Court erred when it failed to grant Mr. William's request to reopen the record to admit and have the Suppression Court view the shooting video. While the Suppression Court erred in not reopening the record, admitting and reviewing the shooting video, the error was remedied. The Trial Court, Judge Ignelzi, admitted and viewed the video in ruling upon Defendant's Motion to Review and/or Reconsider the Suppression Court's ruling. MT, pp. 7-8.

The seventh statement of error alleges the Trial Court erred when it failed to Review and/or Reconsider the Suppression Court's rulings. First and foremost, as was previously stated, the Superior Court has held that a Suppression Court's factual findings are binding and may only be reversed "if the legal conclusions drawn therefrom are erroneous." *Rosas*, *supra* at 346.

Second, the leading case on the Doctrine of Coordinate Jurisdiction is *Commonwealth v. Starr*, 664 A.2d 1326 (Pa. 1995), wherein the Pennsylvania Supreme Court stated, in pertinent part:

Among the related but distinct rules which make up the law of the case doctrine are that:(3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.

Departure from the law of the case doctrine or the coordinate jurisdiction rule is allowed only under exceptional circumstances, such as where there has been a change in the controlling law, a *substantial* change in the facts or evidence, or where the prior holding was clearly erroneous and would create a manifest injustice if followed. *Starr*, *supra*.

None of the above-referenced exceptions apply to the present case and Defendant's allegation of error is without credence. The Suppression Court's ruling was consistent with and supported by the law regarding probable cause. Judge Ignelzi properly concluded the Suppression Court's ruling could not be altered under the doctrine of coordinate jurisdiction. Judge Ignelzi did not err in failing to reverse the Suppression Court's rulings. Judge Ignelzi reached this conclusion after a full-blown hearing on September 2, 2015 to address the issue. This allegation has no merit.

Judge Ignelzi stated at the September 2, 2015 hearing that its understanding of the issue before it is as follows: "Can the Court reconsider the Defendant's Motion to Suppress in light of the law of the case doctrine?" MT, p.3. Judge Ignelzi further explained he understands that "departure from the rules of the law of the case is only allowed in exceptional circumstances such as where there has been a change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the holding was clearly erroneous and would create a manifest injustice if followed." MT, pp. 3-4.

Thereafter, Judge Ignelzi informed all parties that it thoroughly reviewed the Suppression Transcript and the DVD (video of the shooting). MT, p. 9. Judge Ignelzi also offered to play the video during the Hearing. MT, p. 8. Both counsel for the Commonwealth as well as Defendant's counsel stated it was not necessary to replay the video in the Hearing. MT, pp. 8-9. Upon its review, this Court found certain critical facts: (1) there is no question the shooting occurred at the rear of the vehicle; (2) there is no question that the vehicle had a metal strip on the side that was shiny and quite distinctive in the video; (3) Officer Caterino's testimony at the Suppression Hearing shows he relied upon that unique metal strip in the video and, because of that he was able to say it appears to be the same vehicle he stopped within minutes of the shooting and within the locale of the crime; (4) Detective Maher, when questioned by Mr. Avetta, as to whether Officer Caterino provided him with any information as they were viewing the video, responded that yes, as we viewed the video, Officer Caterino immediately responded that was the vehicle he stopped with the Defendant, Mr. Williams, a little while ago. This Court found that Officer Caterino did not have a hint of doubt. MT, pp. 9-11 & 17.

Finally, Judge Ignelzi found there was sufficient probable cause to arrest Mr. Williams, MT, p. 21, and DENIED defense's Motion, MT, p. 23. Judge Todd's ruling will remain the law of the case. No error of law was committed by Judge Ignelzi as Defendant received a fair and impartial hearing.

II

The eighth alleged error is that the Trial Court erred in failing to *sua sponte* grant a mistrial when both Defense Counsel and Counsel for the Commonwealth, through witness examinations, violated the Suppression Court's Order suppressing items found inside Defendant's car.

The Trial Court underwent a thorough discussion, on the record, with Mr. Avetta and Mr. Karsh regarding the suppressed evidence from the interior of the vehicle. *See*, TT, pp.503-533. Of utmost importance is the fact that near the end of the discussion Mr. Karsh stated that he needed to discuss the situation with the Defendant to decide how they want to proceed. TT, p. 523. Mr. Karsh returned to the bench and informed the judge the Defendant preferred to proceed without a cautionary instruction to the jury or striking the evidence. TT, p.525. Counsel for the Defendant "opened the door by asking questions about those water bottles" found inside the vehicle, he cannot now complain the trial court erred in not granting a mistrial. Additionally, none of the experts called to testify made any findings with regard to those water bottles. Any mention of them was, therefore, harmless.

Assuming *arguendo* the evidence should have been stricken, this Court avers it was harmless error. The properly admitted evidence of Defendant's guilt was so overwhelming and the prejudicial effect of the error was so insignificant that it could not have contributed to the error. *See, Commonwealth v. Story*, 383 A.2d 155, 166 (Pa. 1978).

III

Issues 9-11 are all jury-related and will be analyzed by the Trial Court.

Issue nine is whether the trial court erred in failing to grant Defendant's request to strike juror #3 when that juror observed Defendant walking down a courthouse hallway surrounded by seven or eight people, including a uniformed sheriff. This issue lacks merit.

The Pennsylvania Supreme Court has held that "mere accidental observation of a defendant in handcuffs outside a courtroom by a juror does not, without more, require the granting of a mistrial." *Commonwealth v. Evans*, 348 A.2d 92, 94 (Pa. 1975). However, the Court has also held that a cautionary instruction by the trial court in certain situations is appropriate. *Id.*

The *voir dire* conducted by this Trial Court of juror #3 was sufficient to satisfy the standard set forth by the Pennsylvania Supreme Court. Juror #3 was brought into the courtroom and stated when he saw the defendant in the hallway, he noticed his yellow shirt because it was kind of distinctive. TT, p. 657. He further indicated he did not look at the Defendant very carefully and he had a crowd around him of 7-8 people. *Id.* The juror said "in fact, it didn't register that it was the Defendant until I was partway down...I did turn around and look, said, is that the guy, and I shouldn't get near him, so I just kept going." TT, p. 658. The Court asked him if he discussed this viewing of the Defendant with any other jurors, which he did not. *Id.* The juror remembered there was someone in a uniform with the Defendant but that did not cause him any concern. TT, pp. 662-663.

After further discussions with counsel, the Court called back juror #3 and cautioned him that if he remembers anything else concerning the Defendant from that day, he is to immediately notify the court staff and not to discuss it with the other jurors. TT, p. 672.

The Pennsylvania Supreme Court has held that "the scope of *voir dire* is in the discretion of the trial court", *Commonwealth v. Ellison*, 902 A.2d 419, 424 (Pa. 2006), and the judgment of the trial court regarding the impartiality of jurors "is necessarily accorded great weight." *Commonwealth v. Bachert*, 453 A.2d 931, 937 (Pa. 1982). This Court is satisfied that its cautionary instruction was sufficient and no error of law was committed by letting juror #3 remain on the panel.

Issue ten is whether the Trial Court erred in failing to *sua sponte* strike all members of the jury selected on March 30, 2016, since a potential juror disclosed that she and other female members of the jury pool noticed Defense Counsel rolling his eyes at a female ADA.

As a general rule, the test for determining whether a prospective juror is disqualified is "whether he or she is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor." *Commonwealth v. Colson*, 490 A.2d 811, 818 (Pa. 1985). Further, "[t]he decision on whether to disqualify is within the discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion." *Commonwealth v. Koehler*, 737 A.2d 225, 238 (Pa. 1999).

The prospective juror in question was dismissed after she informed counsel that what she viewed would be detrimental to the Defendant. TT, p. 38. Additionally, no other potential juror that day stated in their *voir dire* that they felt any animosity toward Defendant and his counsel. All potential jurors that day stated they could be fair and impartial. TT, p. 40. As the potential juror in conflict was dismissed, she did not contaminate the jury in any way with potential bias. This alleged error lacks credibility and this Court's ruling to not strike any juror selected on March 30, 2016 should be upheld.

Issue 11 is whether the trial court erred in failing to take corrective measures to ensure that the jury pool was not tainted due to the potential juror's disclosure of her negative view of Defense Counsel.

"It is axiomatic in this [state] since *Dilliplaine v. Lehigh Valley Trust Co.*, 322 A.2d 114 (Pa. 1974) and its progeny that one must object to errors, improprieties or irregularities at the earliest stage of the criminal or civil adjudicatory process, to afford the jurist

hearing the case the first occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter.” *Commonwealth v. English*, 667 A.2d 1123, 1126 (Pa. Super. 1995), *aff’d*, 699 A.2d 710 (Pa. 1997).

Finally, in *English, supra*, as in the case at hand, the Court found that the defendant had made the choice to forego inquiry into jury taint and thus could not resurrect the issue in either post-sentence or appellate format. *Id.* Since Defense Counsel did not press the issue of jury taint in any significant way, he should not be allowed to bring up the issue on appeal and this Court’s ruling not to strike any jurors should be upheld.

IV

The twelfth and final issue is whether the evidence was sufficient as a matter of law to establish beyond a reasonable doubt, the Defendant’s identity as the perpetrator of the crimes of First Degree Murder and Carrying a Firearm without a License. This issue is without merit as this Court finds the evidence against the Defendant to be overwhelming.

The well-settled test for determining whether evidence is sufficient to sustain a criminal conviction is:

whether accepting as true all of the evidence of the Commonwealth, be it direct or circumstantial, and all reasonable inferences arising therefrom upon which, if believed, the trier of fact could properly have based the verdict, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime or crimes of which he has been convicted.

Commonwealth v. Enders, 595 A.2d 600, 603 (Pa. Super. 1991).

The facts and circumstances established by the Commonwealth “need not be absolutely incompatible with [the] defendant’s innocence, but the question of any doubt is for the jury unless the evidence is so ‘weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.’” *Commonwealth v. Sullivan*, 371 A.2d 468, 478 (Pa. 1977).

There is no requirement that a homicide, including First Degree Murder, be proven by positive eyewitness testimony. *See, Commonwealth v. Crowson*, 412 A.2d 1363, 1365 (Pa. 1979)(circumstantial evidence may be sufficient to prove any element, or all elements of a crime). This case encompassed compelling circumstantial evidence.

First, on November 4, 2013, while Officer Caterino and Lt. Steele were responding to a call for shots fired, they observed a dark colored vehicle traveling at a high rate of speed and then failing to stop at a stop sign at McClure and 11th Avenue. ST, pp. 8-10. The officers initiated a traffic stop and, Defendant, who was known to Officer Caterino, was the sole occupant of the black Ford 500. Although it was a cold night, Defendant was sweating profusely and was “fidgety” in his seat. He was wearing a red sweatshirt and and gray pants. ST, pp. 11-12. Lt. Steele asked the Defendant where he was coming from and he responded the Trapper’s Club. ST, p. 13. After Defendant was searched, he was released and the officers proceeded to the site of the shooting.

Officer Caterino indicated he was familiar with the East 11th Avenue Extension and noted the area in which Defendant had just passed was known as Cow’s Hill: an area known, through Officer Caterino’s experience, for discarding guns. ST, pp. 15-18. Officer Caterino was also suspicious of Defendant’s statement that he was at the Trapper’s Club and heading to his home on 13th Street due to the fact the Eat 11th Avenue Extension is not accessible if the Defendant traveled across the Rankin Bridge to his home, which is the quickest route. ST, pp. 35-36.

Second, at the scene of the shooting, video surveillance was obtained from a local business. The vehicle in the video from which the actor and victim exited immediately before the shooting was a black sedan with a distinguishing stripe on the side and a landau roof. This vehicle matched the appearance of the vehicle Defendant was driving earlier when stopped by the officers at 3:30 am. Upon viewing the vehicle in the video, Officer Caterino immediately informed Detective Mayer that he stopped Defendant in a vehicle shortly after the call for shots fired, near the scene of the shooting, and Defendant was driving a vehicle that looked identical to that shown in the video. ST, pp.19-20.

Third, based upon this information, a BOLO was issued for the Defendant. At approximately 7:00 am, upon leaving the scene, Detective Mayer encountered Defendant’s vehicle, he was stopped, removed from the vehicle and placed under arrest. ST, pp. 42-44. Defendant was then transported to the Allegheny County Police Headquarters where he was placed in a locked interview room. ST, pp. 47-49. Detective Dolfi of the Allegheny County Police, secured Defendant’s vehicle at the scene and waited for it to be towed away. While there, Detective Dolfi observed on the exterior of the vehicle red droplets on the rear bumper and driver’s side quarter panel. Detective Dolfi, who had viewed the video of the shooting, noted the droplets were in an area where the victim fell behind the car. ST, pp. 80-81.

Fourth, the Defendant informed the detectives that the prior evening, he and the victim had gone to a private party at Pearl’s Bar; the King’s Club in Braddock; and the Trapper’s Club. ST, pp. 51-52. Charles Thomas, the owner of Pearl’s, viewed the video from his establishment on the night in question and observed the Defendant and victim at his bar. TT, p. 212. He noted the Defendant was wearing a red shirt with an emblem on it and the victim wore a baseball cap and coat. TT, p.215.

Fifth, Detective Mayer performed a GSR kit on the Defendant. TT, p.370. He also obtained his clothing, which included a red sweatshirt. TT, pp. 372-373. Detective Dolfi requested information from the State Police and was informed that Defendant did not possess a license to carry a firearm. TT, pp. 373-374.

Sixth, Daniel Wolfe of the Allegheny County Medical Examiner’s analyzed The GSR kit obtained from the Defendant as well as the red sweatshirt. He found gunshot residue on Defendant’s left palm and on the right cuff and sleeve of the sweatshirt. TT, pp. 420-423.

Seventh, Anita Lorenz, an expert in the field of forensic biology, specifically DNA latent prints, testified for the Commonwealth. She performed an analysis of a possible stain from the rear bumper of the Ford 500 and it matched the DNA profile obtained from the whole blood patch of the victim, Mr. Fields. She also analyzed a possible bloodstain from the driver’s side rear fender and it likewise matched the DNA profile of Mr. Fields.

The overwhelming evidence in support of Defendant’s conviction for First Degree Murder, as stated above, include: the video of the shooting; the video of the black Ford 500; Detective Caterino’s traffic stop and subsequent suspicions; the gunshot residue on the Defendant’s hand and sweatshirt; the blood stains on the rear portions of the vehicle that matched the DNA of Mr. Fields; and the videos from the clubs that put Defendant with the victim that night.

The only evidence needed on the firearms charge was that Defendant did not possess a license to carry a firearm. He has no

such license, and the video showed Defendant shooting the gun at Mr. Fields.

Thus, the Commonwealth presented sufficient evidence as a matter of law identifying Defendant as the person who committed the crimes charged.

CONCLUSION

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

BY THE COURT:

/s/Ignelzi, J. and Todd, J.

Dated: August 9, 2017

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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Commonwealth of Pennsylvania v. Robert Burks

Criminal Appeal—PCRA—Homicide—Guilty Plea—After Discovered Evidence

Newly-discovered evidence claim in PCRA petition fails when purported new witness fails to appear.

No. CC 200812434. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—September 28, 2017.

OPINION

On October 31, 2008, the appellant, Robert Burks, (hereinafter referred to as “Burks”), was charged with the crimes of criminal homicide, possession of a firearm without a license and criminal conspiracy. Burks entered a plea of guilty to third-degree murder, possession of a firearm without a license and criminal conspiracy on November 15, 2010. In accordance with the plea agreement reached between the Commonwealth and Burks, he was sentenced to a period of incarceration of not less than fifteen nor more than thirty years for his plea to third-degree murder and no further penalty was imposed at the remaining counts. Burks did not file any post-sentence motions, nor did he file a direct appeal.

On September 29, 2011, Burks filed his pro se petition for post-conviction relief and Robert S. Carey, Jr., Esquire was appointed to represent him in connection with that proceeding. On December 30, 2011, Attorney Carey filed a motion to withdraw as counsel and also prepared a *Turner/Finley* no merit letter after examining the record concluding that there were no meritorious issues that could be raised on Burks’ behalf. On January 9, 2012, this Court granted Carey’s motion to withdraw and issued a notice of intent to dismiss Burks’ petition. On January 9, 2012 a notice of intention to dismiss Burks’ petition was filed and that petition was, in fact, dismissed on July 17, 2012. On August 22, 2012, Burks filed a pro se notice of appeal to the Superior Court and that notice of appeal was amended on October 3, 2012. This Court directed Burks to file a concise statement of matters complained of on appeal on October 26, 2012, however, Burks never filed such a notice. Accordingly, this Court filed an Opinion on January 16, 2013, indicating that Burks’ failure to file a concise statement resulted in a waiver of all of his claims in connection with his petition for post-conviction relief act appeal. On July 24, 2013, the Superior Court affirmed the dismissal of that appeal since it believed that all issues on appeal had been waived by the failure to file a concise statement. On March 17, 2014, Burks filed the second petition for post-conviction relief and Christina M. Stover, Esquire, was appointed to represent him. On May 21, 2015, Attorney Stover filed an amended petition for post-conviction relief.

A hearing on Burks’ petition for post-conviction relief was held on December 10, 2015, at which hearing only Burks testified despite the fact that his petition for post-conviction relief was based upon a claim of after-discovered evidence of the purported testimony of Natale Coston. A hearing had been scheduled earlier, however, it was continued since Coston did not appear at the hearing despite the fact that he had been subpoenaed and got notice of the hearing date. As a result of Coston not appearing at the December 10, 2015 hearing, this Court denied Burks’ petition on January 13, 2016.

Burks filed a pro se appeal which was amended by Stover. He was directed to file a concise statement of matters complained of on appeal on February 8, 2016 and on August 18, 2016, Stover filed a motion of intent to withdraw which required that a *Grazier* Hearing be held. That hearing was held and Burks’ current appellate counsel was appointed to represent him in connection with this appeal. Burks filed his concise statement of matters complained of on appeal on July 21, 2017, in which he raised one claim of error, that being that this Court erred in denying his petition since the affidavit of Coston should have sufficed despite the fact that he did not provide the testimony that Burks had alleged that he would in his petition for post-conviction relief.

On April 17, 2008, the victim, Darrel Nelson, Jr., was at the apartment of Samuel Turner with Keith Sommerville. The victim was approached by Justin Boyd and Burks, both of whom had firearms and were firing at Nelson. Nelson was struck three times and was transported to Mercy Hospital where he later died of the gunshot wounds he sustained. Eric Boyd would provide testimony that Justin Boyd and Burks were the shooters and also that he saw three other individuals who were not shooting, one of them was an individual by the name of Natale Coston. Weeks after the shooting a gun was recovered from Coston and the gun came back as one of the murder weapons.

A petitioner must meet strict jurisdictional requirements to be eligible for relief under the Post-Conviction Relief Act. *Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. Super. 2003). In particular, the petitioner must meet the time limitations for filing a petition contained in Section 9545(b)(1) of the Act which provides as follows:

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

A judgment of sentence becomes final at the conclusion of direct review, including discretionary review by the Supreme Court of the United States and/or the Pennsylvania Supreme Court or at the expiration of time for seeking such review. Burks was sentenced to a period of incarceration of not less than fifteen nor more than thirty years on November 15, 2010. Since Burks did not file any claim for review, his judgment of sentence became final on December 15, 2011. On its face, Burks’ petition for post-conviction relief is untimely filed since it was filed more than two years after the date which his judgment of sentence had become final. In an attempt to avoid these time limitations, Burks has alleged that his claim falls within one of the three exceptions to the time jurisdictional requirement.¹ He alleges that he is now in possession of facts which were unknown to him and could not have been ascertained by reasonable due diligence. In *Commonwealth v. Brown*, 111 A.3d 171, 176 (Pa. Super. 2015), the Commonwealth explained the burden imposed upon an appellate when he claims that he has newly-discovered facts that could not have been discovered by due diligence.

The timeliness exception set forth in Section 9545(b)(1)(ii) requires a petitioner to demonstrate he did not know the facts upon which he based his petition and could not have learned those facts earlier by the exercise of due diligence. *Commonwealth v. Bennett*, 593 Pa. 382, 395, 930 A.2d 1264, 1271 (2007). Due diligence demands that the petitioner take reasonable steps to protect his own interests. *Commonwealth v. Carr*, 768 A.2d 1164, 1168 (Pa.Super.2001). A petitioner must explain why he could not have learned the new fact(s) earlier with the exercise of due diligence. *Commonwealth v. Breakiron*, 566 Pa. 323, 330–31, 781 A.2d 94, 98 (2001); *Commonwealth v. Monaco*, 996 A.2d 1076, 1080 (Pa.Super.2010), *appeal denied*, 610 Pa. 607, 20 A.3d 1210 (2011). This rule is strictly enforced. *Id.* Additionally, the focus of this exception “is on the newly discovered facts, not on a newly discovered or newly willing source for previously known facts.” *Commonwealth v. Marshall*, 596 Pa. 587, 596, 947 A.2d 714, 720 (2008) (emphasis in original).

The basis for Burks’ claim that he has newly-discovered facts based upon his due diligence, is an affidavit purportedly executed by Coston in which he states that he was present at the shooting and that Donald Johnson and not Burks was the shooter. Burks maintains that he could not have obtained that exculpatory information before Coston submitted his affidavit because Coston refused to testify at the time of trial and that he had been afraid to testify because he and his family had been threatened. Since his incarceration he has been rehabilitated and he was willing to set the record straight. This contention conveniently ignores the fact that Burks and Coston were cellmates for more than seven months and there was never a mention of Coston’s testimony. A hearing was held on Burks’ petition for post-conviction relief at which only Burks testified and Coston failed to appear despite the fact that a lawyer had been appointed for him. Coston had been subpoenaed for the first hearing date and did not appear and was subpoenaed for the second hearing date and provided notice of that hearing and still did not appear.

When a petition is time-barred, the petitioner has the burden of pleading and of proving that one of the statutory exceptions is applicable to his case. *Commonwealth v. Beasley*, 559 Pa. 604, 741 A.2d 1258 (2000). Burks has failed to meet his burden since he never proved that Coston had exculpatory information which would identify someone else as the shooter. It should be noted that Burks knew of Coston’s existence since Coston was mentioned in the recital of the facts in Burks’ case at the time that he entered his plea and that Coston was the individual from whom the murder weapon was recovered. Coupled with the fact that they were cellmates for more than seven months, Burks had more than ample opportunity to discuss his case with Coston and acquire that information. The fact that Coston was subpoenaed and notified of two different hearing dates for Burks’ petition for post-conviction relief and ignored those subpoenas and failed to appear, clearly demonstrates that Burks did not meet his burden of proving his claim and, accordingly, this Court dismissed his petition following that hearing.

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

Dated: September 28, 2017

¹ 42 Pa.C.S.A. §9545(b).

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, “government officials” shall not include defense counsel, whether appointed or retained.

**Commonwealth of Pennsylvania v.
David D. Dobson, Jr.**

Criminal Appeal—Commonwealth Appeal—Rule 600

Commonwealth failed to act with due diligence when they knew the defendant was in custody in VA but did nothing to extradite him to PA.

No. CC 201603594, 201603595. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—October 16, 2017.

OPINION

The Commonwealth has filed the instant appeal as a result of this Court’s granting of the motion filed by David B. Dobson, Jr., (hereinafter referred to as “Dobson”), for a dismissal of the charges against him as a result of the violation of his rights under *Pennsylvania Rule of Criminal Procedure 600*. In filing its statement of matters complained of on appeal, the Commonwealth has alleged that this Court erred when it granted Dobson’s motion for dismissal of the charges under *Rule 600* and that this Court did not provide the Commonwealth with an opportunity to have a hearing on Dobson’s motion.

On December 18, 2012 an armed robbery was committed at the Game Stop Store in Edgewood, Pennsylvania. A second robbery was committed at that store on July 16, 2013. On September 13, 2013, two separate criminal complaints were filed against Dobson after a determination was made that he was in all likelihood the perpetrator of both of these robberies. Sergeant Kaskie of the Edgewood Police Department, testified that on September 18, 2013, she was executing a search warrant and an arrest warrant at a residence where it was believed that Dobson was residing and when Dobson saw the police, he jumped out of a window and fled. A foot chase ensued, however, the police were not able to apprehend Dobson on the arrest warrant for these charges. Dobson fled to Virginia where he committed a burglary and he was tried in Virginia. After he was convicted, a presentence report was ordered and he was sentenced on October 20, 2014, to a period of incarceration of three years with one year and eight months suspended. In November of 2014, Dobson was transferred to Maryland to face probation violation charges as a result of his conviction in Virginia and the charges filed in Pennsylvania. On November 20, 2014, Dobson was sentenced to a period of incarceration of seven years for his violation of his terms of parole and probation.

On October 15, 2015, Dobson was advised by the warden of the Maryland Department of Corrections of his right to request extradition or to fight it and on that date, the Edgewood Police Department was informed that Dobson was incarcerated in the Jessup Institution of the Maryland Department of Corrections. After being informed of his right to be extradited, Dobson agreed to be extradited and the process began to effectuate his return to Pennsylvania. On February 8, 2016, the Commonwealth filed an application with the Pennsylvania Department of Corrections indicating that the Sheriff's Office would take custody of Dobson upon his extradition. Dobson was lodged in the Allegheny County Jail on March 3, 2016.

Although the Commonwealth has raised one claim of error, it has two parts. The second part of its claim of error is that this Court did not permit a hearing on Dobson's claim for relief under *Rule 600*, which provides as follows:

Rule 600. Prompt Trial

Currentness

(A) Commencement of Trial; Time for Trial

- (1) For the purpose of this rule, trial shall be deemed to commence on the date the trial judge calls the case to trial, or the defendant tenders a plea of guilty or *nolo contendere*.
- (2) Trial shall commence within the following time periods.
 - (a) Trial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed.
 - (b) Trial in a court case that is transferred from the juvenile court to the trial or criminal division shall commence within 365 days from the date on which the transfer order is filed.
 - (c) When a trial court has ordered that a defendant's participation in the ARD program be terminated pursuant to Rule 318, trial shall commence within 365 days from the date on which the termination order is filed.
 - (d) When a trial court has granted a new trial and no appeal has been perfected, the new trial shall commence within 365 days from the date on which the trial court's order is filed.
 - (e) When an appellate court has remanded a case to the trial court, the new trial shall commence within 365 days from the date of the written notice from the appellate court to the parties that the record was remanded.

(B) Pretrial Incarceration. Except in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of

- (1) 180 days from the date on which the complaint is filed; or
- (2) 180 days from the date on which the order is filed transferring a court case from the juvenile court to the trial or criminal division; or
- (3) 180 days from the date on which the order is filed terminating a defendant's participation in the ARD program pursuant to Rule 318; or
- (4) 120 days from the date on which the order of the trial court is filed granting a new trial when no appeal has been perfected; or
- (5) 120 days from the date of the written notice from the appellate court to the parties that the record was remanded.

(C) Computation of Time

- (1) For purposes of paragraph (A), periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in the computation of the time within which trial must commence. Any other periods of delay shall be excluded from the computation.
- (2) For purposes of paragraph (B), only periods of delay caused by the defendant shall be excluded from the computation of the length of time of any pretrial incarceration. Any other periods of delay shall be included in the computation.
- (3)(a) When a judge or issuing authority grants or denies a continuance:
 - (i) the issuing authority shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance; and
 - (ii) the judge shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance. The judge also shall record to which party the period of delay caused by the continuance shall be attributed, and whether the time will be included in or excluded from the computation of the time within which trial must commence in accordance with this rule.
- (b) The determination of the judge or issuing authority is subject to review as provided in paragraph (D)(3).

(D) Remedies

(1) When a defendant has not been brought to trial within the time periods set forth in paragraph (A), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the charges be dismissed with prejudice on the ground that this rule has been violated. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

(2) Except in cases in which the defendant is not entitled to release on bail as provided by law, when a defendant is held in pretrial incarceration beyond the time set forth in paragraph (B), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the defendant be released immediately on nominal bail subject to any nonmonetary conditions of bail imposed by the court as permitted by law. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

(3) Any requests for review of the determination in paragraph (C)(3) shall be raised in a motion or answer filed pursuant to paragraph (D)(1) or paragraph (D)(2).

(E) Nothing in this rule shall be construed to modify any time limit contained in any statute of limitations.

Even a cursory review of the record in this case, clearly indicates that this contention is specious. Hearings were held on Dobson's motion on June 23, 2016; August 2, 2016; September 26, 2016 and October 25, 2016. The Commonwealth was given every opportunity even after it filed an appeal, to present witnesses and exhibits to demonstrate that it exercised due diligence in attempting to prosecute Dobson.

In *Commonwealth v. Colon*, 87 A.3d 352, 356-357 (Pa. Super. 2014), the Court set forth the purpose of Pennsylvania Rule of Criminal Procedure 600 as follows:

Pennsylvania Rule of Criminal Procedure 600 was adopted "to protect defendant's constitutional rights to a speedy trial under the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, in response to the United States Supreme Court's decision in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)" in which the Court adopted a four-part balancing test to determine whether a defendant's speedy trial rights had been violated. *Commonwealth v. Bradford*, 616 Pa. 122, 46 A.3d 693, 700-701 (2012) (citations and internal quotations omitted).

In *Barker*, the United States Supreme Court identified the following four factors to be considered in determining whether an unconstitutional speedy trial violation had occurred: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of his rights; and (4) the prejudice to the defendant. *Commonwealth v. Terfinko*, 504 Pa. 385, 474 A.2d 275 (1984) Although finding "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months," the United States Supreme Court held that "the individual states are free to prescribe a reasonable period consistent with constitutional standards." *Bradford*, 46 A.3d at 701, quoting *Barker*, *supra*.

In response to *Barker*, and because of the "inherent vagueness" resulting from the *Barker* balancing test, the Pennsylvania Supreme Court adopted Pa.R.Crim.P. Rule 1100, later renumbered Rule 600, "to establish a definitive period of time for a speedy trial violation." *Bradford*, 46 A.3d at 701 quoting *Commonwealth v. Whitaker*, 467 Pa. 436, 359 A.2d 174, 176 (1976) ("the balancing test announced in *Barker* provides only the minimum standards guaranteed by the Sixth and Fourteenth Amendments, and ... such minimum standards are not adequate to provide Pennsylvania criminal defendants the protection guaranteed by the constitution of this Commonwealth").

"[A] speedy trial analysis [thus] mandates a two-step inquiry: (1) whether the delay violated Pennsylvania Rule of Criminal Procedure 1100 [now Rule 600]; and, *if not*, then (2) whether the delay violated the defendant's right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 9 of the Pennsylvania Constitution." *Commonwealth v. DeBlase*, 542 Pa. 22, 665 A.2d 427, 431 (1995) (emphasis added) citing *Jones v. Commonwealth*, 495 Pa. 490, 499, 434 A.2d 1197, 1201 (1981) (although Rule 600 (formerly Rule 1100) was designed to implement the constitutional rights of an accused to a speedy trial, the constitutional guarantees to a speedy trial continue to provide a separate basis for asserting a claim of undue delay in appropriate cases, and in analyzing such constitutional claims, we apply the four-part *Barker* test); *Commonwealth v. Preston*, 904 A.2d 1, 10 (Pa.Super.2006) (while Rule 600 was designed to implement the speedy trial rights provided by the federal and state constitutions, the constitutional provisions themselves continue to provide a separate and broader basis for asserting a claim of undue delay in appropriate cases under the balancing test set forth in *Barker v. Wingo*).

When confronted with the claim that a defendant's rights under Rule 600 had been violated, the Commonwealth is required to exercise due diligence and demonstrate that it did everything possible to guarantee that a trial would begin on time and the Commonwealth has the burden of demonstrating by a preponderance of the evidence that it did, in fact, did exercise that due diligence. *Commonwealth v. Ramos*, 936 A.2d 1097 (Pa. Super. 2007).

The Commonwealth has alleged that Dobson committed two robberies in December of 2012 and July of 2013 and that he fled the jurisdiction when the police attempted to arrest him. Within a month after the police attempted to arrest him, they were aware that he had been arrested on a charge of burglary in Virginia and was being detained in that Commonwealth. Despite the fact that the Commonwealth knew in October of 2013 that Dobson was being held in the Commonwealth of Virginia, it did nothing to attempt to extradite him to Pennsylvania to face the charges filed against him by the Edgewood Police. The reason that Dobson was returned to Pennsylvania was that he requested that he be returned and waived his right to an extradition hearing. Dobson was returned as a result of his own actions while the Commonwealth did nothing until 2016 to effectuate Dobson's return. The record generated in this case clearly indicates that Dobson's rights under Rule 600 were violated and the Commonwealth failed to exercise due diligence to see that Dobson was returned to Pennsylvania.

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

Dated: October 16, 2017

Commonwealth of Pennsylvania v. James Edward Husok

*Criminal Appeal—Homicide—Evidence—Sentencing (Discretionary Aspects)—Prosecutor Closing Argument—Facebook
Various issues related to third-degree murder case.*

No. CC 2015-12327. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Bigley, J.—October 6, 2017.

OPINION

On October 7, 2016, a jury found the defendant guilty of Murder of the Third Degree, Possessing Instruments of Crime and Tampering With or Fabricating Physical Evidence. On January 5, 2017, the defendant was sentenced to twenty (20) to forty (40) years imprisonment for Murder of the Third Degree and no further penalty was imposed at the remaining counts. This timely appeal followed.

The defendant raises the following issues on appeal:

1. The trial court erroneously denied the defendant from entering into evidence a document from Facebook. Specifically, the defendant attempted to admit a document from the decedent's Facebook account that purportedly had provocations and threats aimed at the defendant, which had said documents been admitted into the record, the jury would have been able to objectively and accurately weigh the defendant's state of mind and whether he had a reasonable belief that the decedent was going to harm him or his wife Heather Guerra.
2. The trial court erred by overruling the Defendant's objection and failing to declare a mistrial, to a deliberate remark made by the prosecutor during his closing argument. Specifically, the prosecutor argued the defendant failed to call his wife as a witness, thereby in effect improperly shifting the burden and misleading the jury to believe the defendant had an obligation to prove his claim of justification and/or self-defense, regardless of whether said claim was a reasonable or unreasonable belief that deadly force was necessary.
3. The trial court abused its discretion when it imposed a sentence of 20 to 40 years of incarceration which represented the statutory maximum sentence. Specifically, the court overlooked the defendant's presentence report and allocation and remarked that it found him to be not remorseful at all and instead remarked that the sentencing proceeding was "all about him and his family". This is against the weight of the evidence presented by the defendant during the sentencing hearing through numerous character witnesses, his remarks to the victim's family, his statements to the presentence investigator and incorporated into the PSR, his positive role in society prior to the incident, his employment history, his lack of criminal history, and the fact that this entire event was not perpetuated by him. All of this represents an abuse of discretion by the court in imposing a sentence that purely punishes and leaves no room for rehabilitation and is an unwarranted upward departure from the guidelines.
4. The trial court abused its discretion when it imposed a sentence of 20 to 40 years of incarceration which represented the statutory maximum. Specifically, the sentence issued deviates excessively compared to similarly and dissimilarly situated individuals convicted of the same crime in Allegheny County.

The evidence presented at trial established that in the early morning hours of September 19, 2015, the defendant James Husak shot and killed the victim Michael Welsh, the boyfriend of his estranged wife in Baker Alley in McKeesport, Allegheny County. Earlier in the evening of September 18, and into the morning hours of September 19, the victim and the defendant's estranged wife, Heather Guerra, were drinking at the Cherry Lane Bar in McKeesport. After leaving the bar around 1:45 a.m., they returned to the home of the victim's mother, Winnie Gricar, where they were residing together. At 4:49 a.m., Guerra called the defendant and asked him to pick her up at the Cherry Lane Bar. Guerra was crying and claimed that Michael Welsh had beaten her but spent most of the trip back to the defendant's home talking on her cell phone. The defendant and Guerra went to his residence at 323 28th Street Rear, where they had sex and fell asleep. Around 5:30 a.m., Winnie Gricar arrived at her residence and woke her son to ask if he knew where her cigarettes were. When he told her to ask Heather, he seemed surprised to learn that Heather was not there and walked around looking for her. The victim then tried to contact Heather. After repeated calls to Guerra's phone went unanswered he sent a series of text messages between 6:28 a.m. and 6:55 a.m., "Really?"; "You with James?"; "You're fucking James right now huh?"; "omw"; "Really"; "Where are you I'm at James crib"; "knock knock".

The defendant's home at 323 28th Street Rear was equipped with a video security system, a series of cameras that recorded the area outside his home and some areas of 28th Street and Rockwood Street. Video from that security system from September 19, 2015 was admitted at trial. In that video from September 19, 2015, at approximately 6:35:56 a.m., the defendant can be seen across the street from his house. The defendant is shirtless and has a firearm in a holster on his hip. He has a claw hammer, the head of the hammer in his hand with the handle of the hammer extending up his inner forearm. He is standing between two buildings across from his home and remains there for ten minutes before he returns to his residence. The defendant returns to his residence, only to reemerge again at 6:51:48 when he can be seen exiting the walkway of his home looking down the street. He still has the hammer and the firearm and he walks down the street out of the view of the cameras.

At 6:55 a.m. Lissa Ludinich was in bed with her boyfriend Michael Needham when she heard a gunshot in the alley behind her home. She ran out to the alley and saw the victim's body on the ground. She called out to him to see if he would respond. When he didn't, she ran back to her home and called 911 at 6:58:35.

At 6:58 a.m., the defendant can be seen on his security camera running back to his residence from Rockwood Street still wearing the holstered firearm and carrying the hammer. At 6:59:24 the defendant exits his residence and walks North on 28th Street while talking on his cell phone. The holster and firearm are gone from his hip and he no longer has the claw hammer. The video of the defendant on his cell phone is consistent with a 911 call that he placed at 6:59:28 reporting that he "had heard gunshots" a few blocks over from 28th Street and had gone to the scene to find the victim lying on the ground in the alley. He told the 911 dispatcher that he was in the alley and to let the police know that he was armed. Police arrived at the scene and the defendant was interviewed.

The defendant first denied any knowledge of the incident and told detectives that he heard a gunshot and then found the body of the victim. He later admitted that he shot the victim. He thought the victim was going to come down to fight, so he went outside and waited for him. He later walked a couple of blocks and saw the victim who was turning into the alley. The victim was walking away from him, talking to someone on his phone. He heard the victim say “kill them”, so he yelled “what did you say”. The victim turned toward him and he shot him because he thought he was reaching for something. He then ran back to his home and placed that weapon on a shelf in his room and left the hammer in the kitchen. He grabbed a different firearm and returned to the scene, calling 911 on the way.

The defendant’s first issue relates to what he refers to as a document from Facebook to he attempted to admit at trial¹. The document he refers to is actually a partial screenshot of a Facebook page. You cannot discern whose Facebook page the photo was taken from, nor the time frame of the post. In informal discussions before trial regarding the case schedule, defense counsel brought up the screenshot and said he would be seeking to admit it. The District Attorney told counsel he would object unless defense counsel could lay the foundation for its admission. The screenshot depicts a video post on *someone’s* page showing a video entitled “skinning and gutting a deer in less than 2 minutes” with two comments purportedly posted by the victim. The screenshot came from Heather Guerra’s phone and no effort was made to authenticate the screenshot. There is no date, and no verification that the comments were posted by the victim. In addition, the one comment “likes James LMAO” didn’t clearly refer to the defendant. The essence of the discussion was that if defense counsel was seeking to admit the screenshot he would have to lay the foundation and establish its relevancy. At trial the defense never sought to admit the screenshot. Establishing that the posts were reasonably perceived as threats would require establishing that the victim made the post, the time frame in which they were posted and that the post referred to the defendant. If the defense sought to admit the screenshot at trial it should have been done so on the record. Finally, the impact of this post if it could have been authenticated and established as relevant was minimal in light of the defendant’s confession and the text messages admitted at trial that were sent immediately before the victim was killed.

The defendant alleges that this court erred in failing to declare a mistrial to a remark by the prosecutor in his closing argument regarding the defendant’s failure to call Heather Guerra as a witness. In considering that request I knew that defense counsel had, in opening arguments, made claims of physical abuse perpetrated on Ms. Guerra allegedly by the victim. Defense counsel told the jury that Ms. Guerra would testify to that physical abuse. The defense decided not to call Ms. Guerra as a witness and the jury was instructed not to consider any statements of a witness that was not called to testify. In his closing argument defense counsel then chose to bring up the fact that Heather Guerra was not called by the Commonwealth. [T.T. 667]². In fact, defense counsel pointed out to the jury that Heather Guerra was in the courtroom and that the Commonwealth did not call her as a witness. [T.T. 701]. In his closing the prosecutor merely reiterated that defense counsel, in his opening statement, made allegations of abuse that Ms. Guerra would testify to and that those allegations were not to be considered because Ms. Guerra did not testify. Considering the closing arguments and the instructions to the jury that the Commonwealth has the sole burden to prove the defendant guilty I denied the motion for mistrial.

Finally, the defendant alleges that this court abused its discretion in imposing a sentence of 20 to 40 years imprisonment. In sentencing the defendant, this court considered the Pre-Sentence Report, all testimony from the sentencing proceeding and the facts and circumstances of this case. The defendant first waited for the victim to come to his home. When he didn’t, the defendant walked a few blocks and sought the victim out. The jury rejected the assertion that the defendant had a right to defend himself, or that he had a reasonable belief that deadly force was necessary. The defendant shot the unarmed victim in the chest. In his statement he told police that he kicked the victim in the head to see if he was alive. He then ran back to his home, concealed the firearm and hammer and grabbed a different firearm. He then walked back to the alley calling 911 on the way to report that he heard gunshots. The defendant has never demonstrated any genuine remorse for taking the life of Michael Welsh. Instead, he repeatedly refers to the killing as a chain of events precipitated by the victim, minimizing his own culpability and portraying himself as a victim. Any demonstration of remorse has been limited to what this killing has done to his own promising life and the effect on his own family. In considering the appropriate sentence this court considered all of the above and sentenced the defendant on the Third Degree Murder count and imposed no further penalty and the remaining counts.

By reason of the foregoing, the allegations of error should be rejected and the verdict and judgment of sentence should be affirmed.

BY THE COURT:
/s/Bigley, J.

¹ The screenshot is attached hereto.

² T.T. Jury Trial Transcript Volume II of October 6-7, 2016, followed by the age number(s).

**In Re: Robert L. Reichle,
as Power of Attorney Emily Reichle v.
Mary Juanita Liptak**

Power of Attorney—Surcharge

Denying Petition to Strike and/or Open Judgment related to a surcharge assessed against Defendant by Orphans’ Court for abuse of his Power of Attorney. Petition was a guise to relitigate surcharge proceedings which had been decided against defendant and sustained on appeal.

No. GD-17-000769. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O’Reilly, S.J.—March 2, 2017.

MEMORANDUM ORDER

This novel matter involves the efforts by Defendant, Robert L. Reichle (Reichle) to avoid the consequences of his looting of his mother's assets when he had a Power of Attorney from her. My colleague in our Orphans Court Division, the Honorable Frank Lucchino, after trial, entered a surcharge agent Reichle on January 16 2015 in the amount of \$497,215.11. Reichle appealed that surcharge to the Superior Court which on August 24, 2016 sustained the trial court and "...affirmed the order of the trial court dismissing appellant's Reichle exceptions".

Reichle did not further appeal. Reichle's mother, from whom he held the Power of Attorney has since died leaving only 2 heirs, Reichle and his sister, Juanita M. Liptak (Liptak).

On January 13, 2017, Attorney Mary Elizabeth Fischman filed a praecipe in our Civil Division to enter the surcharge amount of \$497,215.11 as a judgment against Reichle and on behalf of the surviving heir.

Reichle on January 31, 2017 filed a Petition to Strike and/or Open Judgment and a Request to Stay Execution thereon. He and Attorney Fischman appeared before me on February 10, 2017.

After hearing argument and learning the facts I denied relief to Reichle on February 10, 2017. His desire, in the guise of his Petition to Strike, was to re-litigate the surcharge proceedings which had been decided against him and sustained on appeal. This is a Final judgment and it was properly transferred to our Civil Division for execution. Further, Reichle's abuse of his Power of Attorney and the surcharge bar him from receiving any assets from the estate until the full surcharge is paid. Whether the surviving heir needs to raise an estate is not before me, but there is no question that Reichle cannot open the judgment.

Reichle thereafter asked for reconsideration and it is hereby DENIED. Parties to proceed in accordance with law.

SO ORDERED,
/s/O'Reilly, S.J.

March 2, 2017

Gateway School District v. Gateway Education Association/PSEA/NEA

Same Sex Rights—Constitutional

Affirming denial of school district's Petition to Vacate Arbitration Award. Award ruled that Union filed valid grievance regarding District's refusal to add same sex spouse to retired Union member's health insurance plan provided under CBA. Recognizing same sex constitutional rights is not outweighed by a statement that statutes should not be applied retroactively if the effect is to impair contractual rights.

No. GD-17-1109. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—July 31, 2017.

OPINION

INTRODUCTION

Petitioner Gateway School District ("District") has appealed from our order dated May 1, 2017, which denied its Petition to Vacate Arbitration Award and instead confirmed the Award. The Arbitrator had decided that the Respondent, Gateway Education Association/PSEA/NEA ("Union"), had filed a timely and valid grievance regarding the District's refusal to add a same-sex spouse to a retired Union member's health insurance plan provided under the Collective Bargaining Agreement ("CBA").

The District raises four issues in its "Concise Statement of the Errors Complained of on Appeal," restated below:

1. That the Arbitrator wrongly applied an inapplicable principle, "changing legal environment," and as a result wrongly concluded that the grievance was timely filed under the CBA.
2. That the Arbitrator's Award was not rationally derived from the CBA, thereby not satisfying both prongs of the essence test.
3. That the Arbitrator wrongly concluded that "past practice is a nullity in this case."
4. That the Arbitrator's Award violates the constitutional clauses barring "contractual impairment by retroactively implementing the *Whitewood* Decision [which essentially held that same-sex marriages must be afforded the same constitutional protections as heterosexual marriages]."

DISCUSSION

The pre-argument brief filed by the Union clearly sets forth the law applicable to the first three issues above. Since we feel we could not state it better, we adopt that analysis and incorporate it into this opinion by reference.

As to the fourth issue, that the contractual impairment allegedly created by the Award violates the Constitutions of the United States and of the Commonwealth of Pennsylvania, that was not discussed in the Union's pre-argument brief but was fully discussed at oral argument, by counsel for the District at page 8, line 19 – page 17, line 8, and by counsel for the Union at pages 21- 23 of the Transcript.

Petitioner relies primarily on *dicta* of the Commonwealth Court in *Danville Area Sch. Dist. v. Danville Area Educ. Assn.*, 754 A.2d 1255 (Pa. 2000), to the effect that retroactively applying a statute affecting retirement age was violative of the constitutional provisions against impairment of contracts. Here, *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014) appeal dismissed *sub nom. Whitewood v. Sec'y Pa. Dept. of Health*, 621 F. App'x 141 (3 CA 2015), deals with constitutional issues and is not the equivalent of a statute.

We do not see how recognizing that the constitutional rights of same-sex married couples must be the same as the rights of heterosexual married couples is outweighed by a statement that statutes should not be applied retroactively if the effect is to impair contractual rights. The Arbitrator considered the District's constitutional position, listing it as item 4 of its issues, and was

entitled to conclude, even *sub silentio*, that the impairment of contracts issue was without merit in the context of this case, which he describes as a “C [Sea] Change.”

Whitewood clearly reflects a radical change in the legal landscape. The Arbitrator correctly refused to impose an inapplicable past practice covering only heterosexual married couples and refers to the District’s position as a Catch 22, pointing out the District essentially is penalizing the Grievant for not having chosen an insurance coverage option that was not available to him at the time he retired.

CONCLUSION

Our order was properly entered, in deference to the factual findings of the Arbitrator and his legal conclusions which take their essence from the CBA. We respectfully suggest that the order should be affirmed.

Date 07-31-17

PITTSBURGH LEGAL JOURNAL

OPINIONS

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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 Clause 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.

Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to *how* the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.

In order to address this claim, we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975). When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).

A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211.^{FN3} An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson, supra*. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that “notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.” *Id.*

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

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

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

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. BACKGROUND

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', 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 stationery 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 Commission ("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 performing 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

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).

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*This opinion was redacted by the ACBA staff. It is the express policy of the *Pittsburgh Legal Journal* not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

PLJ

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OPINIONS

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**Commonwealth of Pennsylvania v.
Keith Callen***

Criminal Appeal—Sufficiency—Sexual Assault—Sentencing (Discretionary Aspects)—Statute of Limitations—Severance—Propensity Evidence

Multiple claims of sexual assault, with multiple victims, relating to claims against a gymnastics coach.

No. CC 201609929, 201609926. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—October 2, 2017.

OPINION

The Defendant has appealed from the judgment of sentence entered on May 9, 2017. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with numerous offenses¹ in relation to a series of events involving a gymnastics student the Defendant coached and the two (2) young step-daughters of his best friend. A jury trial was held before this Court from February 27 to March 1, 2017 and at its conclusion, the Defendant was convicted of all charges. He appeared before this Court on May 9, 2017 and was sentenced to consecutive terms of imprisonment totaling 13 to 26 years.² Timely Post-Sentence Motions were filed and were denied on May 31, 2017. This appeal follows.

The evidence presented at trial regarding CC 201609929 established that in 2010, when she was 12 years old, B.M. began to take gymnastics lessons at Jewart's Gymnastics in the Hampton Township area of Allegheny County. The Defendant was one of several coaches that worked with her group. In December 2010, B.M. began to take private lessons with the Defendant one (1) day a week, while also continuing her group lessons with the Defendant and other coaches four (4) days a week. When she was 12 and 13 years old, the Defendant began to text her, initially about her lessons and, later, about school and personal matters. During this time he told her that if he was her age, he'd want to date her.

In March, 2012, the Defendant was fired from Jewart's Gymnastics and began working at Trinity Gymnastics in the West Deer Township area of Allegheny County. At the Defendant's request, B.M. quit training at Jewart's and began training with him at Trinity Gymnastics. In August, 2012, B.M. attended Woodward Gymnastics Camp and the Defendant went with her, despite the fact that he was not on the camp's coaching staff. During this time period, the Defendant was texting B.M. pictures of himself and telling her that he loved her. At some point, B.M.'s mother saw the text messages, became upset and forbade B.M. from having any more contact with the Defendant. The Defendant was removed from her group at Trinity Gymnastics and the two had no contact for almost a year, until B.M. attended a gymnastics camp at the University of Michigan in the summer of 2013, where the Defendant was coaching. B.M. wanted to return to training with the Defendant and an agreement was made with B.M.'s mother whereby she would be permitted to return to training with the Defendant but that her mother had to be present at all times.

In July, 2013, B.M.'s mother did not attend a training session. At that session, the Defendant had B.M. lay on the vault table so he could stretch her. He positioned her so that she was laying on her back with her leg on his shoulder and he put his finger under her shorts and underpants and inserted it into her vagina. B.M. testified that this touching occurred several additional times until the end of August, 2013. Throughout this time, the repeatedly defendant told B.M. that he did not have a good home life.

In August 2013, the Defendant left Trinity for reasons unknown to B.M. and moved to the Elite Athletic Center in Butler. B.M. and four (4) other gymnasts went with him. The Defendant continued to train B.M. and continued to put his fingers in her vagina while he was stretching her. This occurred multiple times throughout 2013 and 2014, when B.M. was in 10th grade. As the holiday season approached, the Defendant gave B.M. several gifts, including a Victoria's Secret sweatshirt and leggings and an infinity ring that said "Love" on the front and had "Forever Love" engraved on the inside.

In March, 2014, the Defendant took B.M. and several other gymnasts to a state competition. The Defendant picked B.M. up first and before the other students arrived, he had sexual intercourse with her in his vehicle. Thereafter, the Defendant, while purporting to rehab B.M. from an ACL tear, would have B.M. (who was by then 17 and driving herself to gymnastics practice) meet him in the parking lot of the Home Depot in Butler before practice and they would have sexual intercourse in his car. Additionally, he requested oral sex from B.M., but she refused. This pattern continued until November, 2015, when B.M. left Elite and told a fellow gymnast what had been happening. Thereafter, B.M. began to attend therapy and disclosed the abuse to her therapist, who reported the incidents to Child Line.

With regard to the charges at CC 201609926, the Commonwealth presented the testimony of D.G. and K.G., sisters who were 23- and 22-years old, respectively, at the time of trial. They testified that when they were 4 (four) and three (3) years old, their mother married M.C., the best friend of the Defendant since childhood. Over the years M.C. was married to their mother, he girls had many contacts with the Defendant, whom they called "Uncle Keith" and had visited his home on many occasions.

On several occasions when they were between the ages of five (5) and seven (7), M.C. brought the girls to the Defendant's home or the Defendant would come to M.C.'s home when his wife was at work. The Defendant and M.C. instructed the girls to put on skirts and remove their underpants. They then asked the girls to do cartwheels and would pose them bent over with their legs spread apart and photograph them.

On other occasions, the Defendant would take K.G. into another part of his house by herself and would instruct her to take off her clothing and would then touch her vagina with his fingers and mouth.

M.C. testified and confirmed K.G. and B.M.'s testimony and indicated that on two occasions he saw the Defendant touch K.G.'s vagina and put his penis between her legs to simulate intercourse.

On appeal, the Defendant has raised a total of 13³ claims of error, which this Court has combined and re-ordered as follows for ease of review.

1. Sufficiency of the Evidence - Sports Program

Initially, the Defendant argues that the evidence was insufficient to support the conviction of Sexual Assault at CC 201609929 because the Commonwealth failed to establish that gymnastics was a "sports program" covered by 18 Pa.C.S.A. §3124.3(a). A review of the record demonstrates that this claim is meritless.

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

Our Crimes Code defines Sexual Assault by a Sports Official as follows:

§3124.3. Sexual assault by sports official, volunteer or employee of nonprofit association

(a) *Sports official.* - Except as provided in sections 3121(relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse), 3124.1 (relating to sexual assault) and 3125 (relating to aggravated indecent assault), a person who serves as a sports official in a sports program of a nonprofit association or a for-profit association commits a felony of the third degree when that person engages in sexual intercourse, deviate sexual intercourse or indecent contact with a child under 18 years of age who is participating in a sports program of the nonprofit association or the for-profit association.

...

(c) *Definitions.* - As used in this section, the following words and phrases shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

...

“Sports official.” A person who supervises children participating in a sports program of a nonprofit association or a for-profit association, including, but not limited to, a coach, assistant coach, athletic trainer, team attendant, game manager, instructor or a person at a sports program who enforces the rules of a sporting event sponsored by a sports program of a nonprofit association or a for-profit association, including, but not limited to, an umpire or referee, whether receiving remuneration or holding the position as a volunteer.

“Sports program.” As defined in 42 Pa.C.S. §8322.1.

18 Pa.C.S.A. §3124.3.

and

§8322.1. Manager, coach, umpire or referee and nonprofit association negligence standard

...

(d) *Definitions.* - As used in this section the following words and phrases shall have the meanings given to them in this subsection:

...

“Sports program.” Baseball (including softball), football, basketball, soccer and any other competitive sport formally recognized as a sport by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978 (Public Law 95-606, 36 U.S.C. §371 et seq.), the Amateur Athletic Union or the National Collegiate Athletic Association. The term shall be limited to a program or that portion of a program that is organized for recreational purposes and whose activities are substantially for such purposes and which is primarily for participants who are 18 years of age or younger or whose 19th birthday occurs during the year of participation or the competitive season, whichever is longer. There shall, however, be no age limitation for programs operated for the physically handicapped or mentally retarded.

42 Pa.C.S.A. §8322.1.

As noted above, the Defendant’s challenge to the sufficiency of the evidence is based entirely on his averment that the Commonwealth failed to introduce evidence establishing that gymnastics “has been formally recognized as a sport by the United States Olympic Committee, the Amateur Athletic Association or the National Collegiate Athletic Association.” (Defendant’s Concise Statement of Errors to be Complained of on Appeal, p. 4). However, this claim disregards both the evidence presented at trial and matters of general knowledge.

At trial, B.M. testified repeatedly that she attended regional and national gymnastics competitions and training camps, including sessions at the Karolyi Ranch and the University of Michigan (See, e.g. Trial Transcript, pp. 38, 44, 55). A.L. testified that the USA Association of Gymnastics governs the sport and maintains rules for the certification of coaches. (Trial Transcript, p. 172). The Commonwealth certainly introduced substantial evidence that gymnastics is a sport that would fall within the definition of a “sports program” for purposes of 18 Pa.C.S.A. §3124.3 and 42 Pa.C.S.A. §8322.1. Moreover, that gymnastics is an Olympic sport is an indisputable and established fact well within the common knowledge of this Court and the citizenry. “A court may take judicial notice of an indisputable adjudicative fact’... A fact is indisputable if it is so well-established as to be a matter of common knowledge... Judicial notice is intended to avoid the formal introduction of evidence in limited circumstances where the fact sought to be proved is so well known that evidence in support thereof is unnecessary... Judicial notice allows the trial court to accept into evidence indisputable facts to avoid the formality of introducing evidence to prove an incontestable issue.” *Commonwealth v. Brown*, 839 A.2d 433, 435 (Pa.Super. 2003), internal citations omitted.

What the Defendant is now averring - that the Commonwealth should have put forth a witness who would have testified that gymnastics is an Olympic sport - is both disingenuous and distracting. As noted above, it is well within the common knowledge of the citizenry that gymnastics is an Olympic sport. At the time of trial, only six (6) months had passed from the 2016 Summer

Olympics in Rio, where the United States gymnasts won multiple medals in gymnastics and the media coverage of the gymnastics competition inundated our consciousness. There is no reasonable argument that average citizens do not know that gymnastics is an Olympic sport. Moreover, review of the record reveals that there was no dispute at trial that gymnastics was a sport covered by 18 Pa.C.S.A. §3124.3 and 42 Pa.C.S.A. §8322.1. In addition to cross-examining B.M. regarding her contact with the Defendant, defense counsel also presented the testimony of several witnesses who had been coached by the Defendant or whose children had been coached by the Defendant, and referred repeatedly to the Defendant as “coaching gymnastics”. (See, e.g. T.T. pp. 323-324, 326-327, 330, 333-334, 336-337). It seems rather disingenuous for the Defendant to have introduced evidence regarding his gymnastic coaching as part of his defense at trial only to disclaim the sport on appeal. He cannot have it both ways.

Regardless, in addition to there being sufficient evidence that gymnastics is a sport at trial, the fact that gymnastics is an Olympic sport is an indisputable fact well within the common knowledge of this Court and the citizenry, such that the Commonwealth was not required to present a witness to that effect. This claim is meritless.

2. Sufficiency of the Evidence - Supervising Welfare

The Defendant also challenges the sufficiency of the evidence to sustain the Endangering the Welfare of a Child convictions because there was no evidence that he was supervising the welfare of D.G. and K.G.. Again, this claim is meritless.

Our Crimes Code defines Endangering the Welfare of a Child as follows:

§4304. Endangering welfare of children

(a) Offense defined. -

(1) A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

18 Pa.C.S.A. §4304.

As noted above, the evidence presented at trial established that the Defendant was M.C.’s best friend and D.G. and K.G. referred to him as “Uncle Keith.” The girls were frequently in his company and on several occasions he was both alone with K.G. or sharing their care with their stepfather.

Under these circumstances, it is clear that the Defendant was supervising the welfare of D.G. and K.G. for purposes of the Endangering the Welfare of a Child statute. Although not their parent or legal guardian, the Defendant was clearly supervising their welfare and the evidence was therefore sufficient to support the conviction. This claim must also fail.

3. Weight of the Evidence (Victim B.M.)

Next, the Defendant argues that the verdict at CC 201609929 was against the weight of the evidence because B.M. “has a reputation for dishonesty; and that she was not, therefore, sexually abused by [the Defendant], who has a reputation for chastity among children.” (Concise Statement of Errors to be Complained of on Appeal, p. 7). Again, this claim is meritless.

It is well-established that the “scope of review for [a weight of the evidence] claim is very narrow. The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court, and [the appellate court] will not disturb that decision absent an abuse of discretion. Where issues of credibility and weight are concerned, it is not the function of the appellate court to substitute its judgment based on a cold record for that of the trial court. The weight to be accorded conflicting evidence is exclusively for the fact finder, whose findings will not be disturbed on appeal if they are supported by the record. A claim that the evidence presented at trial was contradictory and unable to support the verdict requires the grant of a new trial only when the verdict is so contrary to the evidence as to shock one’s sense of justice.” *Commonwealth v. Knox*, 50 A.3d 732, 737-8 (Pa.Super. 2012).

Moreover, “when the challenge to the weight of the evidence is predicated on the credibility of trial testimony, [appellate] review of the trial court’s decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, those types of claims are not cognizable on appellate review.” *Commonwealth v. Bowen*, 2012 WL 5359264, p. 6 (Pa.Super. 2012).

“Where the trial court has ruled on the weight claim below, an appellate court’s role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.” *Commonwealth v. Shaffer*, 40 A.3d 1250, 1253 (Pa.Super. 2012). “A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence.” *Commonwealth v. Moreno*, 14 A.3d 133, 136 (Pa.Super. 2011).

Here, a careful examination of the record reveals that the Defendant’s challenge to the weight of the evidence is based solely on his character witnesses who testified that he had a reputation for chastity among minors and M.M., who testified that B.M. had a bad reputation for honesty. Once again, there is a disconnect between the actual evidence presented at trial and appellate counsel’s characterization of that evidence in his Concise Statement. Yes, the Defendant presented character and victim reputation testimony that, if believed by the jury, would have been sufficient to justify an acquittal. However, the jury obviously chose not to credit that testimony and instead credited the very credible testimony of B.M., which was corroborated by A.L. and K.B..

Because the Defendant properly raised his weight of the evidence claim on Post-Sentence Motions, the appellate court’s review is only directed to this Court’s discretion in denying the motion. See *Shaffer*, *supra*. After reviewing the record and the evidence discussed above, it cannot be said under any analysis that the testimony presented at trial was “so unreliable and/or contradictory as to make any verdict based thereon pure conjecture,” see *Bowen*, *supra*. A review of the evidence as a whole clearly demonstrates Defendant’s perpetration of the crimes. Given the evidence presented at trial and discussed above, there is no question that the verdict was appropriate and not “shocking” to the conscience. This claim must fail.

4. Statute of Limitations

Next, the Defendant argues that this Court erred in failing to dismiss Counts 2 through 6 at CC 201609926 (Indecent Assault,

Endangering the Welfare of a Child - 2 counts and Corruption of Minors - 2 counts) because the charges were brought outside of the statute of limitations. He argues that at the time of the commission of the offenses - between 1998 and 2001 - the statute of limitations extended two (2) years after the girls turned 18, so the instant prosecution was in violation of the limitations period. This claim is meritless.

The statute of limitations for the instant offenses is controlled by 42 Pa.C.S.A. §5552. From 1984 to 1991, the statute of limitations was five (5) years after the commission of the offense. On February 20, 1991, the statute was amended and the statute of limitations was extended to five (5) years after the victim turned 18 (i.e. the victim's 23rd birthday). On January 22, 2002 the statute was once again amended and the statute of limitations was extended to 12 years after the victim turned 18 (i.e. the victim's 30th birthday). On December 16, 2008, the statute was once again amended to extend the statute of limitations to the victim's 50th birthday. 42 Pa.C.S.A. §5552(c)(3).

Our courts have repeatedly held that when a statute of limitations is amended and extended, the new limitations period applies to offenses committed before its amendment so long as the previous limitations period had not expired. See *Commonwealth v. Harvey*, 542 A.2d 1027 (Pa.Super. 1988) and *Commonwealth v. Johnson*, 553 A.2d 897 (Pa. 1989). In *Harvey*, the defendant was charged with sexual offenses against his girlfriend's daughter occurring between 1976 and July, 1981. At the time the offenses were subject to a two (2) year statute of limitations, which would have required prosecution by July, 1983. However, in July, 1982, before the two (2) year limitations period had expired, the statute of limitations was extended to five (5) years. In May of 1984, after the original two (2) year period had expired but while the five (5) year period was still in effect, the police were notified of the crimes and prosecution commenced. Our Superior Court examined the statute of limitations and applied rules of statutory construction which provide "that when a new period of limitations is enacted, and the prior period of limitations has not yet expired, in the absence of language in the statute to the contrary, the period of time accruing under the prior statute of limitations shall be applied to calculation of the new period of limitations." *Commonwealth v. Harvey*, 542 A.2d 1027, 1029-30 (Pa.Super. 1988). It went on to hold that an extension to the statute of limitations "applies prospectively to any prosecution commenced after its effective date on a cause of action which has not already expired regardless of whether the crime for which the prosecution is commenced occurred prior to or after the effective date of the Act." *Id.* at 1031.

Similarly, in *Commonwealth v. Johnson*, 553 A.2d 897 (Pa. 1989), our Supreme Court held that an extension to the statute of limitations does apply to offenses "not already time-barred by the former [limitations] period as of the date the new [extended] statute became effective." *Commonwealth v. Johnson*, 553 A.2d 897, 898 (Pa. 1989). It found that this is not a "retroactive" application of the extension of the statute of limitations. It stated that a criminal defendant "had no vested 'right' to be free from conviction within two years after he committed the crime for which he was later tried. A criminal statute of limitations is an act of legislative grace, not of right. Thus, the concept of retroactivity, and the correlative presumption of prospectively embodied in 1 Pa.C.S. §1926, are inapplicable here." *Id.* at 900.

The birthdates of the victims and their key ages for statute of limitations purposes are as follows:

Name	Year of Birth	23rd Birthday (SOL as of 2/20/91)	30th Birthday (SOL as of 1/22/02)	50th Birthday (Current SOL)
D.G.	1993	2016	2023	2043
K.G.	1994	2017	2024	2044

At trial, D.G. and K.G. testified that the abuse began when they were approximately five (5) years old (1998) and continued until 2001. At the time of the offenses the applicable limitations period was the victims' 23rd birthdays, which are noted in the chart, above. However, before the victims turned 23 years old, the statute was extended again (on January 22, 2002) to their 30th birthdays. Once more, the statute was again extended to the victims' 50th birthdays on December 16, 2008. The instant information was filed on August 22, 2016, well within the then-effective statute of limitations.

Because the statute of limitations never expired on any of the instant claims, the amendments to the statute properly applied to extend the limitations period each time. The instant prosecution was appropriately commenced within the statutory period for each victim based on their date of birth. This claim is meritless.

5. Severance

Next, the Defendant argues that this Court erred in denying his Motion to Sever the informations as they concerned different victims and different conduct. Again, this claim is meritless.

The joinder of informations is controlled by Rule 582 of the Pennsylvania Rules of Criminal Procedure which states, in relevant part:

Rule 582. Joinder – Trial of Separate Indictments or Informations

(A) Standards

(1) *Offenses charged in separate indictments or informations may be tried together if:*

- (a) *the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or*
- (b) *the offenses charged are based on the same act or transaction.*

Pa.R.Crim.Pro. 582.

"A motion for severance is addressed to the sound discretion of the trial court, and...its decision will not be disturbed absent a manifest abuse of discretion. The critical consideration is whether the appellant was prejudiced by the trial court's decision not to sever. The appellant bears the burden of establishing such prejudice." *Commonwealth v. Page*, 59 A.3d 1118, 1133 (Pa.Super. 2013). "Evidence of distinct crimes...is admissible...to show a common plan, scheme or design embracing commission of multiple crimes, or to establish the identity of the perpetrator, so long as proof of one crime tends to prove the others... This will be true when there are shared similarities in the details of each crime." *Commonwealth v. Keaton*, 729 A.2d 529, 537 (Pa. 1999).

At trial, D.G. testified that the publicity surrounding the charges involving B.M. prompted she and K.G. to contact the police. Although it is true that the informations involved different sets of facts and different victims, the evidence presented in support of each informed the other and there was some overlap of historical details. Moreover, the facts of this case clearly establish a logical connection and a common scheme, plan or design in the incidents. For example, although the Commonwealth's case focused on the Defendant's activities with B.M. during her teenage years, she testified that the Defendant gave her a diamond necklace when she was seven (7) years old, the approximate age D.G. and K.G. were when the Defendant abused them. That the Defendant had begun to groom B.M. at a young age demonstrates a common scheme and course of conduct in his abuse of young girls and is relevant to both cases. Additionally, the evidence was readily separable between the separate informations, as was the Defendant's impossibility defense, presented through his wife, to the charges involving D.G. and K.G.. There was nothing confusing about the evidence that rendered the jury incapable of discerning between the cases.

The Defendant's prejudice argument is without merit. By its very nature, all evidence admitted by the Commonwealth is prejudicial to a criminal defendant. The Defendant is undoubtedly upset with the nature and quantity of evidence against him, but ultimately, that was a consequence of his own making. Ultimately, the evidence was not so unduly prejudicial as to require severance and this Court was well within its discretion in denying the Motion to Sever. This claim must fail.

6. "Jurisdiction and Venue"

Next, the Defendant argues that this Court erred in failing to grant his Motion to Dismiss the informations because "jurisdiction and/or venue" were lacking. Again, this claim is meritless.

Initially, the Defendant's claim that this Court did not possess "jurisdiction and/or venue" indicates that he does not understand the meaning of either concept. Subject matter jurisdiction "relates to the competency of a court to hear and decide the type of controversy presented...Controversies arising out of violations of the Crimes Code are entrusted to the original jurisdiction of the courts of common pleas for resolution... Every jurist within that tier of the unified judicial system is competent to hear and decide a matter arising out of the Crimes Code." *Commonwealth v. Bethea*, 828 A.2d 1066, 1074 (Pa. 2003). Said another way, "all courts of common pleas have statewide subject matter jurisdiction in cases arising under the Crimes Code." *Id.* Because the Defendant was charged with various that occurred within the Commonwealth of Pennsylvania, any Court of Common Pleas in the Commonwealth - including this Court - had subject matter jurisdiction over the charges. The Defendant's challenge to this Court's jurisdiction is utterly without merit.

Alternately, venue "relates to the right of a party to have the controversy brought and heard in a particular judicial district...venue pertains to the locality most convenient to the proper disposition of a matter." *Id.* at 1074-1075. "Venue in a criminal action properly belongs in the place where the crime occurred... This practice recognizes the necessity of bringing a party to answer for his actions in the place where the crime itself occurred because that is where the evidence and the witnesses will most likely be located. *Id.* at 1075. However, "where multiple offenses committed across several counties are to be prosecuted in one county, 'it is not necessary that the county so chosen be the situs of each and every crime charged. It is enough that one of the offenses being tried occurred in that county.'" *Commonwealth v. Brookins*, 10 A.3d 1251, 1259 (Pa.Super. 2011). Furthermore, a determination on motions relating to venue "rests within the sound discretion of the trial judge, whose ruling thereon will not be disturbed on appeal absent an abuse of that discretion." *Id.* at 1258.

In the instant case, the majority of the Defendant's conduct with B.M. occurred at two (2) gymnastics facilities - Jewart's Gymnastics in Hampton Township and Trinity Gymnastics in West Deer Township - both in Allegheny County, and so the charges were brought in Allegheny County. When K.G. and D.G. came forward as a result of the publicity surrounding B.M.'s case, their case was joined with B.M.'s given the course of conduct discussed above. At the pre-trial motions hearing, Assistant District Attorney Lisa Carey explained as follows:

MS. CAREY: This defendant is a certified U.S. gymnastics coach. The Affidavit of Probable Cause indicates that in the winter of 2012 through 2012 he was employed at Jewart's Gymnastics. That's in Hampton Township in our county. Then in 2012 to 2013 he was employed at Trinity Gymnastics. That is Gibsonia which is West Deer, Allegheny County. And 2013 to 2014 he was at Elite Athletic Center. That is in Butler Township, Butler County. This is a course of conduct, Your Honor, with most of the allegations for this victim taking place in West Deer and Hampton.

THE COURT: Okay.

MR. SINDLER: Judge, I'm not alleging as to victim one a subject matter jurisdiction question. Victim number one is part of the docket at 20169929. I didn't raise a subject matter jurisdiction motion in that docket. IT concerns alleged victims number two and three, not victim number one.

MS. CAREY: Your Honor, we have these cases joined together and they have been from the start because of the course of conduct here.

THE COURT: Yeah.

MR. SINDLER: Right, but there is no subject matter jurisdiction motion as to alleged victim number one. It only concerns alleged victims number two and three. We're talking about victim number one now and I didn't raise that motion as to her.

THE COURT: Well, but the cases are joined.

MR. SINDLER: I'm just indicating for the record that if we're discussing alleged victim number one there is no subject matter jurisdiction claim as to her. It is limited to numbers two and three. And I made that clear. It is particularly clear in CC 20169926. I set forth that they are alleged victims number two and three.

THE COURT: Has [sic] the district attorneys been in contact, do you know, under McNeil?

MS. CAREY: We have, Your Honor, and the Pennsylvania State Police agency is the law enforcement agency handling this course of conduct. These sexual assaults took place for all victims, we have a course of conduct that took place over a number of years, a range of dates, and the first two victims in time that Mr. Sindler is naming victims two and

three did take place in Butler County, but because these sexual assaults have taken place over a length of time and this conduct is a course of conduct, the district attorney's offices have consulted with each other and it was determined that Allegheny County would prosecute as to all victims here.

(Pretrial Motions Hearing Transcript, 1/3/17, p. 9-12).

As discussed in greater detail above, the Defendant's actions with D.G., K.G. and B.M. represented a course of conduct and included common elements such as his abuse and grooming of young girls. The charges relating to victim B.M. were filed in Allegheny County, as the majority of the conduct took place here. The charges relating to D.G. and K.G. were brought later and were joined with B.M.'s charges given the course of conduct and similarities of the cases. This decision was made following the consultation of the Allegheny and Butler County District Attorneys Offices in conjunction with the Pennsylvania State Police which was the investigating police agency. Under these circumstances venue was proper in Allegheny County and this Court was well within its discretion in denying the Defendant's Motion to Dismiss. This claim must also fail.

7. Trial Court Error - Testimony of A.L. and K.B.

Next the Defendant avers that this Court erred in allowing the testimony of A.L. and K.B., two of the Defendant's former gymnastics students, on the basis that it was improper "propensity" evidence. Again, this claim is meritless.

It is well-established that the "standard of review regarding the admissibility of evidence is an abuse of discretion. 'The admissibility of evidence is a matter addressed to the sound discretion of the trial court and...an appellate court may only reverse upon a showing that the trial court abused its discretion'... 'An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law.'" *Commonwealth v. Collins*, 70 A.3d 1245, 1251 (Pa.Super. 2013), internal citations omitted. "In assessing whether challenged evidence should be admitted, 'the trial court must weigh the evidence and its probative value against its potential prejudicial impact.'" *Commonwealth v. Dillon*, 863 A.2d 597, 601 (Pa.Super. 2004). The appellate court's "scope of review is limited to an examination of the trial court's stated reason for its decision." *Id.*

At trial, the Commonwealth presented the testimony of A.L. and K.B., two (2) former gymnastics students of the Defendant. Both testified that the Defendant complained about his marriage and made sexual advances towards them while he was their coach:

Q. (Ms. Carey): I guess what I'm asking is, did the defendant ever say anything to you, ever have a conversation with you other than a professional or friendly one?

A. (A.L.): Yes. There was a time, I was - there was a sleep-over at Trinity. We do them usually over Christmas break and there was a conversation between - you know, he told me about problems that he was having in his marriage, things about wanting to leave his wife, wanting to be with me instead...

...Q. Okay. And the time when he talked to you about not wanting to be with his wife, do you recall where and when that happened?

A. Yeah. He - the rest of the girls had really gone to sleep, so early hours of the morning. I think there was, you know, a movie playing. We were in the gym and there's a foam pit, a below-ground-level foam pit, and the conversation occurred in there. You know, it was dark, probably, like I said, early hours of the morning, and we were both sitting in the pit whenever he initiated the conversation.

Q. Okay. So this is the team sleep-over you said, I believe you said Trinity hosts annually?

A. Yeah. They did whenever I was there, yeah.

Q. Did it happen at a certain time of year?

A. Usually around Christmas break, usually in between Christmas and New Year's.

Q. And this sleep-over you talk about where you're in a foam pit with the defendant and he's talking to you about wishing he could leave his wife or would leave his wife, do you remember how old you were at the time?

A. I was 16.

Q. And so, you were - were you employed?

A. No, ma'am. I was still - I was recovering from, you now, major surgery, so I was still technically on the team, but I wasn't training vigorously. I just had my surgery in August.

Q. So you're still participating at the gym?

A. I was still an athlete.

Q. And at the time that you're 16, an injured athlete and this sleep-over, is this defendant employed as a coach at Trinity?

A. Yes, ma'am.

Q. And you said - I'm sorry. Who else was in the foam pit besides you and the defendant?

A. No one.

Q. And you said you don't remember how the two of you ended up there?

A. No. That part doesn't really stick out. The conversation itself obviously I remember was a lot more bothersome than getting into the pit. I'm not sure how that happened.

Q. Okay. Is this the first time the defendant has ever had such a conversation with you?

A. I believe, yeah, first. He had never said anything like that to me before. I would have been bothered earlier.

Q. And you said that he was talking to you about wanting to be with you?

A. Yeah. It was - the situation made me so uncomfortable because it was like a lot of stuff that it's like very sweet if it was done by somebody who you were interested in or who you wanted to do that to you. So, you know, there was hand-holding. He kissed me up my arm, tried to kiss my face. You know, he told me that he was having troubles with his wife. He wasn't happy in his marriage anymore. He was, you know, desperately unhappy, that he wanted to leave and be with me.

...

...Q. Okay. You said that he kissed you up your arm. Can you describe that?

A. I would be sweet if it was somebody who you wanted to do that.

Q. Do you mean like -

A. Yeah. I mean, from, like I said, he's holding my hand, up my fingers, up my arm. You know, the kissing people on their fingertips and it was just - you know, I was expressing my - that you can't leave your wife. You know, and those things were done while I was speaking to him and, you know, like saying no, you know, that he was kissing my fingers and my arms and, like I said, eventually up to my face and I turned my face away.

Q. You said he tried to kiss your face. He wasn't able to?

A. Tried to kiss me on my mouth, and I turned my face away.

(T.T. pp. 164, 165-169) and

Q. (Ms. Carey): K.B., did there ever come a time that he touched you under clothing?

A. (K.B.): No, not at the gym.

Q. Not at the gym. Was there any other non-coach-student like touching or kissing or anything like that at the gym?

A. No.

Q. Okay. Did it occur someplace else?

A. Yes.

Q. Where?

A. The first time it happened, it was at a gymnastics camp. Other times after that, it was in his vehicle. There was once time in a hotel room.

Q. Do you recall which gymnastics camp?

A. Woodward Gymnastics Camp.

...

Q. And how old were you the summer at Woodward Camp when there was some kind of non-coach-like physical contact?

A. I was 18 at the time.

Q. And how did that occur?

A. I was in my room by myself late at night, and I had been upset because I had recently broken up with my boyfriend, and he had texted me and asked me if I wanted him to come over and talk to him.

Q. Who's "him"? Who texted you?

A. Keith texted me, yes.

Q. Okay.

A. And he came over to my room and started talking to me, and I was telling him that I was upset and he asked if I wanted a hug to be comforted, and I said okay. And so, he gave me a hug which then led to him starting to kiss me, which led to sex.

Q. You're a student at that time?

A. Yes.

...

...Q. You said that there were times that things happened in his vehicle?

A. Uh-huh.

Q. Do you remember what kind of vehicle he had?

A. It was a Toyota truck. I'm not sure exactly what model, a black, I believe black Toyota truck.

Q. Is this the kind of truck that has one row of seats or are there passenger seats other than the front row?

A. I think just one row. I can't remember.

Q. I guess what I'm trying to ask, is it like a pickup truck or an SUV?

A. A pickup truck

Q. And so, how would you get to the truck?

A. He would drive and meet me somewhere. We would either meet at the parking lot of the Wal-Mart in Gibsonia or I believe we met in I think a Wendy's parking lot, mostly at Wal-Mart.

Q. What happened in the parking lot?

A. We would have sex in his vehicle or my vehicle.

Q. And whose idea was it to meet in a parking lot to have sex in a vehicle?

A. It was his idea.

...

Q. Do you remember speaking with Detective Mikus?

A. Uh-huh.

Q. Do you remember answering Detective Mikus' questions about along the same lines of questions I've asked you here today?

A. Yes.

Q. And do you recall being asked or providing information about the defendant kissing your hand or arm?

A. Yes, that he would kiss all the way up and down my arm.

(T.T. pp. 240-242, 244-245, 246).

Rule 404 of the Pennsylvania Rules of Evidence addresses the admissibility of evidence of other crimes or acts. It states, in relevant part:

Rule 404. Character Evidence; Crimes or Other Acts

...(b) *Crimes, Wrongs or Other Acts.*

(1) *Prohibited Uses. Evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.*

(2) *Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.*

Pa.R.Evid. 404.

In expounding on Rule 404(b), our Courts have held that "even where evidence of other crimes is prejudicial, it may be admitted where it serves a legitimate purpose... Pursuant to the Pennsylvania Rules of Evidence, these other purposes include, inter alia, proving: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the other; or (5) to establish the identity of the person charged." *Commonwealth v. Wattley*, 880 A.2d 682, 685 (Pa.Super. 2005). Moreover, "Rule 404(b) does not distinguish between prior and subsequent acts. See Edward D. Ohlbaum, *Ohlbaum on the Pennsylvania Rules of Evidence* §404.16 (2004-2005 ed.) (stating 'crimes, wrongs or acts that occur after the offense for which the accused is on trial also may be admitted.')

At the pretrial motions hearing held on February 15, 2017, the following occurred:

THE COURT: Okay. And number three - oh, let's talk about these prior bad acts. The prior bad acts - I'm not clear. There's two people.

MS. CAREY: So, Judge, there are two former gymnastic students of Mr. Callen's. He coached them, and but for the fact that the sports official log [sic] came into place in 2014, these would have been crimes, and we'd be - he would be charged today.

However, these were students of his that are prepared to testify that he said and did the identical acts with them.

THE COURT: That they were his students?

MS. CAREY: They were.

THE COURT: And at what time are you alleging these things happened?

MS. CAREY: I have the exact dates. I think I have that with me. I remember one girl said it was within her senior high school year. She graduated in 2006.

THE COURT: So that would have been after the allegations made by the Butler kids?

MS. CAREY: Yes. But the MO here is identical to the gymnastics student victim B.M., and her allegations were made after these two 404(b) gymnasts' situations.

THE COURT: But the kids from Butler were before?

MS. CAREY: Yes.

THE COURT: Okay. Mr. Sindler.

MR. SINDLER: A.L. is one of the women. She's currently approximately 26-years old.

So these events happened a little more than 10 years ago as to here.

K.B. is the other individual. She's currently 29-years old. So there's a 13 year difference.

This is propensity evidence, Judge and 404(b) is more of a rule of exclusion than inclusion, and the Government is trying to use other activities that occurred quite sometime ago in order to try to rope in and find him guilty, Mr. Callen, as to one or more of the offenses as to B.M. where she's alleged to be the victim.

THE COURT: I disagree. I think it goes to show scheme.

MR. SINDLER: If I can - I don't mean to interrupt, but common scheme is not part of 404(b). It is under the Federal rules, but common scheme is excluded from 404(b).

MS. CAREY: Judge, this is the exact same MO discussed in detail. Each victim - before speaking with the others or knowing what the others said, each of these two 404(b) witnesses talked about -

THE COURT: Did they ever disclose?

MS. CAREY: No.

THE COURT: Until recently?

MS. CAREY: Yes. We hunted them - we found them and said, "Did you ever have any kind of relationship with Mr. Callen other than his private coaching?" And it is identical, including like the same exact locations within the gym, something called the pit, kissing up and down the arm, saying the same things. The MO is identical, Judge.

THE COURT: Okay. I'll allow it.

(P.H.T., 1/15/17, p. 7-10).

A review of the record demonstrates that this Court's decision to allow the testimony of A.L. and K.B. was well within this Court's discretion. The incident supports the Commonwealth's contention and is reflective of a common scheme regarding the Defendant's actions with his students, including complaining about his marriage, and stating he wanted to be with the student instead, kissing the student's arm and progressing to sex in his vehicle in the parking lot of a vehicle near the gym.

Neither is the evidence unduly prejudicial. As this Court stated previously, by its nature, all evidence presented by the Commonwealth is prejudicial to a criminal defendant. However, the testimony of A.L. and K.B. was not so overly prejudicial that it justified exclusion. Ultimately, the testimony was more vastly more probative than prejudicial and so this Court correctly allowed its admission. This claim must fail.

8. *Illegal Sentence*

The Defendant also avers that this Court erred in imposing an illegal sentence at Count 3 of CC 201609929. After a thorough review of the record, this Court has determined that the sentencing orders on both cases contained clerical errors and has corrected those errors with Corrected Orders of Sentence filed concurrently herewith.

At the sentencing hearing, this Court imposed sentence as follows:

THE COURT: So at the Criminal Complaint ending in 9926, the case referring to B.M., at Count 1, I order you to pay the costs and undergo a term of three to six years with credit for time served. At Count 4, unlawful contact with a minor, I order you to serve three to six years. And at the criminal complaint ending in 9929, and these would be the two cases with the young children, at Count 1, I order you to pay the costs and undergo a term of three to six years. At Count 3, 2 to 4 years. And at Count 5, which would be for the Jane Doe No. 3, I sentence you to serve 2 to 4 years. All sentences will be served consecutively or following one another.

(Sentencing Hearing Transcript, p. 31).

Upon close examination of this Court's statement, this Court acknowledges that it misspoke when it identified the docket numbers. The charges at CC 201609929 pertained to B.M. and the charges at CC 201609926 pertained to K.G. and D.G. (identified in the information as Jane Does No. 2 and 3, respectively). Thus, it is easy to see how the clerical error followed.

As noted above, this Court has corrected the clerical error with Corrected Orders of Sentence filed simultaneously herewith. This Court's intent regarding the sentences was clear as evidenced by this Court's identification of the sentences to be imposed for each victim. To the extent that any further explanation is necessary, this Court specifically stated that the sentence at Count 3 was to be imposed on the information relating to the "young children" - which was an Endangering the Welfare of a Child charge as a course of conduct, and was appropriately graded as a third-degree felony. This Court apologizes for its inadvertent misstatement and any confusion that may have resulted from it, however the sentence as intended did not exceed the statutory maximum and was not illegal, as the Defendant now avers. Again, this claim is meritless.

9. *Excessive Sentence*

Finally, the Defendant argues that this Court erred in imposing an excessive sentence without placing adequate reasons for it on the record. Again, this claim is meritless.

It is well-established that "sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. *Commonwealth v. Hardy*, 939 A.2d 974, 980 (Pa.Super. 2007). "An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. In more expansive terms... an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness or partiality, prejudice, bias or ill-will, or such lack of support as to be clearly erroneous." *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa.Super. 2008). "The Sentencing Code requires a trial judge who intends to sentence outside the guidelines to demonstrate, on the record, his awareness of the guideline ranges... Having done so, the sentencing court may, in an appropriate case, deviate from the guidelines by fashioning a sentence which takes into account

the protection of the public, the rehabilitative needs of the defendant and the gravity of the particular offsets as it relates to the impact on the life of the victim and the community. In doing so, the sentencing judge just state of record the factual basis and specific reasons which compelled him or her to deviate from the guideline ranges... When evaluating a claim of this type, it is necessary to remember that the *sentencing guidelines are advisory only.*" *Commonwealth v. Griffin*, 804 A.2d 1, 7-8 (Pa.Super. 2002), *emphasis added*.

At the sentencing hearing, this Court noted that it had read and considered a Pre-Sentence Investigation report and approximately 20 letters written on behalf of the Defendant. (S.H.T., p. 3-4). "Where pre-sentence reports exist, [the appellate court] shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. *Commonwealth v. Macias*, 968 A.2d 773, 778 (Pa.Super. 2009). This Court noted the sentencing guideline ranges then placed its reasons for imposing sentence on the record:

THE COURT: Okay. Mr. Callen, as you know, you were convicted in two separate information [sic] of all counts. The Court has ordered, read and considered a presentness report that was prepared on your behalf. At the most serious offenses, the Felony 2's, your offense gravity score is ten. Your prior record score is zero, which is a mitigated suggested sentence of 10 months, a standard sentence of 22 to 36 months at all of the counts. And the one misdemeanor, I think it's actually a felony, a course of conduct, the standard sentence is 3 to 12 months. And I've read the presentence report. I know your attorney has had it available to him. He has shared it with you, I understand, and with your family.

In addition, I have a number of letters that are very positive that were submitted in your behalf by, I don't know, maybe 20 people.

...

Okay. First of all, to Mr. and Mrs. Callen and to the friends of Keith Callen, I guess the best thing for me to say is I'm not sure how I understand we all got to be here. I think when people go out and commit crimes, especially horrendous crimes, and you look at their past, they come from a good family they have no involvement with the criminal justice system. And Mr. Callen, on paper, seems to be an all-around good guy until you get to the facts of these crimes.

Mr. Callen clearly groomed B.M.. He committed multiple offenses against B.M. as well as the two little girls that were five and seven. He has multiple victims. B.M. was 14 years old when his abuse began. The five- and six-year olds were abused by their stepfather as well as Mr. Callen. He took photos of them and made them pose and do other things that are just not things that are to be done to young children.

We had two witness here that testified that they had regular sex with Mr. Callen and although that does not go to the seriousness of the crimes that are involved here, it does show a pattern of behavior from Mr. Callen.

We have just heard the impact that his actions had on the victims in this case. And interestingly enough, during all of these times, you were married with children, you had a good family, you had a good support system.

One of the things that struck me as very unusual is that during the trial, near the end of the trial, it was reported to me by one of the deputies that you and a 16-year-old gymnastics victim were out in the hall and kind of being overly familiar with each other and sort of touching each other's hair, and I threw that off as that's okay, it doesn't matter. But then you, being under a no-contact order with any minor, came in and sat right next to her in my courtroom and held her hand, and I saw that with my own eyes. So don't look at me like I'm losing my mind. I know what I saw.

You know, Mr. Callen, I think that you are a danger to the community. And I think that in spite of all the mitigating things in your life, you have a number of very serious aggravating offenses. You may be able to be rehabilitated over a period of time. I've not seen any evidence neither for nor against that.

(S.H.T. p. 28-31).

As the record reflects, this Court appropriately read and considered the pre-sentence investigation report and numerous letters in support of the Defendant, considered the factors and severity of the present offense, evaluated the Defendant's potential for rehabilitation and imposed a sentence which took all of these factors into consideration. Moreover, the record reflects great deliberation and consideration in the formulation of the sentence. Under the circumstances, and particularly given the multiple victims, the repeated nature of the offenses and the grooming of his victims, the sentence was appropriate and well below the statutory maximum. The Defendant's unhappiness with the length of his sentence does not mean it is excessive or otherwise inappropriate and this Court was well within its discretion in imposing it. This claim must also fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on May 9, 2017 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

¹ Due to the numerous charges involving multiple victims, this Court has created a chart showing the charges, their disposition and resulting sentence, which it has attached to this Opinion as Appendix 1.

² As discussed in greater detail below, the sentencing Orders contained clerical errors and this Court has filed Corrected Orders of Sentence concurrently with this Opinion.

³ Reference is made to the oft-cited quote from Judge Aldisert: "With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court, it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors...When I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that this is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness." Aldisert, *The Appellate Bar: Professional Competence and Professional Responsibility – a View from the Jaundiced Eye of One Appellate Judge*, 11 Cap.U.L.Rev. 445, 458 (1982).

APPENDIX 1

CC#	Crime	Victim	Section (18 Pa.C.S.A.)	Disposition	Sentence
201609929	Aggravated Indecent Assault-Person Under 16	B.M.	3125(a)(8)	Guilty	3-6 years
	Sexual Assault	B.M.	3124.3(a)	Guilty	No Further Penalty
	Indecent Assault - Person Under 16	B.M.	3126(a)(8)	Guilty	N.F.P.
	Unlawful Contact with a Minor	B.M.	6318(a)(1)	Guilty	3-6 years consecutive
	Corruption of Minors	B.M.	6301(a)(1)(ii)	Guilty	N.F.P.
	Corruption of Minors	B.M.	6301(a)(1)(i)	Guilty	N.F.P.
201609926	Aggravated Indecent Assault-Person Under 13	K.G.	3125(a)(7)	Guilty	3-6 years consecutive
	Indecent Assault - Person Under 13	K.G.	3126(a)(7)	Guilty	N.F.P.
	Endangering the Welfare of a Child	K.G.	4304(a)	Guilty	2-4 years consecutive
	Corruption of Minors	K.G.	6301(a)(1)(ii)	Guilty	N.F.P.
	Endangering the Welfare of a Child	D.G.	4304(a)	Guilty	2-4 years consecutive
	Corruption of Minors	D.G.	6301(a)(1)(i)	Guilty	N.F.P.

COMMONWEALTH OF PENNSYLVANIA v. KEITH RICHARD CALLEN
 IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO: CP-02-CR-0009929-2016

DATE OF ARREST:

OTN: T 786510-4

SID: 434-95-38-1

DOB: 04/18/1971

ORDER OF SENTENCE CORRECTED

AND NOW, this 27th day of September, 2017, the defendant having been convicted in the above-captioned case is hereby sentenced by this Court as follows. The defendant is to pay all applicable fees and costs unless otherwise noted below:

Count 1 - 18 § 3125 §§ A8 - Agg. Ind. Assault - Comp. Less Than 16 (F2)

To be confined for a minimum period of 3 Year(s) and a maximum period of 6 Year(s) at SCI Camp Hill.

The following conditions are imposed:

Megan's Law Registration - TIER 3 - Lifetime Registration: SORNA registration required for lifetime.

This sentence shall commence on 05/09/2017.

Count 2 - 18 § 3124.3 §§ A- Sexual Assault by Sports Official (F3)

A determination of guilty without further penalty.

Count 3 - 18 § 3126 §§ A8 - Ind Asslt Person Less 16 Yrs Age (M2)

A determination of guilty without further penalty.

Count 4 - 18 § 6318 §§ A1 - Unlawful Contact With Minor - Sexual Offenses (F2)

To be confined for a minimum period of 3 Year(s) and a maximum period of 6 Year(s) at SCI Camp Hill.

The following conditions are imposed:

Additional Counts: Same conditions as count 1 apply.

Count 5 - 18 § 6301 §§ A1ii - Corruption Of Minors - Defendant Age 18 or Above (F3)

A determination of guilty without further penalty.

Count 6 - 18 § 6301 §§ A1i - Corruption Of Minors (M1)

A determination of guilty without further penalty.

LINKED SENTENCES:

Link 1

CP-02-CR-0009929-2016 - Seq. No. 4 (18§ 6318 §§ A1) - Confinement is Consecutive to

CP-02-CR-0009929-2016 - Seq. No. 1 (18§ 3125 §§ A8) - Confinement

Commonwealth of Pennsylvania v. Keith Richard Callen**Order of Sentence**

Docket No: CP-02-CR-0009929-2016

The defendant shall receive credit for time served as follows:

Confinement Location	Start Date	End Date	Days Credit
Allegheny County Jail	03/02/2017	05/09/2017	69
Total			69

BY THE COURT:
Judge Donna Jo McDaniel

09/27/2017

CPCMS 2066

Printed: 09/27/2017 11:28:31AM

COMMONWEALTH OF PENNSYLVANIA v. KEITH CALLEN

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

DOCKET NO: CP-02-CR-0009926-2016

DATE OF ARREST:

OTN: T 813584-2
SID: 434-95-38-1
DOB: 04/18/1971

ORDER OF SENTENCE CORRECTED

AND NOW, this 27th day of September, 2017, the defendant having been convicted in the above-captioned case is hereby sentenced by this Court as follows. The defendant is to pay all applicable fees and costs unless otherwise noted below:

Count 1-18 § 3125 §§ 7-Aggrav Indec Asslt/Person Less 13 Yrs Age (F2)

To be confined for a minimum period of 3 Year(s) and a maximum period of 6 Year(s) at SCI Camp Hill.

The following conditions are imposed:

Megan's Law Registration - TIER 3 - Lifetime Registration: SORNA registration required for lifetime.

Count 2 - 18 § 3126 §§ A7 - Indecent Assault Person Less than 13 Years of Age (F3)

A determination of guilty without further penalty.

Count 3 - 18 § 4304 §§ A - Endangering Welfare Of Children (F3)

To be confined for a minimum period of 2 Year(s) and a maximum period of 4 Year(s) at SCI Camp Hill.

The following conditions are imposed:

Additional Counts: Same conditions as count 1 apply.

Count 4 - 18 § 6301 §§ A1 - Corruption Of Minors (M 1)

A determination of guilty without further penalty.

Count 5 - 18 § 4304 §§ A- Endangering Welfare Of Children (F3)

To be confined for a minimum period of 2 Year(s) and a maximum period of 4 Year(s) at SCI Camp Hill.

The following conditions are imposed:

Additional Counts: Same conditions as count 1 apply.

Count 6 - 18 § 6301 §§ A 1 - Corruption Of Minors (M1)

A determination of guilty without further penalty.

Count 999 - 18 § 3126 §§ A7 - Ind Asslt Person Less 13 Yrs Age (M1)

Offense Disposition: Withdrawn

CPCMS 2066

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Commonwealth of Pennsylvania v. Keith Callen**Order of Sentence**

Docket No: CP-02-CR-0009926-2016

LINKED SENTENCES:**Link 1**

CP-02-CR-0009926-2016 - Seq. No. 5 (18§ 4304 §§ A) - Confinement is Consecutive to
CP-02-CR-0009926-2016 - Seq. No. 3 (18§ 4304 §§ A) - Confinement is Consecutive to
CP-02-CR-0009926-2016 - Seq. No. 1 (18§ 3125 §§ 7) - Confinement is Consecutive to
CP-02-CR-0009929-2016 - Seq. No. 4 (18§ 6318 §§ A1) - Confinement is Consecutive to
CP-02-CR-0009929-2016 - Seq. No. 1 (18§ 3125 §§ A8) - Confinement

BY THE COURT:
Judge Donna Jo McDaniel

09/27/2017

CPCMS 2066

Printed: 09/27/2017 11:38:39AM

*This opinion was redacted by the ACBA staff. It is the express policy of the *Pittsburgh Legal Journal* not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

**James J. Zwick v.
Bethany Lyn Zwick and Jimmy Z's Place, Ltd., jointly and severally
Jimmy Z's Real Estate Management, L.P. v.
Bethany Lyn Zwick and Jimmy Z's Place, Ltd., jointly and severally, defendants**

Petition to Open Judgment

A party entered into two confessed judgments, and then sought to open these judgments due to the party's history of alcoholism, threats, and lack of an attorney. The Court ruled that the party was likely under duress and did not have the capacity to enter into the judgments, and the judgments were opened.

No. GD-16-021154, GD-16-021156. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—December 21, 2017.

MEMORANDUM ORDER

This Matter involves confessed Judgments entered by Plaintiff, James J. Zwick (JAMES) against Defendant, his sister, Bethany Lynn Zwick (BETHANY) in the amount of \$131,400.00 at Docket Number GD-16-021154. There was a second set of documents executed at the same time on August 14, 2014 and a second confessed judgment was entered in the amount of \$129,761.00 at Docket Number GD-16-021156. These do not appear to have been consolidated but are being heard at the same time and the same Facts and circumstances apply to both of them.

Defendant filed a Petition to Open said judgments, rules were entered and the depositions were taken and the parties came before me in Motions Court, I heard Argument at that time as well as at a later time. I have also read the depositions and other documents in the case.

In essence, Defendant contends that she signed the documents containing the confession of Judgment provision under duress and/or while she was not in full possession of her faculties due to her illness from acute alcoholism. She acknowledge signing the loan documents at a closing held in the office of James' attorney. James himself was not in attendance and he participated via telephone from his residence in Michigan. Her alcoholism is amply supported by the Medical Reports attached to her deposition. While they may be hearsay at this point, the doctors would testify at the trial order.

Defendant got to the closing via a ride from a friend, William Stephens. He testified that he did not believe she knew what she was doing and was also subjected to a severe "brow beating" and threatening language from her brother. Further, counsel for James, who was coordinating the closing, put Defendant through a litany of questions all designed to focus on her condition and her knowledgeable non-use of a lawyer at this closing. (See Stephen's deposition at 68, 69 and Bethany's deposition at page 47-50.

I conducted a second argument on October 24, 2017 with counsel and pointedly asked, what is the standard I am to use in evaluating the conflicting testimony? Both agreed that the standard is set forth in *Seeger v. First Union National Bank*, 836 A.2d 163 (Pa. Super 2003).

The significant language is:

Generally speaking, a default judgment may be opened if the moving party has

- (1) Properly filed a petition to open the default judgment;
- (2) Pleaded a meritorious defense to the allegation contained in the Complaint; and
- (3) Provided a reasonable excuse or explanation for failure to file a responsive pleading.

Here the Complaints in confession of judgment were filed on November 1, 2016 and served on Bethany Zwick on November 14, 2016. On the very next day, November 15, 2016, the Petition to Open and Strike the confessed judgments were filed. Thus, the Petition to Open was promptly filed satisfying criterion number 1. A defense was attached, to the Petition so criterion number 3, is not applicable.

The remaining question is whether the defense is a meritorious defense. We are advised in *Seeger* (Supra) that the Petition is addressed to the equitable powers of the court and the decision to open or not is within the sound discretion of the trial judge. The trial court's action will not be overturned unless it "manifests abuse of discretion or error of law".

Further, a "meritorious defense" is one that if proved at trial would justify relief. "In addition, under Rule of Civil Procedure 2959 (e), a judgment is to be opened ". . . If evidence is produced which in a jury trial could require the issues to be submitted to the jury".

Here the defense of one of duress and incapacity as set forth is manifestly clear in the deposition of Bethany and Stephens. I am persuaded that Bethany's history of alcoholism coupled with the abusive language and threats from her brother does create a meritorious defense. Further, the efforts of James' attorney to advise Bethany of her right to a lawyer and having her sign some

kind of disclaimer strongly suggests that James' lawyer knew there was something amiss with Bethany. Accordingly, I will open the judgments and make the rule absolute. Parties to try this case as the court schedule will permit.

SO ORDERED,
BY THE COURT,
/s/O'Reilly, S.J.

December 21, 2017

**National Collegiate Student, Loan Trust 2006-3,
a Delaware Statutory Trust(s) v.
Leshay L. Robinson and Gloria M. Smith**

Negligence—Nuisance—UTPCPL—Strict Liability

In action by Homeowners against Municipality and Water company for house fire damages resulting from non-functioning fire hydrants, preliminary objections sustained on nuisance counts. However, strict liability and UTPCPL claims permitted to go forward even though defendants were not manufacturers of defective fire hydrants. Negligent supervision claim permitted to go forward despite lack of allegations related to intentional acts.

No. GD-16-014118, GD-16-014123 consolidated at GD-16-014101. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—March 8, 2017.

MEMORANDUM ORDER

In this Breach of Contract Action, Plaintiff is seeking to sue Defendants for their alleged failure to pay certain student loans allegedly made to them in 2006. Three (3) cases are involved, all involving the same parties and making substantially the same allegations of money loaned and not repaid. They are identified at Docket Numbers GD-16-14101, GD-16-14118 and GD-16-14123. The complaint alleges money loaned by Charter One Bank, N.A. and then assigned to Plaintiff. Defendants have filed Preliminary Objections asserting that the complaints are defective under rule 1019(1) because the assignment, on which Plaintiff bases its claim is not attached. Defendant argues that the document is too cryptic and does not identify Defendants. In support of their argument, Defendant's cite a recent opinion by my colleague, the Honorable R. Stanton Wettick involving this same Plaintiff and Defendants named *Mikhail M. Mishkov (Mishkov) and Tatyana M. Perkins (Perkins)*, at Docket No. AR-16-001701.

After review and analysis I agree with the Wettick ruling and find that Plaintiff has not complied with Rule 1019(1) in that the Pool Supplement Agreement does not identify Defendants, or anyone else, for that matter.

Defendants also argue that the verification to the complaint is defective. They cite another Wettick opinion in *Citibank (South Dakota) v. Paul A. Mszyco*, AR-10-004428, where he found that a verification by an agent or "Attorney In Fact" for the plaintiff did not satisfy the requirement of Rule 1024(c), VIZ, the core of the rule is "That a party verify the pleading unless all the parties lack sufficient knowledge or information or belief and that a non-party who makes the verification states that he or she has sufficient information and describe the Source of that Information". (emphasis supplied)

The verification tendered here is from an authorized representative (but not the party) who says he is employed by the Servicer of the loan and the Facts set forth are known to him in his servicer capacity and are true and correct.

As noted above an authorized representative of Plaintiff but who may also be the servicer is not the verification of a party. Hence the verification is defective.

Accordingly, it is ordered the Plaintiff file an Amended Complaint curing these two defects and do so within 90 days. Preliminary Objection sustained. All three cases consolidated at Docket No. GD-16-14101.

So Ordered,
/s/O'Reilly, S.J.

March 8, 2017

PITTSBURGH LEGAL JOURNAL

OPINIONS

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**This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*

PLJ

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OPINIONS

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Commonwealth of Pennsylvania v. Courtland Mitchell*

Criminal Appeal—Evidence—Weight of the Evidence—Admission of Forensic Interview—Taint—Prior Consistent Statement

Nine year-old-girl freezes on the stand in front of abuser and thereafter her preliminary hearing testimony is admitted at trial.

No. CP-02-CR-07794-2016. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—December 13, 2017.

OPINION

On March 7, 2017, a jury found Appellant guilty of one count each of Unlawful Contact with a Minor, Endangering Welfare of Children (“EWOC”) and Corruption of Minors.¹ On June 22, 2017, this Court imposed a sentence of six to twelve months incarceration at the Unlawful Contact count, six months of intermediate punishment consecutive to incarceration at the EWOC count, and a five year period of consecutive probation at the Corruption of Minors count. Appellant’s Post Sentence Motion was denied on July 25, 2017. Appellant filed a Notice of Appeal on August 23, 2017 and a Concise Statement of Errors Complained of on Appeal on September 13, 2017.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges five errors on appeal. Appellant alleges this Court erred denying Appellant’s request for a hearing on the issue of taint. (Concise Statement of Errors Complained of on Appeal at 1). Next, Appellant alleges this Court abused its discretion by admitting the victim’s testimony from the preliminary hearing. *Id.* at 2. Appellant further alleges that this Court erred in admitting the March 23, 2016 audio/video recording of the victim’s statement to Jamie Mesar. *Id.* at 3. In addition, Appellant alleges that this Court erred in permitting the victim’s mother to testify to statements the victim made to her. *Id.* at 5. Lastly, Appellant alleges that the verdicts for Unlawful Contact with a Minor, EWOC, and Corruption of Minors were against the weight of the evidence. *Id.* at 6.

SUMMARY OF THE EVIDENCE

On February 17, 2017, this Court held a pretrial hearing on the issues of competency and taint. This Court considered Appellant’s Pre-trial Motion requesting a taint hearing, as well as briefs filed on behalf of the Commonwealth and Appellant. (Transcript of hearing on Pretrial Motion, Feb. 17, 2017, hereinafter PT at 3) This Court informed Appellant the burden is his to produce some evidence beyond mere speculation before this Court could grant a hearing on the issue of taint. *Id.* Appellant failed to present any evidence of taint beyond mere speculation. (PT 8) Appellant’s allegation that the victim had many conversations with family members about the allegations is belied by the record, which indicated two conversations between the victim and her mother prior to the forensic interview. (PT 7-8) Thereafter, this Court conducted a competency hearing and deemed the child witness S.W. competent to testify at trial. (PT 9)

At trial, S.W., the nine year old victim, testified fully regarding numerous aspects of her daily life. (Transcript of Jury Trial, Mar. 1-7, 2017, hereinafter TT, at 45-48, 61-64) However, when the Commonwealth asked her specifics regarding Appellant, her step-grandfather, S.W.’s demeanor would change and she would become nonresponsive. (TT 52-53, 67, 72, 76) This Court observed that the witness appeared to be “frozen” on the witness stand, looking downward and failing to answer those questions asked. (TT 55) The most explicit S.W. was in her testimony was when she stated that she told her mother that “he like did bad things to like me and my body.” (TT 74)

After her testimony, the Commonwealth moved to admit S.W.’s testimony from the preliminary hearing as a prior inconsistent statement. (TT 76) After brief argument by opposing counsel, this Court granted the motion and admitted her prior testimony from the preliminary hearing as both an inconsistent and a consistent statement under *Commonwealth v. Brady* and *Commonwealth v. Hunzer*. (TT 82) The preliminary hearing transcript was read into the record. (TT 88)

S.W. testified at the preliminary hearing that Appellant once licked her ear while the rest of her family was out of the home picking up Chinese food. (Transcript of Preliminary Hearing, July 1, 2016, hereinafter “PT” at 16). She testified that Appellant touched her buttocks underneath her clothes, (PT 17) kissed her on more than one occasion and put his tongue in her mouth, (PT 19) and he kissed her vagina under her clothes on more than one occasion. (PT 21-22)

Dr. Jennifer Wolford from the Children’s Hospital of Pittsburgh Child Advocacy Center testified that she conducted a physical exam on S.W. (TT 93) Despite a small amount of hymenal tissue irritation, Dr. Wolford testified that the exam was “entirely normal.” (TT 95) She stated that the lack of physical evidence does not rule out that a child has been abused. (TT 103)

Jamie Mesar, also from the Children’s Hospital of Pittsburgh Child Advocacy Center testified that she conducted a forensic interview of S.W. on March 23, 2016. (TT 106) Mesar testified that the interview had been recorded. (TT 109) Over the objection of counsel for Appellant, the forensic interview video was played in open court for the jury. (TT 111)

During the forensic interview, S.W. disclosed to Mesar that Appellant stuck his tongue in her mouth and it grossed her out. (Transcript of forensic interview, Mar. 23, 2016, hereinafter FT at 9) Later in the interview, S.W. stated that Appellant put his tongue inside her vagina. (FT 12-13) Appellant would squeeze her butt while this happened. (FT 13) He would also lick her buttocks. (FT 14) The first time he did this was when she was in kindergarten and the last time was earlier that year. (FT 15) S.W. described other interactions with her grandfather, including one where he said “[N]ow that no one’s here, um, let’s kiss.” and asking her if she kisses on the first date. (FT 18-19) S.W. also said that no one told her what to say at this interview. (FT 22)

S.W., S.W.’s mother, testified that she became aware of some inappropriate kissing between her mother-in-law (Appellant’s wife) and some of the grandsons. (TT 124) She asked her sons, S.W.’s brothers, if their grandmother kissed them on the lips. (TT 125) One child denied and another said it happened “all the time.” (TT 126) S.W.(mother) testified that after she asked the boys, S.W. came down the stairs and S.W.(mother) decided to ask S.W. about her grandmother. *Id.* S.W.(mother) then asked S.W. if her grandmother ever did anything that made her feel uncomfortable. (TT 127) S.W. said that her grandmother once rubbed Vaseline on her and that made her feel uncomfortable. *Id.* S.W.(mother) then asked if Pop-Pop (Appellant) had ever done anything that made her feel uncomfortable. (TT 128) S.W. paused, started breathing heavily, and then responded with a few “um”s before saying no. *Id.* S.W.(mother) said that S.W. got off her lap and pulled her off of the couch and led her upstairs, away from her brothers, and into S.W.(mother)’s bedroom. *Id.* Once upstairs, S.W.(mother) asked S.W. again if “Pop-Pop” ever did anything that made her feel uncomfortable. *Id.* S.W. told her mother that Appellant kisses her and “stick[s] his tongue in my mouth” and that it happens “a lot.” (TT 130)

Detective Robert Synowiec testified that he interviewed Appellant on April 6, 2016. (TT 155) Appellant denied the allegations and denied that he was ever alone with S.W. (TT 165)

Appellant testified in his own defense, saying that he has never been accused of a crime before and that he was a father figure to his wife's children. (TT 276) He spoke at length regarding the family dynamics, specifically the tension which arose when certain family members failed to call and check on him when his wife was away. (TT 284-287) Appellant also discussed the failed attempt to work through the family's issues at the restaurant. (TT 289-290) He denied sexually touching S.W. or putting his tongue in her ear. (TT 295) He admitted that he played "dollies" with S.W. and pretended to go on dates with her, pretended to go to the movies, swimming, and specifically pretended to be her boyfriend. (TT 301) He denied asking S.W. if she kissed on the first date. (TT 302)

Clarnece Mitchell, Appellant's wife of 35 years, testified that she had never been accused of inappropriately kissing her grandchildren. (TT 249) She testified that in February of 2016, prior to any allegations of Appellant's sexual misconduct with his granddaughter, she and Appellant met with S.W.'s parents at a local restaurant to resolve some differences. *Id.* The family caused a scene to the extent that she thought the police would be called. (TT 251) She testified that she never observed anything in S.W.'s demeanor or interaction with Appellant that gave her pause or concern. (TT 254)

Lastly, M.W., S.W.'s father, testified that he kept any conflict between himself and Appellant away from S.W. (TT 322)

DISCUSSION

Appellant alleges this Court erred denying Appellant's request for a hearing on the issue of taint. An allegation of taint is related to the concept of competency. In Pennsylvania, the general rule is that every witness is presumed to be competent. *Commonwealth v. Delbridge*, 855 A.2d 27, 39 (Pa.2003), *opinion after remand*, 859 A.2d 1254 (Pa.2004); Pa.R.E. 601(a). However, young children must be examined for competency pursuant to the following test:

- (1) The witness must be capable of expressing intelligent answers to questions;
- (2) The witness must have been capable of observing the event to be testified about and have the ability to remember it; and,
- (3) The witness must be aware of the duty to tell the truth.

Delbridge, 855 A.2d at 39. An allegation of taint centers on the second element of this test. *Id.*

The standard for an allegation of taint is clear and convincing evidence. *Commonwealth v. Lukowich*, 875 A.2d 1169, 1173 (Pa. Super. 2005), *appeal denied*, 584 Pa. 706, 885 A.2d 41 (2005).

Where an allegation of taint is made before trial the "appropriate venue" for investigation into such a claim is a competency hearing. *Delbridge*, 578 Pa. at 664, 855 A.2d at 40. A competency hearing is centered on the inquiry into "the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth." *Id.*, 578 Pa. at 663, 855 A.2d at 40.

Commonwealth v. Judd, 897 A.2d 1224, 1228-29 (Pa. Super. 2006). However, before this Court could address taint at a competency hearing, Appellant was required to proffer some evidence of taint beyond mere speculation.

In order for the court to investigate the issue of taint at a competency hearing, however, the moving party must come forward with evidence of taint. *Id.*, 578 Pa. at 664, 855 A.2d at 40. Once the moving party comes forward with some evidence of taint, the court must expand the scope of the competency hearing to investigate that specific question. *Id.* The party alleging taint bears the burden of production of "some evidence" of taint as well as the ultimate burden of persuasion to show taint by clear and convincing evidence after any hearing on the matter. *Id.*, 578 Pa. at 664-665, 855 A.2d at 41. When determining whether a defendant has presented "some evidence" of taint, the court must consider the totality of the circumstances surrounding the child's allegations. *Id.*, 578 Pa. at 664, 855 A.2d at 41. Some of the factors that are relevant in this analysis are: (1) the age of the child; (2) the existence of a motive hostile to the defendant on the part of the child's primary custodian; (3) the possibility that the child's primary custodian is unusually likely to read abuse into normal interaction; (4) whether the child was subjected to repeated interviews by various adults in positions of authority; (5) whether an interested adult was present during the course of any interviews; and (6) the existence of independent evidence regarding the interview techniques employed. *Id.*

Commonwealth v. Judd, 897 A.2d 1224, 1228-29 (Pa. Super. 2006).

Appellant's taint allegation was not supported by the proffer. S.W. was eight years old at the time of the abuse and nine years old at the preliminary hearing. S.W. had two conversations with her mother regarding the allegations prior to the forensic interview. While the family had a disagreement over the adult children not checking in with Appellant while their mother was away, that type of ordinary family squabble is not the type of circumstance which might reasonably cause a parent to coach a child to falsely accuse a step-grandfather of inappropriate sexual conduct. Unlike, for example, a situation where parents are going through divorce and custody proceedings, or where a jilted mother may seek revenge against a paramour who broke her heart or otherwise caused her substantial pain, S.W.'s parents had full custody of S.W. and had nothing to gain from having their daughter make false sexual allegations. None of the other *Judd* factors support an allegation of taint. This Court conducted a competency hearing before trial and S.W. was deemed to be competent. Finally, the jury was permitted to hear testimony regarding the family dispute and the circumstances around the original disclosure. To the extent that the testimony raised questions of S.W.'s credibility, it was presented to the jury.

Appellant next alleges this Court abused its discretion by admitting the victim's testimony from the preliminary hearing. Appellant further alleges that this Court abused its discretion in permitting the Commonwealth to admit the victim's forensic interview video as a prior consistent statement. Appellant alleges that this Court erred in permitting the victim's mother to testify to statements the victim made to her. These allegations of error are substantially similar in nature and can be addressed together.

When offered for the truth of the matter asserted therein, prior consistent statements are usually inadmissible hearsay. However, when offered to corroborate in-court testimony, a prior consistent statement is not hearsay. *Commonwealth v. Willis*, 552 A.2d 682, 691 (Pa. Super. 1988).

The general rule precluding corroboration of unimpeached testimony with prior consistent statements is subject to exceptions when particular circumstances in individual cases tip the relevance/prejudice balance in favor of admission. Among the common examples of such exceptions are prior consistent statements which constitute prompt complaints of sexual assault. . . Evidence of a prompt complaint of sexual assault is considered [e]specially relevant because (rightly or not) a jury might question an allegation that such an assault occurred in absence of such evidence. . . Similarly, jurors are likely to suspect that unimpeached testimony of child witnesses in general, and child victims of sexual assaults in particular, may be distorted by fantasy, exaggeration, suggestion, or decay of the original memory of the event. Prior consistent statements may therefore be admitted to corroborate even unimpeached testimony of child witnesses, at the trial court's discretion, because such statements were made at a time when the memory was fresher and there was less opportunity for the child witness to be effected by the decaying impact of time and suggestion.

Commonwealth v. Hunzer, 868 A.2d 498, 512 (Pa. Super. 2005) quoting *Willis*, 552 A.2d at 691-692. The rule regarding use of a prior inconsistent statement is articulated through *Commonwealth v. Brady* 507 A.2d 66 (Pa. 1986), and its progeny.

We did not address in *Brady* under what circumstances a prior inconsistent statement would be considered highly reliable so as to render the statement admissible as substantive evidence. The issue was subsequently addressed in *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992). We held that a prior inconsistent statement by a non-party witness shall be used as substantive evidence only when it was given under oath at a formal legal proceeding, or the statement was reduced to a writing signed and adopted by the declarant, or the statement was recorded verbatim contemporaneously with the making of the statement.

Commonwealth v. Wilson, 707 A.2d 1114, 1116 (Pa. 1998).

S.W.'s testimony at trial could be construed both as consistent and as inconsistent with her prior statement to S.W.(her mother), to Ms. Mesar at the forensic interview, and during the preliminary hearing. At trial, S.W. testified and responded well to preliminary matters but when asked questions specific to the underlying allegations, she looked down at her feet and was generally unresponsive. She did, however, testify that she told her mother that her grandfather did bad things to her that S.W. did not like. As her prior testimony at the preliminary hearing was under oath and subject to cross-examination, and as S.W. did testify about the underlying allegations at that hearing, S.W.'s preliminary hearing testimony is admissible under *Hunzer* and *Wilson*.

The exceptions defined by the Superior Court for admissibility of prior consistent statements include child victims of sexual assault. The forensic interview falls within this exception, and this Court did not abuse its discretion by admitting the transcript. The forensic interview was played for the purpose of corroborating S.W.'s testimony at the preliminary hearing as well as the trial. *Hunzer*, 868 A.2d at 512. Courts have long recognized that a prior consistent statement of a child in a sexual assault case is particularly relevant and probative. *Hunzer*, 868 A.2d at 512. In this case, the probative value of establishing that the child's testimony had not been "distorted by fantasy, exaggeration, suggestion, or decay of the original memory of the event" outweighed any potential danger of unfair prejudice.

Next, Appellant alleges this Court abused its discretion by permitting the victim's mother to testify regarding the victim's disclosure to her that Appellant had performed oral sex on her. S.W.'s statement to her mother was substantially similar to her testimony from the forensic interview and from the preliminary hearing. S.W.(mother)'s testimony also qualifies as a prior consistent statement, admissible under *Hunzer*. Furthermore, S.W.(mother)'s statement was offered in response to Appellant's allegations of fabrication and improper motive. Pa.R.E. 613(c); See *Commonwealth v. Taylor*, No. 1168 MDA 2014, 2015 WL 6949312, at *4 (Pa. Super. July 7, 2015) (non-precedential) (Under similar facts, the Superior Court of Pennsylvania found such a statement to be admissible.)

Lastly, Appellant alleges that all of the verdicts were against the weight of the evidence. The standard for a "weight of the evidence" claim is as follows:

A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court. An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings.

Commonwealth v. Cousar, 928 A.2d 1025, 1035-36 (Pa. 2007).

The jury reasonably found credible the testimony of the victim, S.W. A fair reading of the evidence supports the conclusion that Appellant waited for opportunities to be alone with his minor granddaughter. When he found himself in this situation he engaged in mouth to mouth kissing and inserted his tongue into her mouth. He further engaged in oral sex with her on more than one occasion. Upon further review of the evidence, this Court's sense of justice is not shocked by the jury's verdict in this case as it was not against the weight of the evidence but rather supported by it.

CONCLUSION

For all of the above reasons, the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

¹ 18 Pa.C.S. §§ 6318 (a) (1), 4304 (a) (1), and 6301 (a) (1) (ii), respectively. Appellant was found not guilty of Involuntary Deviate Sexual Intercourse (18 Pa.C.S. § 3123 (a) (1)) and Indecent Assault (18 Pa.C.S. § 3126 (a) (7)).

*This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

Commonwealth of Pennsylvania v. Terrill Hicks

Criminal Appeal—Sentencing (Discretionary Aspects)—Juvenile Lifer Without Parole—Standard Range Sentence

Upon remand, the trial court sentences the juvenile who committed homicide to 35 years to life in prison.

No. CP-02-CR-0006205-2007. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Rangos, J.—November 13, 2017.

OPINION

In an opinion dated November 18, 2016, the Superior Court of Pennsylvania instructed this Court “to resentence Appellant in accordance with the factors set forth in *Knox*¹ and *Miller*². *Commonwealth v. Hicks*, 151 A.3d at 230. On July 21, 2017, this Court re-sentenced³ Appellant, Terrill Javon Hicks, on one count of Murder of the First Degree, to 35 years to life imprisonment, with consecutive sentences of 10 to 20 years for Criminal Attempt-Homicide, and 2 ½ to 5 years for Aggravated Assault. This Court denied Appellant’s Motion for Post Sentence Relief on July 26, 2017. Appellant filed a Notice of Appeal and a Statement of Errors Complained of on Appeal on August 8, 2017.

MATTERS COMPLAINED OF ON APPEAL

Appellant contends that the re-sentences of 35 years to life imprisonment for Murder in the First Degree, 10 to 20 years imprisonment for Criminal Attempt-Homicide and 2 ½ to 5 years imprisonment for Aggravated Assault, imposed consecutively, resulted in a sentence which was individually and manifestly excessive. (Statement of Errors to be Raised on Appeal, p. 7). Appellant alleges that this Court failed to adequately weigh Appellant’s remorse, acceptance of responsibility for his actions, and his progress toward rehabilitation. *Id.*

SUMMARY OF EVIDENCE

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

DISCUSSION

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

Since Appellant’s allegation of error is substantially similar to his allegation of error in his prior appeal, which the Superior Court determined to have raised a substantial question, this Court will address the merits of Appellant’s allegation of error. The standard of review with respect to sentencing is whether the court abused its discretion. *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996). A court will not have abused its discretion unless “the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.” *Id.* In sentencing Appellant, this Court must consider the protection of the public, the rehabilitative needs of the offender, and the gravity of the offense as it relates to the victim and the community. 42 Pa.C.S. § 9721(b).

Appellant was originally sentenced on August 2, 2010 to the then-mandatory term of life imprisonment for his conviction of Murder of the First Degree. Due to the subsequent decision in *Miller v. Alabama*, Appellant was re-sentenced.⁴ In response to *Miller v. Alabama*, Pennsylvania enacted 18 Pa.C.S. § 1102.1, which provides the mandatory minimum sentences for juvenile murderers. A court is required to sentence a juvenile between ages 15-18 who commits a Murder in the First Degree to at least 35 years to life imprisonment. 18 Pa.C.S. § 1102.1(a) (1).

In accordance with § 1102.1, this Court resentedenced Appellant on October 23, 2014 to 35 years to life imprisonment. Again the case was appealed, and eventually remanded, pursuant to the holding in *Batts II*⁵, for the Court to resentence upon consideration of the sentencing factors outlined in *Knox* and *Miller*. The Court in *Knox* listed several factors to consider at resentencing:

Therefore, although *Miller* did not delineate specifically what factors a sentencing court must consider, at a minimum it should consider a juvenile’s age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Commonwealth v. Knox, 50 A.3d 732, 745 (Pa. Super. 2012).

At the July 21, 2017 resentence hearing, this Court considered the sentencing factors in *Knox* and *Miller*, the 18 Pa.C.S. § 1102.1(a) (1) factors, as well as the totality of information presented to fashion an individualized sentence. (Transcript of Resentencing Hearing, July 21, 2017, hereinafter “RT” at 16) Assistant District Attorney Jennifer DiGiovanni reviewed the *Knox/Miller* sentencing factors at the resentence hearing on July 21, 2017.

If we just look at *Knox* and *Miller* sentencing factors quickly, Your Honor, obviously the Defendant was a little over 15 years old at the time [of] this offense. The decertification transcript showed that he had a low to average IQ. He got his GED while incarcerated. The circumstances of the crime I have already accounted, except for the interpretation of the crime. He obviously was the primary person participating on the crime.

* * *

The notion of maturity and development. We know that Mr. Hicks was expelled from school in December of 2006 due to violence and aggression. He was identified at school, and this [is] in some decertification materials, as being a member of a gang.

The extent of family or peer pressure may have [a]ffected him. As I noted in 2015, Raymont Walker [his co-defendant] was likewise 15. So there remains external influence on Mr. Hicks, and there was some testimony to that effect that the person he was palling around with in those days leading up to the crime was the same age as he was.

Past aggressive violence, there was no [] testimony about that. Drug and alcohol history. The Defendant told one of the evaluators that he did not drink alcohol and rarely smoked marijuana because he didn't like the effect that it had on him.

His ability to deal with the police. I think it's important to note that the Defendant lied during both the police interviews. During the first police interview right after the homicide, he gave a false alibi saying he was with the family of his co-defendant, Raymont Walker, at the Monroeville Mall and later went to a church party.

So even at 15 years old, he had the ability to sit down and speak with the police and lie to them.

* * *

His capacity to assist his attorney, there's been no testimony that he is unable to do that.

Mental health history. In his original decertification evaluation by Mr. Metusak, there is no history.

Finally, Your Honor, potential for rehabilitation, I think I have already covered that.

(RT 13-14)

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

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

CONCLUSION

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

BY THE COURT:

/s/Rangos, J.

¹ *Commonwealth v. Knox*, 50 A.3d 732 (Pa. Super 2012).

² *Miller v. Alabama*, 567 U.S. 460 (2012).

³ For a detailed summary of the prior procedural history, *See Opinions*, Feb. 8, 2012, and Feb. 29, 2016.

⁴ In *Miller v. Alabama*, the Supreme Court held that “mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.” *Miller v. Alabama*, 567 U.S. 460 (2012).

⁵ *Commonwealth v. Batts*, 66 A.3d 286, 295 (Pa. 2013).

Commonwealth of Pennsylvania v. Terelle L. Smith

Criminal Appeal—Sufficiency—Photo of Tattoo—Flight to Avoid Apprehension

Trial court agrees that evidence is insufficient to support flight to avoid apprehension charge.

No. CC 2014 14 980. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Williams, J.—December 19, 2017.

OPINION

Mr. Smith was convicted after a jury disbelieved his alibi witnesses. According to him, he was at a nearby hospital when a City of Pittsburgh officer, who knew him from prior interactions, spotted someone and that someone ran after pulling a gun from the waistband of his pants.

The jury's decision was October 16, 2015. Sentencing took place on January 20, 2016. His punishment was 4-8 years incarceration for possessing a firearm with an altered serial number and 2 years of consecutive probation. At count 2, carrying a firearm without a license, the Court imposed a consecutive 8 years of probation.¹ The Court imposed no penalty on the third count – flight to avoid apprehension. His trial counsel, Hart Hillman, filed no post sentence motions nor did he file an appeal.

On September 13, 2016, Mr. Smith filed a *pro se* request for post-conviction relief. After hearing from the government, PCRA relief was granted in the form of allowing Mr. Smith to file a post sentence motion. On July 17, 2017, his post sentence motion was denied but for the correction of his sentence on count 2 from 8 years of probation to seven. On August 16, 2017, a Notice of Appeal was docketed. On October 10, 2017, Mr. Smith penned his Concise Statement. He raises two issues. Both will be addressed although in reverse order.

Smith has a tattoo on his chest. It says “De Ruad Mob”. This incident happened on De Ruad Street. A rather short street in the City of Pittsburgh not far from UPMC-Mercy Hospital and PPG Paints Arena, the home of the current Stanley Cup Champion, Pittsburgh Penguins. Before trial this admissibility of the “tattoo” was brought up. The Court heard from both sides. Ultimately, the Court authorized a photograph to be taken of the tattoo and that photograph was then admitted. The basis for its admission was its relevance outweighed the prejudice. The case was tried through the filter of an alibi offered by Mr. Smith. Him having a tattoo made it more probable than not that he would be on that very street when the officer saw him immediately before the chase began.

Smith’s other argument hits the mark. He claims the government failed to present sufficient evidence to support a conviction for Flight to Avoid Apprehension. Smith is right.

The Court has reviewed the government’s evidence and has not uncovered a sufficient quantity of evidence that supports the jury’s verdict of guilt. In fact, the only “evidence” the Court found is a stipulation between the parties.² Trial Transcript, pg. 222. The stipulation was:

The defendant was previously convicted of a felony as of Sept. 17, 2014, the date of this incident.

T.T.114, 195. This is simply not enough. The jury needed more facts. The evidence did not show he was avoiding trial. In fact, the evidence showed his trial was over and done with. The evidence did not show he was avoiding punishment or avoiding something that might flow from a sentence, like a probation violation warrant. *See, Commonwealth v. Steffy*, 36 A.3d 1109 (Pa. Super.2012). The totality of the government’s evidence fails to answer the quintessential question in this type of case – What was he avoiding? On this record that simple question remains a mystery. The conviction at Count 3 should be reversed and Mr. Smith should be adjudicated not guilty of this accusation.

Our Department of Court Records should send the certified record of this case to our Superior Court in due course.

BY THE COURT:
/s/Williams, J.

¹ The penalty exceeded the maximum by a year and was modified through the granting of PCRA relief which then prompted the filing of a post sentence motion.

² The Court quotes “evidence” because a stipulation is not evidence. The facts underlying the stipulation are what a jury can believe or disbelieve. The fact that both sides agree to certain facts does not mean a fact finder must accept them.

Commonwealth of Pennsylvania v. Dyllon Lee Powell

Criminal Appeal—Rule 600—Escape—Fugitive from Justice

Man escaped from work release and cannot be found for one year; his speedy trial rights are suspended while he is a fugitive from justice.

No. CC 201700426. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—December 4, 2017.

OPINION

The Appellant, Dyllon Powell (hereinafter referred to as “Powell”), was charged with escape, after failing to return to Riverside Community Corrections Center¹ at the expiration of a period of authorized work leave. Powell’s work leave began on March 4, 2016, at approximately 4:30 p.m., and he was to return to the corrections center no later than 3:00 a.m. on March 5, 2016. When Powell did not return to Riverside at the expiration of this leave period, an employee of the facility notified police. On March 5, 2017, the Pennsylvania State Police (hereinafter referred to as “PSP”) filed a criminal complaint charging Powell with one count of escape, and a warrant was issued for Powell’s arrest. The PSP thereafter attempted to locate Powell, but their attempts were unsuccessful. The PSP documented its efforts to execute the arrest warrant for Powell by way of a departmental document referred to as a due diligence of warrant service report.

On September 12, 2017, Powell was arrested on unrelated charges in Westmoreland County, at which time the outstanding arrest warrant was discovered. Powell was lodged in the Westmoreland County Jail on the unrelated charges on September 12, 2017, and was subsequently booked into the Allegheny County Jail on the escape charge, on December 13, 2016. On or about April 28, 2017, Powell filed a Motion to Dismiss pursuant to Pa.R.Crim.P. 600, in which he alleged that his speedy trial rights had been violated. A Rule 600 hearing was held on May 16, 2017, after which this Court denied Powell’s Rule 600 Motion to Dismiss. Powell waived his right to a jury trial, and a non-jury trial commenced on June 9, 2017. Powell was found guilty on the single escape charge, and was sentenced to time served, and three (3) years of supervised probation.

Powell filed Notice of Appeal to the Superior Court, on or about July 10, 2017. This Court thereafter issued an Order directing Powell to file his statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Powell timely filed his 1925(b) statement on September 28, 2017. In his statement of matters complained of on appeal, Powell alleges that this Court erred in denying his Rule 600 Motion, arguing that the Commonwealth did not exercise due diligence in attempting to bring him to trial within the 365-day period prescribed by Rule 600. Powell therefore argues that his Rule 600 Motion to Dismiss should have been granted.

Rule 600 of the Pennsylvania Rules of Criminal Procedure (hereinafter referred to as “Rule 600”) provides, in relevant part: “[t]rial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.” Pa.R.Crim.P. 600 (A)(3). Under Rule 600’s speedy trial rule, the Commonwealth must make a reasonable effort to bring a defendant to trial within the prescribed 365-day period. *Com. v. Hunt*, 2004 Pa.Super. 358 (2004). Rule 600 serves two equally important functions: (1) the protection of the accused’s speedy trial rights, and (2) the protection of society. *Com. v. Horne*, 2014 Pa.Super. 58 (2014).

In determining whether an accused's right to a speedy trial has been violated, Pennsylvania courts must consider society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. *Com. v. Hunt*, 2004 Pa.Super. 358. Rule 600's speedy trial mandate was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth. *Id.* So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the speedy trial rights of an accused, Rule 600 must be construed in a manner consistent with society's right to punish and to deter crime. *Id.*

The date by which a trial must commence under Rule 600 is referred to as the mechanical run date, and is calculated by adding 365 days to the date on which the criminal complaint is filed. *Com. v. Cook*, 544 Pa. 361, n. 12 (1996) *cert. denied*, 519 U.S. 1119 (1997). The plain language of Rule 600 makes clear that the Rule's 365-day speedy trial period is applicable only when the defendant is at liberty on bail. Pa.R.Crim.P. 600(A)(3). In the instant matter, Powell was not at liberty on bail during the period of time from the filing of the complaint and the date on which his non-jury trial commenced. To the contrary, Powell was a fugitive from justice from March 5, 2016, the date on which he escaped from the Riverside Community Corrections Center, and September 12, 2016, the date on which he was arrested on unrelated charges in Westmoreland County. Powell absconded from the Riverside Community Corrections Center, and did not voluntarily return at any time after his escape. Accordingly, he cannot assert that his speedy trial rights were violated.

Rule 600's time limitations are not absolute. Rule 600(C) and Rule 600(G) operate to modify the mechanical run date under certain circumstances. Assuming, *arguendo*, Rule 600's speedy trial mandates do apply in Powell's case, the period of time between the filing of the criminal complaint for escape and his subsequent arrest are excludable pursuant to Rule 600(C). Rule 600(C)(1) defines excludable time as, "the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence." Once the mechanical run date is modified pursuant to Rule 600(C), it becomes the adjusted run date. *Com. v. Ramos*, 2007 Pa.Super. 335 (2007).

If the defendant's trial commences prior to the adjusted run date, the court need go no further in addressing a Rule 600 motion. *Id.* If, however, the defendant's trial takes place outside of the adjusted run date, the court must determine, pursuant to Rule 600(G), whether the delay occurred despite the Commonwealth's due diligence. The Commonwealth bears the burden of proving, by a preponderance of the evidence, that its efforts were reasonable and diligent, in order avail itself of an extension pursuant to Rule 600(G). *Id.* A Rule 600 motion to dismiss must be denied where the Commonwealth exercises due diligence³ in bringing the case to trial before the run date. *Com. v. Trippett*, 2007 Pa.Super. 260 (2007).

The Superior Court succinctly summarized the process employed by Pennsylvania courts when considering a Rule 600 motion to dismiss:

[T]he courts of this Commonwealth employ three steps...in determining whether Rule 600 requires dismissal of charges against a defendant. First, Rule 600(A) provides the mechanical run date. Second, we determine whether any excludable time exists pursuant to Rule 600(C). We add the amount of excludable time, if any, to the mechanical run date to arrive at an adjusted run date. If the trial takes place after the adjusted run date, we apply the due diligence analysis set forth in Rule 600(G). As we have explained, Rule 600(G) encompasses a wide variety of circumstances under which a period of delay was outside the control of the Commonwealth and not the result of the Commonwealth's lack of diligence. Any such period of delay results in an extension of the run date. Addition of any Rule 600(G) extensions to the adjusted run date produces the final Rule 600 run date. If the Commonwealth does not bring the defendant to trial on or before the final run date, the trial court must dismiss the charges.

Com. v. Ramos, 2007 Pa.Super. 335, (internal citations omitted).

In the instant matter, Powell escaped from incarceration on March 5, 2016. A criminal complaint was filed on March 5, 2016, and a warrant was issued for Powell's arrest on the same day. Following the issuance of the arrest warrant, the Pennsylvania State Police commenced efforts to locate Powell. During Powell's Rule 600 hearing, members of the PSP testified that the agency disseminated the arrest warrant for Powell, along with other relevant information, to both state and local law enforcement agencies, the PSP Fugitive Task Force, and Crime Stoppers. *See* May 16, 2017, Rule 600 Hrg. Tr. 4-10. The PSP also utilized social media to attempt to locate Powell. *Id.* In addition, to their administrative efforts to locate Powell, a Trooper traveled to Powell's last known address and canvassed the neighborhood. *Id.* at 19. The PSP documented their attempts to locate Powell by way of a due diligence of warrant service report. *Id.* at 5; 18. Despite the efforts of the PSP, Powell evaded capture until September 12, 2016, when he was arrested on the unrelated charges in Westmoreland County, and the outstanding arrest warrant was discovered.

As the Superior Court observed in *Hunt*, *supra*, Rule 600 was not intended to insulate the criminally accused from good faith prosecution. Not only would adoption of Powell's argument in the instant appeal insulate him from good faith prosecution, it would also yield absurd results. Under the theory advanced by Powell, all that would be required for an escaped inmate to avoid punishment would be to avoid detection until 365 days have passed. Pursuant to Rule 600(C), the adjusted run date of the speedy trial period was September 12, 2016, the date on which Powell was arrested in Westmoreland County⁴. Powell's non-jury trial commenced on June 9, 2017, which is 271 days from the adjusted run date. Powell was therefore brought to trial within the requisite 365 days of the adjusted run date, and his Rule 600 Motion was properly denied.

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

Dated: December 4, 2017

¹ Pennsylvania Department of Corrections Detention Facility.

² Effective April 1, 2001, Pa.R.Crim.P. 1100 was amended and renumbered as Pa.R.Crim.P. 600.

³ Due diligence is fact-specific, to be determined case-by-case; "it does not require perfect vigilance and punctilious care, but merely a showing the Commonwealth has put forth a reasonable effort." *Com. v. Plowden*, 2017 Pa.Super. 61 (2017) (citing *Com. v. Selenski*, 606 Pa. 51, 61 (2010)).

⁴ Rule 600(G) arguably applies to extend the Rule 600 run date for the period from Powell's arrest in Westmoreland County to his transfer to the Allegheny County Jail. *See Com. v. McNear*, 2004 Pa.Super. 218 (2004) ("the defendant should be deemed unavailable for the period of time during which the defendant...was absent under compulsory process requiring his or her appearance elsewhere in connection with other judicial proceedings."). Using this method of calculation, the adjusted run date would be December 13, 2016. If the adjusted run date were calculated using this method, Powell was brought to trial within 179 days of the adjusted run date. However, a Rule 600(G) analysis was not necessary in the instant matter, because the earlier run date of September 12, 2016, places Powell's June 9, 2017, non-jury trial within Rule 600's 365-day speedy trial period.

PITTSBURGH LEGAL JOURNAL

OPINIONS

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In Re: Petition of Gregory A. Beluschak and at Least Five (5) Electors of the First Ward of the City of Clairton to Appoint Gregory A. Beluschak, a Registered Elector in and Resident of the First Ward of the City of Clairton, to fill the Current Vacancy on Clairton City Council for the First Ward of the City of Clairton, Allegheny County, Pennsylvania

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Appeal—Garnishment—Interlocutory

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PLJ

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OPINIONS

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**Deborah S. Johnson v.
Pennsylvania American Water Company,
the Municipality of Bethel Park and John Does 1-2**

Negligence—Nuisance—UTPCPL—Strict Liability

In action by Homeowners against Municipality and Water company for house fire damages resulting from non-functioning fire hydrants, preliminary objections sustained on nuisance counts. However, strict liability and UTPCPL claims permitted to go forward even though defendants were not manufacturers of defective fire hydrants. Negligent supervision claim permitted to go forward despite lack of allegations related to intentional acts.

No. GD-16-020584. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—March 9, 2017.

MEMORANDUM ORDER

This case involves a civil action claim filed by Plaintiff, Deborah S. Johnson, against Defendants Pennsylvania American Water Company (PAWC), the Municipality of Bethel Park (Bethel Park) and John Does 1-2 over incidents that occurred as a result of a fire at Plaintiff's home at 984 Willow Glen Drive, Bethel Park, on January 11, 2015. At approximately 2:50 p.m., fire crews from Bethel Park Volunteer Fire Company arrived at Plaintiff's Property to extinguish a house fire. Firefighters initially battled the fire with water contained in the firetruck but when they attempted to obtain additional water, all three nearby fire hydrants were either inoperable or had insufficient pressure. In her Complaint, Plaintiff alleges that as a result of the malfunctioning or nonfunctioning fire hydrants, firefighters were unable to contain the fire. Plaintiff claims that the fire hydrants were owned or maintained by the Defendants.

Plaintiff alleged eight counts in her Complaint including negligence, negligent supervision, strict liability, negligent infliction of emotional distress, public nuisance, private nuisance, breach of contract and a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). Plaintiff made no distinction among the four (4) defendants named and asserts all claims against all defendants.

Defendants PAWC and Bethel Park filed Preliminary Objections to Plaintiff's Complaint asserting that it only supports a cause of action for negligence even though the Complaint contained eight counts. Specifically, they claim that Plaintiff failed to state any cause of action aside from negligence. I agree to the extent that public nuisance, and private nuisance do not lie and the Preliminary Objections to those allegations are sustained and the nuisance allegations are dismissed with prejudice.

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Haun v. Community Health Systems, Inc.*, 14 A.3d 120, 123 (Pa. Super. 2011).

Plaintiff claims that Defendant PAWC failed to exercise ordinary care in instructing its employees to "properly maintain, inspect, repair, and replace the water lines responsible for providing water to Plaintiff Johnson's house." Defendants state that Plaintiff's negligent supervision claim cannot stand because Plaintiff made no allegations of intentional acts of any specific employees. *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968) citing *Restatement (Second) of Torts § 317* (1965). I do not accept this theory and find negligent supervision to simply be an element of negligence.

In her strict liability claim, Plaintiff alleges that the Defendants "supplied, sold distributed, installed, manipulated and placed into the stream of commerce the fire hydrants, water lines and water delivery system that was designed to provide water to Plaintiff Johnson's house in the event of a fire." Defendants state that this count cannot stand because Plaintiff does not allege that they are a manufacturer of a defective product. I do not believe manufacture of the malfunctioning lines or hydrants is a necessary pre-condition to this allegation.

In her negligent infliction of emotional distress claim, Plaintiff claims that she experienced "intense emotional distress" as a result of the fire and the loss of her pets. Pennsylvania law states that a claimant must allege physical injury or contemporaneous observance of injury to a close relative to state a claim for negligent infliction of emotional distress. *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979). At this juncture of the case, I will permit these allegations to stand so as to permit discovery. They may not survive Summary Judgment.

Plaintiff's breach of contract claim alleges that she entered into a contract with Defendants to supply water to her property. Defendant PAWC states that the Plaintiff's allegations are clearly barred by the gist of the action doctrine. *Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa. 2014). Plaintiff states that the gist of the action doctrine is inapplicable because the Defendants' duty arises independently of a contract. Both Defendants cite the fact that Plaintiff failed to attach a copy of the alleged contract to her Complaint. At Argument I asked whether an implied contract could exist under these factors. After review, I will let this allegation stand.

Finally, Plaintiff claims that the Defendants violated the UTPCPL. The UTPCPL makes it unlawful to engage in any deceptive trade practices, including "representing that goods or services are of a particular standard, quality or grade" or "engaging in any fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." 73 P.S. § 201-2. Defendant PAWC states that although they maintain the fire hydrants, they do not manufacture or sell them and therefore this incident cannot constitute a violation of the UTPCPL. As noted above, manufacture of the lines or hydrants is not a necessary pre-condition. Discovery will shed more light on what trade practices PAWC engages in.

Defendant Bethel Park claims that they are immune to liability under the UTPCPL because they are not a "person" within the meaning of the UTPCPL. This is an attractive argument at first blush, but Bethel Park is a municipal corporation and I think that is enough. Business corporations – persons – are sued all the time under UTPCL.

A claim for punitive damages appear in the Plaintiff's *ad damnum* clause and not as a separate count. Whether punitive damages are available is a function of the facts developed. I will let that stand for now.

To recapitulate, the nuisance allegations are dismissed but all other allegations survive Preliminary Objections and those Preliminary Objections are overruled. Defendants to answer in 30 days.

BY THE COURT:
/s/O'Reilly, S.J.

Dated: March 9, 2017

**In Re: Petition of Gregory A. Beluschak
and at Least Five (5) Electors of the First Ward of the City of Clairton
to Appoint Gregory A. Beluschak, a Registered Elector in and
Resident of the First Ward of the City of Clairton,
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**Re: Petition of Richard L. Lattanzi, Raymond A. Kurta
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to Appoint Raymond A. (“Tony”) Kurta to fill the Vacancy on Clairton City Council
Due to the Passing of Councilman John A. Lattanzi on October 24, 2016**

Home rule—Candidates—City Council

Under a Home Rule Charter, Court was tasked with deciding between two candidates to fill a vacated City Council position. The Court weighed the merits of each candidate, and chose one accordingly.

No. GD-16-23932, GD-16-23965 consolidated at GD-16-23932. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

O'Reilly, S.J.—March 27, 2017.

OPINION

This Matter involves a vacancy on the City Council of the City of Clairton, occurred by the death of a member of Council to which I appointed one Raymond A. Kurta (Kurta).

The vacancy occurred on October 24, 2016 when Councilman John A. Lattanzi, died.

The Home Rule Charter, which Clairton had adopted many years ago, provided a procedure to fill such vacancy. It gave Council 45 days to appoint a replacement. If Council cannot agree, the matter can then come to court if 5 electors of Clairton petition the court to make the appointment. That is how the case came before me.

Specifically, the above-referenced Kurta and another applicant for the seat, Gregory Beluschak (Beluschak), both sought appointment by the Council. Due to the death of Councilman Lattanzi, there were only 4 members of Council and the vote split 2 to 2.

Thereafter, on December 9, 2016, Beluschak, by counsel, appeared before me and presented a Motion to be appointed to the Vacancy. Said Counsel represented this Motion as “uncontested” so I signed it.

Shortly thereafter, Counsel for Kurta and also the City Solicitor filed a Motion to Vacate said order because they had not had notice of its presentation and the Motion was certainly not “uncontested”.

I heard argument on this issue on December 20, 2016 and Counsel for Beluschak did not deny the lack of notice but asserted none was required. Kurta and the City argued otherwise. I concluded that fundamental due process required notice particularly when Beluschak and his counsel were aware of Kurta's interest. Further, the representation that the Motion was uncontested was, in my judgment, sharp practice. After argument, I vacated my order. Beluschak's counsel advanced various arguments opposing the due process issue but I found none of them persuasive. Beluschak also contended that because I had signed the order, and he had immediately thereafter been sworn in, the only challenge was via a writ of *Quo Warranto*. I did not find this persuasive because the appointment had been made in violation of due process, and indeed fraud was committed when the motion was presented as uncontested. Accordingly I vacated my prior order.

Concurrent with the aforesaid proceedings, Kurta filed his own petition for appointment at Docket Number GD-16-23965. I consolidated these two petitions and set a hearing thereon for January 17, 2017.

At that hearing Beluschak testified on his own behalf as did the two members on Council who had voted for him. They were Richard L. Ford, III and Denise Johnson, both members of Council.

Similarly, Kurta testified on his own behalf as did the other two council persons, Richard L. Lattanzi and Levina Lashich. Kurta's cousin, Robert Kurta also testified.

In essence, then, my assignment was to assess the relative merits of the two applicants and the other testimony offered in their behalf. I found this to be an unenviable task given that both men evidenced a public spirit and a desire to serve their community.

Beluschak was a life-long resident of the City and had spent his entire working life with either the City or its Municipal Authority in a laborer capacity. He was on a disability leave and the likelihood of his returning to work was problematic. He had never held other office or been in a supervisory or managerial position. He was an active member of various social clubs in the city.

The council members who supported him thought he would do a good job if appointed and, more than likely, he would give them a majority on Council.

In this regard, the testimony was that Council usually voted unanimously on any issue that came before them. Although there may have been debate at non-public executive sessions but Council generally presented a united front and unanimity on all public votes.

Kurta testified that he was a manager with a Cable TV company serving the area (Comcast) and had 10 to 17 other employees under his supervision (N.T. 74). He was also active in the community and held an annual charity party to which the guest brought toys for distribution to disadvantaged children in the area. He coordinated this party and the distribution of the toys with the School District. Kurta, a non-drinker, does not belong to any of the social clubs in the city. The aforesaid members of Council, testified on Kurta's behalf and said they believed he was civic minded and always ready to lend a hand in any community project. Obviously his appointment would give the three (3) of them control of Council in the event of any dispute. None however was on the horizon and it seems the Council, for the most part, acted in harmony.

After analysis I determined that Kurta would be a better appointment for the city. I emphasized that I was *not* finding Beluschak to be unqualified, I simply pointed out that as between the two, Kurta was the better choice.

I entered an order to that effect at the close of the hearing. At that time an issue arose as to the length of the term to which Kurta was appointed. Beluschak argued that Kurta would have to seek election to the balance of the term in the May 2017 Primary.

Kurta contended the appointment was for the balance of John Lattanzi's term which ran until the first Monday in January 2020. After briefing and analysis, I found the term to which I appointed Kurta is to run until the first Monday in January 2020. I entered a Memorandum Order and an Order of Court to that effect and they are attached as Exhibit 1-A and 1-B. I have already stated my conclusions as to the *Quo Warranto* issue which I have found not applicable.

BY THE COURT:

/s/O'Reilly, S.J.

Dated: March 27, 2017

EXHIBIT 1-A

In Re: Petition of Gregory A. Beluschak and at Least Five (5) Electors of the First Ward of the City of Clairton to Appoint Gregory A. Beluschak, a Registered Elector in and Resident of the First Ward of the City of Clairton, to fill the Current Vacancy on Clairton City Council for the First Ward of the City of Clairton, Allegheny County, Pennsylvania

Re: Petition of Richard L. Lattanzi, Raymond A. Kurta and Five (5) Electors of the First Ward of the City of Clairton to Appoint Raymond A. ("Tony") Kurta to fill the Vacancy on Clairton City Council Due to the Passing of Councilman John A. Lattanzi on October 24, 2016

In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
No. GD-16-23932 and GD-16-23965 consolidated at GD-16-23932.
Hon. Timothy Patrick O'Reilly—February 14, 2017.

MEMORANDUM ORDER

I conducted a hearing on January 17, 2017 involving the filling of a vacancy on the City Council in the City of Clairton caused by the death of Councilman, John A. Lattanzi. I appointed one, Raymond A. Kurta (Kurta) to the vacancy.

An issue arose as to duration of the appointment, that is, whether it was for the remainder of the deceased Councilman's term which would be until the first Monday in January, 2020 or whether the vacancy was to be placed on the ballot for the Municipal Election in 2017 and the winner of that election in May 2017, would serve out the balance of the term.

I gave Counsel 20 days to file briefs on this issue and they have filed able and insightful briefs in support of their contending positions.

Counsel for Beluschak argues that the vacancy must be on the ballot for the upcoming May 2017 primary. He bases that argument on the introductory sentence to the relevant section of the Clairton Charter at 2404(a) which reads:

"... If a vacancy shall occur in any elective office in the municipality for any reason set forth in this Charter, the remaining members of the Council shall fill such vacancy by appointing a person eligible under the **Charter to hold such office until a successor is elected at the next municipal election. Such successor will serve the remainder of the unexpired term ...**"

(emphasis from Beluschak)

However, Counsel for Kurta cites to the second sentence of that section which reads:

"... If the Council shall fail to fill such vacancy within forty-five (45) days after the vacancy occurs, then the Court of Common Pleas of Allegheny County shall, upon petition of the Council or of any five (5) electors of that ward of the municipality whose Council seat is vacant, *fill the vacancy in such office by the appointment of an eligible resident of the municipality for the unexpired term of office ...*"

Beluschak argues that the first sentence should be controlling while Kurta argues the second sentence is controlling. Beluschak also argues that principals of Statutory Construction require the first sentence to take priority over the second, because that is the *only* way to achieve consistency between the two.

I fail to see how "consistency" is achieved by choosing the first sentence over the second. When consistency cannot be achieved and there is *direct* contradiction between parts of a statute, what is to be done?

We need to consult the Rules of Statutory Construction, 1 Pa.C.S.A. 1901 et seq at Section 1934. That section reads:

"... Except as provided in Section 1933 of this title (relating to particular controls general. Whenever in the same statute several clauses are irreconcilable, the clause last in order of date or position shall prevail ..."

Obviously, the second sentence then prevails by reason of its position and Kurta is to serve the remainder of the deceased Councilman's term.

To a like effect is the March 30, 2010 court order from my colleague, the Honorable Joseph M. James in the case of GD-10-4905 which also involved this City and this Charter. Judge James found an appointee to a vacancy on Council would serve the remainder of the term.

Beluschak also argues that the Home Rule Charter Legislation, which enables Home Rule Charters, "pre-empts" the Clairton in matters of filling vacancies. See 53. P.S. Sec. 2962.

Kurta however, cites the same legislation at 53.Pa C.S. Sec. 2961 for the proposition that powers of a municipality with a Home Rule Charter "shall be liberally construed". Further, any limitations imposed by the Home Rule law apply only to matters of "statewide concern" involving the health, safety, security and general welfare of all inhabitants of the State. *Devlin v. City of Philadelphia*, 862 A.2d 1234 (Pa 2004).

The filling of a vacancy in Clairton is not a matter of statewide concern and thus there is no pre-emption.

Based on the foregoing, I am satisfied that Kurta is to serve the balance of the term of the deceased, John A. Lattanzi and he need not seek election in the May 2017 Primary.

An appropriate order is attached.

BY THE COURT:
/s/O'Reilly, S.J.

February 14, 2017

EXHIBIT 1-B

In Re: Petition of Gregory A. Beluschak and at Least Five (5) Electors of the First Ward of the City of Clairton to Appoint Gregory A. Beluschak, a Registered Elector in and Resident of the First Ward of the City of Clairton, to fill the Current Vacancy on Clairton City Council for the First Ward of the City of Clairton, Allegheny County, Pennsylvania

Re: Petition of Richard L. Lattanzi, Raymond A. Kurta and Five (5) Electors of the First Ward of the City of Clairton to Appoint Raymond A. ("Tony") Kurta to fill the Vacancy on Clairton City Council Due to the Passing of Councilman John A. Lattanzi on October 24, 2016

In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
No. GD-16-23932 and GD-16-23965 consolidated at GD-16-23932.
Hon. Timothy Patrick O'Reilly—February 14, 2017.

ORDER OF COURT

AND NOW to wit this 14th day of February, 2017, upon consideration of the foregoing petitions it is hereby Ordered, Adjudged and Decreed that Raymond A. Kurta shall be appointed to fill the vacancy on Clairton City Council for the unexpired term of Councilman, John A. Lattanzi, deceased, which shall run until the first Monday in January, 2020.

BY THE COURT:
/s/O'Reilly, S.J.

Thomas P. O'Toole v. Ocwen Loan Servicing, LLC

Summary Judgment—Facts—Burden

Defendant moved for summary judgment because plaintiff failed to comply with a court order that required him to provide discovery. Court denied the motion as it held that summary judgment was an inappropriate remedy for noncompliance with a discovery request. Instead, the Court left it to the trial judge to determine what, if any, evidence plaintiff would be permitted to present at trial in light of his noncompliance.

No. GD-12-017261. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—May 24, 2017.

MEMORANDUM ORDER

This case involves a claim by Plaintiff, Thomas O'Toole (O'Toole) (*Pro Se*) that his mortgage loan has not been properly serviced by the Defendant, Ocwen Loan Servicing, LLC, (Ocwen). O'Toole contends that payments have not been applied properly and that Ocwen has also inappropriately assessed various penalties against him. O'Toole asserts counts of Breach of Contract, Unfair Credit Reporting and Fraud.

O'Toole has resisted efforts at Discovery and has either refused to supply any documentation for his claim or has not answered completely. Ocwen filed 3 Motions to Compel O'Toole to provide documentation and my colleague, the Honorable R. Stanton Wettick, on October 14, 2016 entered an order giving O'Toole 90 days to produce all documents he will use at trial. Under that order, compliance would have been required by January 12, 2017.

It appears that O'Toole never did comply with the Wettick order.

Ocwen filed its Motion for Summary Judgment on January 1, 2017 asserting basically that because of the Judge Wettick order of October 14, 2016, O'Toole could not present any documentary evidence in support of his Complaint. Thus, Summary Judgment should now be granted. I heard Argument on that Motion on April 12, 2017.

While the forgoing Argument of Ocwen is well-taken; I do not find it dispositive.

Rather, and given the rubric that Summary Judgment should be granted only if there is no dispute of material Fact and the non-moving party cannot prevail on the Facts of the case, I am inclined to permit O'Toole to proceed. Even under the Wettick order, O'Toole can still testify himself. Thus I am not inclined to grant the Motion.

I will leave to the Trial Judge the duty to rule on what O'Toole may offer if anything. But for now, this Motion for Summary Judgment is DENIED.

BY THE COURT:
/s/O'Reilly, S.J.

Dated: May 24, 2017

**Michael Coriston v.
All About Autos, LLC,
a Pennsylvania Limited Liability Company**

Auto—Repairs—Damages

The Court weighed evidence regarding damages to a diesel vehicle. After hearing expert testimony, the Court found defendants to be liable, but not completely at fault. The Court also lowered plaintiff's damages due to unnecessary and duplicative expenses.

No. AR 14-003948. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—September 21, 2017.

MEMORANDUM ORDER

This case involves a dispute between a vehicle owner and a repair garage as to whether or not the repairs made or attempted were so inept so as to virtually destroy the engine. Plaintiff, Michael Coriston filed suit against Defendant, All About Autos, LLC on September 16, 2014. I heard the matter on September 1, 2016 and both Plaintiff and Defendant testified. A third witness, a purported expert, one Andrew Bittenbinder was not available to testify but I permitted his deposition to be taken for use at trial and it was submitted to me on July 30, 2017. Plaintiff is Michael Coriston the owner of a certain 2003 Dodge Sprinter van which he used in his business of delivering small packages for Federal Express. The vehicle had a diesel engine with approximately 225,000 miles of use at the time involved herein.

Defendant, All About Autos, LLC is an automobile repair business owned by Bill Rathbun with which Coriston had dealt occasionally in the past. (N.T. 8)

I am satisfied that Bittenbinder is an expert in his field and that his hands on experiences with vehicles and engines of this type qualifies him to render an opinion. Further, he actually worked on this vehicle. While his testimony was somewhat disjointed and he showed combative and argumentative tendencies, I think he correctly diagnosed the problem with Coriston's vehicle. Counsel did not do a good job in helping the deposition flow smoothly and repeated interruptions and talking over the witness and each other exacerbated the problem.

In February 2013, Coriston began to experience a loss of power in the vehicle. He testified that he talked to All About Auto's owner, Mr. Bill Rathbun about the problem. There is some dispute as the Facts and circumstance surrounding this conversation. According to Coriston, when he spoke by telephone to Rathbun about the problem Rathbun opined that it was, or may be, a "glow plug" issue with the diesel engine. (N.T. 31) According to Rathbun, a "glow plug" diagnosis had already been made by Coriston and when he brought the vehicle in he had already purchased glow plugs to be installed. Rathbun asserted that the "glow plug" issue was diagnosed by Coriston alone. (N.T. 90)

Rathbun attempted to install the new "glow plugs" but broke off the existing glow plugs so that the threaded holes for the new plugs could not be accessed.

From this point, according to Bittenbinder, a cascade of misdiagnosis and ineptitude were performed on this engine which ultimately had to be replaced.

In his deposition, Bittenbinder opined that the loss of power being experienced by Coriston had nothing to do with "glow plugs" but rather was a result of the turbine or supercharger powering this engine. In his opinion the turbine was failing and caused the loss of power due to an electrical problem which could have been easily remedied.

Coriston's testimony was that after the glow plugs had broken off, at Rathbun's advice he took the head of the engine to be re-machined. As a result the vehicle could not be used and stayed at the Defendant's garage. It appears to have been stored outside with the hood open and was exposed to the elements. (N.T. 17)

The chronology here, as shown by Coriston's Expedition, is also worthy of consideration:

- 1) March 18, 2013 - \$846 for repair of head after the glow plugs broke off.
- 2) June 11, 2013 - \$1,200.00 to Defendant to install the refurbished head.
- 3) October 19, 2013 - \$2,700 to Rick's towing to tow vehicle to Schindler and purchase of parts needed.
- 4) March 24, 2014 - \$1,978 - remove, repair and install motor.
- 5) April 5, 2014 - \$3,500 - purchased rebuilt engine.

Other considerations are the age of the vehicle and the miles on the engine and circumstances under which Defendant stored the vehicle. Bittenbinder opined that diesel motors of this type usually run for 500,000 to a million miles.

The testimony was that the replacement engine failed shortly thereafter. I do not believe failure of the rebuilt engine gives rise to any further claim against Defendant. However, analysis of the facts and evidence does show that Defendant did not possess the necessary skill to properly service this engine and then his casual method of storage exacerbated the problem. I am not convinced that all of this cascade of events is all attributed to Defendants of this gross claim of \$12,926.70. (N.T. 30) I do believe that some of these expenses were unnecessary or duplicated.

Accordingly and after analysis a verdict of \$9,000.00 to Plaintiff is appropriate and the same will be entered. An appropriate verdict is attached.

BY THE COURT:
/s/O'Reilly, S.J.

Dated: September 21, 2017

**Brian W. Jones, Assignee of ARP Associates LLC, Plaintiff v.
John Skaro and Karen A. Skaro, Defendants
Dorothy Donauer, Intervenor
PNC Bank, Garnishee**

Appeal—Garnishment—Interlocutory

Court had previously opened a judgment against the garnishee, which plaintiff appealed. Court thereafter requested that the Superior Court quash the appeal as premature and interlocutory.

No. GD-09-007166. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—March 30, 2017.

OPINION

Plaintiff Brian Jones has appealed our order dated February 8, 2017, which opened a judgment against the garnishee and permitted PNC to file an amended answer to interrogatories in garnishment. Mr. Jones is the assignee of a judgment entered in the captioned matter against the Defendants, John and Karen Skaro. PNC, the Garnishee, filed its Amended Answer and New Matter on February 17, 2017, nine days after the entry of the order but after the Notice of Appeal was filed. According to the docket, Plaintiff, Brian W. Jones, has not filed an Answer to the New Matter. It is possible that his appeal is slightly premature because of this; the pending appeal prevents him from filing a response to the new matter. The appeal also should have prevented the filing of the Amended Answer to Interrogatories. We suggest the appeal should be quashed, without prejudice to Mr. Jones's right to file an appeal after the garnishment issue is fully dealt with so a final appealable order on that issue may be entered. If the appeal is not quashed, we will file a supplemental opinion on its merits.

BY THE COURT:
/s/Friedman, J.

Dated: March 30, 2017

PITTSBURGH LEGAL JOURNAL

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Motion to Vacate Award—Collective Bargaining

Plaintiff's motion to vacate an arbitrator's award was denied because the issue before the arbitrator was properly defined within the collective bargaining agreement, and the award was rationally derived, thus satisfying the two-prong "essence test." The arbitrator found that employer did not prove its burden of an unpaid suspension and termination and employee was entitled to reinstatement and back pay.

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Gist of the Action—PA Unfair Trade Practices and Consumer Protection Act

Plaintiff's complaint alleged that dentist breached contract and violated the PA Unfair Trade Practices and Consumer Protection Act (UTPCPL) by performing an unnecessary dental procedure. Court overruled preliminary objection asserting the gist of the action doctrine bars the breach of contract claim in light of Bruno v. Erie Insurance Company, 106 A.3d 48 (2014). Court sustained preliminary objection related to UTPCPL because the Superior Court has ruled that the legislature did not intend the act to apply to medical services.

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Post Trial Relief—Failure to Appear

Defendant's Motion for Post-trial Relief from arbitration verdict following Defendant's failure to appear was not overturned as Defendant's unsubstantiated speculation that his mailbox may have been pilfered was not sufficient to establish a breakdown of the court sufficient to set aside the verdict.

Weirton Medical Center, Inc. v. Introublezone, Inc., d/b/a Introublezone Productions, A Wyoming Corporation, and Paul Schneider and Lynda Schneider, husband and wife, O'Reilly, S.J.Page 77
Defamation

Preliminary objections sustained and claim for defamation dismissed. While publication of reality show pitch video on Vimeo online service satisfied the publication element of defamation, video contained nothing that identified the Plaintiff. Although Plaintiff's well known employee appeared in the video, this connection is not sufficient to give rise to a defamation cause of action.

The County of Allegheny v. Allegheny County Prison Employees Independent Union, O'Reilly, S.J.Page 78
Motion to Vacate Award—Sick Leave

Plaintiff's motion to vacate an arbitrator's award was denied. Arbitrator issued an award modifying the calculation of an employees' probationary period and determined that the employee was entitled to sick leave because employee had served his probationary period during his part-time employment before transitioning into a full-time role in the same position.

Forest Highlands Community Association v. Stone Fox Capital, LLC, Friedman, J.Page 78
Default Judgment—Foreclosure—Attorney as Witness

The Court granted Plaintiff's motion to reassess a default judgment taken by Defendant homeowners association in foreclosure action for unpaid monthly maintenance charges. Additionally, the Court held that trial counsel may not testify as a witness for his or her client; and attorneys' fees were properly submitted by detailed affidavit for review by the Court, and Defendant failed to respond by counter-affidavit.

Judy Torma v. Parrot Construction Corp.; Paul Chambers, Friedman, J.Page 81
Arbitration Clause—Change Orders

The Court determined that a subsequent agreement was a change order to the original contract, not a separate agreement. Thus, the original contract's arbitration clause controlled the dispute and the arbitrator's award was proper.

PLJ

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OPINIONS

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Gateway School District v. Teamsters Local 205

Motion to Vacate Award—Collective Bargaining

Plaintiff's motion to vacate an arbitrator's award was denied because the issue before the arbitrator was properly defined within the collective bargaining agreement, and the award was rationally derived, thus satisfying the two-prong "essence test." The arbitrator found that employer did not prove its burden of an unpaid suspension and termination and employee was entitled to reinstatement and back pay.

No. GD 16-24655. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—May 25, 2017.

OPINION

I write this Opinion in support of my February 28, 2017 Order of Court, which denied Plaintiff's Motion to Vacate Arbitration Award. On March 28, 2017 Plaintiff filed a Notice of Appeal, appealing the Order to the Commonwealth Court of Pennsylvania. On March 28, 2017, I issued an Order directing Plaintiff to file a Concise Statement of Errors Complained of On Appeal ("Concise Statement"). On April 17, 2017 Plaintiff served its Concise Statement on the undersigned.

Plaintiff alleges that I erred by "finding that the Arbitrator's Award rationally derived from the Collective Bargaining Agreement and satisfied the essence test...." The Grievant, a member of Defendant union, is a school secretary who has worked for Plaintiff school district for 25 years. Grievant works on an 11 month schedule, and has sick days and personal days, but no vacation days. On Thursday, May 19, 2016, Grievant requested to take sick leave for the afternoon of Friday, May 20, 2016. When the HR Director for Plaintiff inquired further, Grievant candidly responded that "she could not lie," and that she was not taking sick time for a doctor's appointment or illness, but rather that she wanted to attend her granddaughter's school function. Grievant previously had exhausted her allocated personal days. The HR Director informed Grievant that if she left work to watch her granddaughter's event, they would need to discuss it in the future. Grievant ultimately attended her granddaughter's event. On July 21, 2016, Plaintiff notified Grievant that the discipline resulting from her use of sick time for personal reasons would be unpaid suspension followed by termination.

On July 25, 2016 Defendant filed a grievance on Grievant's behalf. Marc A. Winters was appointed to serve as impartial arbitrator from a panel supplied by the Federal Mediation and Conciliation Service. On November 9, 2016 an arbitration hearing was held and on November 22, 2016 an Opinion and Arbitration Award was entered. Arbitrator Winters found that Plaintiff did not prove its burden of "just cause" for an unpaid suspension that would end in termination. The Arbitrator awarded Grievant reinstatement, to be made whole for any loss of earnings, less ½ day's pay for the afternoon of May 20, 2016 and less one day of unpaid suspension from the made whole remedy.

On December 22, 2016 Plaintiff filed a Petition to Vacate Arbitration Award in the Court of Common Pleas¹. On February 27, 2017 I heard argument on this Petition and denied Plaintiff's Petition to Vacate. "An arbitration award must be upheld if it can, in any rational way, be derived from the collective bargaining agreement considering the language, context, and other indicia of the parties' intention." *Cranberry Area School District v. Cranberry Education Association*, 713 A.2d 726 (Pa.Cmwlt.1998). This "essence test" is used to determine whether an arbitration award is rationally derived from a collective bargaining agreement. The essence test is two pronged: 1) the court must determine whether the issues before the arbitrator are properly defined within the Collective Bargaining Agreement, and 2) determine whether the arbitrator's award can be rationally derived from the Collective Bargaining Agreement. *See Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educational Support Personnel Association*, 939 A.2d 855, 863 (Pa.2007). "The heart of the essence test is that, if the subject matter is within the four corners of the contract, courts are not to judge the validity of the arbitrator's interpretation...." *Conneaut School Service Personnel Association v. Conneaut School District*, 96 Pa.Cmwlt. 586, 590 (1986). At issue in this case is the suspension and discharge of the Grievant, and whether just cause existed for these forms of discipline. The Collective Bargaining Agreement between the parties encompassed the issues of: the employer's right to suspend and discharge employees, the use of sick days, the necessity of just cause for suspension or discharge, and the finality of an arbitrator's finding. (*See Plaintiff's Brief in Support of Motion to Vacate*, pp. 2-3). Therefore, the first prong of the essence test is satisfied as the issues before the arbitrator are clearly encompassed in the Collective Bargaining Agreement.

The second prong of the essence test is whether the arbitrator's award can be rationally derived from the Collective Bargaining Agreement. As in *Westmoreland Intermediate Unit #7*, *supra*, Arbitrator Winters found that Plaintiff established just cause for disciplinary action against Grievant, but not just cause for termination. The interpretation of just cause and the discretion to consider mitigating factors are within the authority of an arbitrator. *See Office of the Attorney General v. Council 13, AFSCME*, 577 Pa. 257 (2004). Because the Collective Bargaining Agreement requires just cause for dismissal, the arbitration award was rationally derived from the Collective Bargaining Agreement. A court will only vacate an arbitrator's award where the award is "indisputably and genuinely without foundation...." *Blue Mountain School District v. Soister*, 758 A.2d 742, 743 *citing State System of Higher Education (Cheyney University) v. State College University Professional Association (PSEA-NEA)*, 560 Pa. 135, 148 (1999). The Arbitrator adequately provided a foundation for finding Plaintiff lacked just cause to terminate Grievant by citing the mitigating factor of Grievant telling the truth about using sick leave to watch her granddaughter. *See Opinion and Award*, pp. 5-6. Because the arbitrator's award in this case satisfied both prongs of the essence test and was not without foundation, I committed no error by denying Plaintiff's Petition to Vacate Arbitration Award.

BY THE COURT:
/s/Hertzberg, J.

¹ The November 22, 2016 Opinion and Award of Arbitrator Marc Winters is attached to Plaintiff's Petition. A stenographic record of the arbitration hearing was not made. *See Opinion and Award of Arbitrator*, p. 2.

**Elizabeth Whitlock v.
Designs In Dentistry, LLC,
and
Adam K. Rich, DMD**

Gist of the Action—PA Unfair Trade Practices and Consumer Protection Act

Plaintiff's complaint alleged that dentist breached contract and violated the PA Unfair Trade Practices and Consumer Protection Act (UTPCPL) by performing an unnecessary dental procedure. Court overruled preliminary objection asserting the gist of the action doctrine bars the breach of contract claim in light of Bruno v. Erie Insurance Company, 106 A.3d 48 (2014). Court sustained preliminary objection related to UTPCPL because the Superior Court has ruled that the legislature did not intend the act to apply to medical services.

No. GD-16-023694. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

O'Reilly, S.J.—March 8, 2017.

MEMORANDUM ORDER

This case involves a civil action claim filed by Plaintiff, Elizabeth Whitlock, against Defendants Designs in Dentistry, LLC and Adam R. Rich, DMD over a root canal procedure performed on October 10, 2013. Plaintiff alleges in her Complaint that she continued to experience pain after the procedure and returned to Dr. Rich twice. On January 16, 2014, he refunded her \$960.00, the cost of the root canal treatment. The Plaintiff sought treatment with another dentist, Dr. Tom Gillen, who reported no findings on radiograph or upon examination to explain her pain. On March 11, 2014, Plaintiff presented for consultation with Dr. Willeam A. Choby. Dr. Choby opined that the root canal procedure was of questionable necessity. Plaintiff paid Dr. Choby \$3,538.00 for his services.

In her Complaint, Plaintiff alleges that Dr. Rich breached his duty to exercise reasonable care in the performance of the work he agreed to perform. She alleges that he performed an unnecessary, unwarranted and invasive dental procedure. As a result of this breach, she has sustained damages.

Plaintiff alleged four counts in her Complaint including negligence, breach of contract, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (UTPCPL), and respondeat superior. Defendants filed Preliminary Objections to Plaintiff's Complaint seeking dismissal of Counts two and three on the grounds that they are legally insufficient. Specifically, they claim that the Gist of the Action Doctrine bars Plaintiff's claim for breach of contract. They also claim that Plaintiff has failed to state a valid claim for violation of the UTPCPL.

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Haun v. Community Health Systems, Inc.*, 14 A.3d 120, 123 (Pa. Super. 2011). That standard has not been met.

Count two of Plaintiff's Complaint states a claim for breach of contract. Defendants assert that the Gist of the Action Doctrine bars Plaintiff's breach of contract claim. The Gist of the Action Doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort claims. See *Bruno v. Erie Insurance Company*, 106 A.3d 48 (2014). The Plaintiff's allegations against the Defendants arise as a matter of tort. However, *Bruno*, supra has shed new light on the "gist of the action" defense and I will permit both theories, at this time, to proceed.

Count three of Plaintiff's Complaint states a claim for UTPCPL. Two Superior Court cases have dealt with the applicability of the UTPCPL to medical service providers. *Foflygen v. Zemel*, 615 A.2d 135 (Pa. Super. 1992) and *Gatten v. Merzi*, 579 A.2d 974 (Pa. Super. 1990). Both dealt with weight loss surgical procedures. The *Foflygen* Court adopted the reasoning of *Gatten* in reaching its decision. *Foflygen* held that the UTPCPL "is inapplicable to the providers of medical services," and upheld the trial court's dismissal of a count premised on it. *Id.* at 1355. According to the Act, unfair methods of competition and deceptive practices in the conduct of any trade or commerce are unlawful. 73 P.S. § 201-3. The phrase "trade or commerce" includes the sale of services. 73 P.S. § 201-2(3). Among the practices condemned by the Act are various misrepresentations as well as other fraudulent conduct that creates a likelihood of confusion or misunderstanding. 73 P.S. § 201-2(4). However, even though the Act does not exclude services performed by physicians, the above cases say that the Act is intended to prohibit unlawful practices relating to trade or commerce and of the type associated with business enterprises. The Superior Court has said that it is clear that the legislature did not intend the Act to apply to physicians regarding medical services. *Gatten* at 976. "I must follow those controlling Pennsylvania Superior Court decisions, *Foflygen* and *Gatten*, and find that the UTPCPL does not apply to the medical services provided by a dentist. However, my belief is that those two cases should be revisited because they set forth little reasoning of why Consumer Protection issues are not available in dental cases. The M-Care Statute does *not* reference dental care. Further in both of the above cases the court simply makes the bald statement that the UTPCPL didn't apply and said its application would make the dentist a "guarantor". I question that theory. Liability would attach only if the dental services were delivered negligently and I do not comprehend this guarantor theory. Further in today's mercantile world, where dentists and hair transplant doctors are constantly on TV a re-visitation of these cases would be worthwhile. To recapitulate, the Preliminary Objection as to the UTPCPL law is sustained but all others are overruled. Answer in 30 days.

So Ordered,
/s/O'Reilly, S.J.

Date: March 8, 2017

**Kristine Kirk v.
Edward Hollinger**

Post Trial Relief—Failure to Appear

Defendant's Motion for Post-trial Relief from arbitration verdict following Defendant's failure to appear was not overturned as Defendant's unsubstantiated speculation that his mailbox may have been pilfered was not sufficient to establish a breakdown of the court sufficient to set aside the verdict.

No. AR-16-4484. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—March 27, 2017.

OPINION

This case is one of those that out of Rule 1303, Rule of Civil Procedure, which provides that in Common Pleas Arbitration, when the case is called and one party fails to appear, the party that does appear can come before the Motions Judge and get a final verdict on the evidence presented.

In this case, it was called on January 24, 2017 and defendant, Edward Hollinger (HOLLINGER), failed to appear. Plaintiff, Kristine Kirk (KIRK) then appeared before the Motions Judge that day, the Honorable Michael McCarthy and got a verdict of \$9,500.00 plus costs.

On January 31, 2017, Defendant filed a timely Motion for Post-trial Relief. I heard the Motion on February 10, 2017 when I was the Motion Judge and the Honorable McCarthy had since been assigned to our Orphans Court Division.

The argument presented by Defendant was that he had not gotten notice of the original Arbitration date and suggested that his mailbox may have been pilfered and the notice of hearing destroyed. This was sheer speculation on his part and he offered nothing concrete to bolster that supposition. Further, his Motion was filed within a matter of days from the entry of the verdict, suggesting that he does indeed get his mail. After analysis, I am not inclined to grant relief since there was no showing of any count break down and I found his speculative reason for why he didn't get notice too fanciful to warrant setting the verdict aside.

Thus, I DENIED relief.

BY THE COURT:
/s/O'Reilly, S.J.

Date: March 27, 2017

**Weirton Medical Center, Inc. v.
Introublezone, Inc., d/b/a Introublezone Productions, A Wyoming Corporation,
and Paul Schneider and Lynda Schneider, husband and wife**

Defamation

Preliminary objections sustained and claim for defamation dismissed. While publication of reality show pitch video on Vimeo online service satisfied the publication element of defamation, video contained nothing that identified the Plaintiff. Although Plaintiff's well known employee appeared in the video, this connection is not sufficient to give rise to a defamation cause of action.

No. GD-16-001563. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—June 13, 2017.

MEMORANDUM ORDER

This matter involves the effort by Plaintiff, Weirton Medical Center, Inc. (WEIRTON) to bring a defamation action against Defendants, Introublezone, Inc., d/b/a Introublezone Productions, A Wyoming Corporation, and Paul Schneider and Lynda Schneider along with ancillary claims for trespass and violations of the Lanham Act.

The Complaint alleges Defendants, in collaboration with one, Doctor Craig Richard Oser, board certified plastic surgeon employed by Weirton defamed Weirton. Dr. Oser specializes in female enhancements and related plastic surgery. Interestingly, Dr. Oser is *NOT* a named defendant.

The facts as alleged and supplemented at oral argument on Defendant's Preliminary Objections show that at Dr. Oser's instance, he retained the Defendants to prepare a video "pilot" for him to be circulated among Television Producers as a possible reality show starring Dr. Oser. In its Complaint, Weirton characterized the video as a "treatment" (para 10). Weirton also avers that a copy of said "written treatment" is attached as Exhibit B.

In fact, Exhibit B is *not* the written treatment – rather it can best be described as a "screen play" complete with stage direction and the like.

The gravamen of the Weirton's complaint is that the video pilot placed Weirton in an unfavorable light and ridiculed some of the putative "patients" appearing in the film.

Apparently the publication element of defamation is satisfied by the allegations at paragraph 22 that the video was aired on an online video service known as Vimeo (para 22).

At argument, on June 1 2017, I inquired, why there was *not* an actual transcript of the video and I opined that Exhibit B was merely a screen play and that Weirton Medical Center, Inc. had not taken the time to transcribe that video into an actual written document. At argument counsel promised to send me the actual video. He did. So to my mind, the defamation, *vel non*, would stand or fall on the video.

After my review – in which I watched the video three times – I find nothing defamatory. Poor taste, yes; Defamation – No.

Nothing in the video identified Weirton and any plaques or pictures on the wall are illegible. That Dr. Oser is an employee of Weirton is well known and Weirton has advertised his employment by it. Nevertheless, this connection does not give rise to a cause of action for something he did, with others, that Weirton doesn't like but does not defame it.

Since I find no defamation, the other claims, *a fortiori*, fail as well.

Accordingly, the Preliminary Objections to all counts are sustained and the Complaint is DISMISSED with PREJUDICE.

BY THE COURT:

/s/O'Reilly, S.J.

Date: June 13, 2017

**The County of Allegheny v.
Allegheny County Prison Employees Independent Union**

Motion to Vacate Award—Sick Leave

Plaintiff's motion to vacate an arbitrator's award was denied. Arbitrator issued an award modifying the calculation of an employees' probationary period and determined that the employee was entitled to sick leave because employee had served his probationary period during his part-time employment before transitioning into a full-time role in the same position.

No. GD-16-022826. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

O'Reilly, S.J.—June 6, 2017.

MEMORANDUM ORDER

This case involves the Appeal by Allegheny County (County) of an arbitration award entered on behalf of the Union representing the Prison Employees at the Allegheny County Jail. The Union is the Allegheny County Prison Employees Independent Union (Union).

The issue involves the calculation and application of a probationary period to be served by new employees.

The matter is somewhat convoluted in that on April 4, 2015, Arbitrator, Matthew Franckiewicz issued an award modifying the calculation of an employees' probationary period. (the Franckiewicz Award).

Thereafter, employee Brandon Carter, on May 7, 2015 received a "counseling letter" (practically a reprimand) in regard to his use of sick leave. The County took the position that he was a probationary employee and was not eligible for the sick leave he used. Carter grieved this "letter" and the matter came on for arbitration before Arbitrator Atul Maharaja who issued an award on August 21, 2016 sustaining the grievance. The County then moved to vacate that award.

I issued a Rule to Show Cause on December 20, 2016 and heard Argument on February 13, 2017.

As noted the interpretation of the Franckiewicz Award are at issue here.

The facts show that the County employed both full and part-time officers and imposed a one year probationary period. The Union took the position that many employees who have served long periods as part-timers and then became full time employees, did not have to serve *another* probationary period.

Here Carter was hired June 4, 2011 and graduated from the training academy in March 2011. He then served as a part-time corrections officer for 3 and 1/2 years and was then made full-time on June 15, 2014. The County took the position that he had to serve another probationary period which would run to June 14, 2015.

Under the Franckiewicz Award a new probationary clause was awarded, to wit:

The one year probationary period shall start when a corrections officer graduates from the training academy. If the officer graduates the training academy as a part-time officer and is part-time for less the one year, the probation time will extend into the full-time status for the remaining time equaling one year.

The above language appeared in the Union contract effective June 1, 2014 and ending June 30, 2019. It is therefore applicable to the period involving the Carter grievance.

As noted, the Carter matter was heard by Arbitrator Maharaja who ruled in favor of the Union.

In reviewing the award and the briefs of the parties, it appears there was an argument that the Franckiewicz award had only prospective application and was not retroactive. Apparently, this is based on the fact that the grievance by Carter arose on May 7, 2015. The County therefore asserted that the Franckiewicz award was *not* retroactive. The clear language of the Franckiewicz award was that the probationary language went into effect on June 1, 2014.

After review and analysis, the Maharaja award does indeed draw its essence from the Collective Bargaining Agreement and is not to be vacated. Indeed, common sense dictates that after serving one probationary period, Carter ought not be required to serve a second one when he is doing the same job. Rule is discharged and the Arbitration award is affirmed.

BY THE COURT:

/s/O'Reilly, S.J.

Date: June 6, 2017

**Forest Highlands Community Association v.
Stone Fox Capital, LLC**

Default Judgment—Foreclosure—Attorney as Witness

The Court granted Plaintiff's motion to reassess a default judgment taken by Defendant homeowners association in foreclosure action for unpaid monthly maintenance charges. Additionally, the Court held that trial counsel may not testify as a witness for his or her client; and attorneys' fees were properly submitted by detailed affidavit for review by the Court, and Defendant failed to respond by counter-affidavit.

No. GD-15-021806. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—March 24, 2017.

OPINION

INTRODUCTION

Defendant LLC has appealed from our order dated December 5, 2016, which granted Plaintiff's Amended Motion to Reassess a Default Judgment entered in the captioned mortgage foreclosure action more than a year ago, on January 26, 2016, against the LLC. Foreclosure is the method dictated by the statute governing homeowners associations such as Plaintiff. The matter has an extensive procedural history, which does *not* include any petition to open the default judgment.

The undersigned first became involved in the case while sitting as the General Motions Judge on September 30, 2016. Other judges, sitting earlier in General Motions Court, had entered orders which ultimately resulted in the original Motion to Reassess Damages being scheduled before me. At the request of the parties, who at the time were hoping to settle the matter amicably, we signed a consent order postponing a Sheriff's Sale of the real estate at issue until January 3, 2017.

They were unable to resolve their differences and a hearing on the original Motion to Reassess was scheduled by order dated November 2, 2016. We inadvertently characterized the hearing as a "non-jury trial," a clerical error which Defendant raises in item no. 8 of his 1925(b) Statement; this was discussed in an Interim Partial Opinion filed on March 21, 2017, a copy of which was hand-delivered that same day to the Superior Court Prothonotary. We also ordered that the parties file pre-trial statements, but only Plaintiff did so; Defendant did not file one at all, timely or otherwise. Shortly before the hearing date, Plaintiff filed an *Amended* Motion to Reassess Damages and this was also considered at the hearing. Defendant complains of this as well in his Rule 1925(b) Statement.

The hearing on the motion began and ended on November 15, 2016.

Counsel for the Defendant LLC indicated in his opening statement that he also expected to be its only witness. He planned to testify about the reasonableness of daily fines that had been imposed beginning around August or September of 2015 for a deck that had been constructed without Board approval in May 2013. However, he had neglected to obtain substitute counsel for his client, a fictitious entity, and as a result the Plaintiff's objection to his testimony was sustained, based on the well-settled principle that trial counsel cannot also be a witness for his client.

After Plaintiff had rested its case, asserting claims for unpaid monthly maintenance charges as well as the daily fines, defense counsel stated he had no evidence to present except his own previously barred testimony. This was despite the fact that he had earlier stated he would call the President of the Plaintiff's Board in his own case after the Court had ruled he could not go as far beyond the scope of her direct testimony as he had wished to do during his cross-examination of her. This witness could have been questioned in the LLC's case by defense counsel regarding the relationship of the fines levied to the violations asserted, but he chose not to do so.

Defendant also had no closing argument to make, instead raising an objection that the instant motion should have been filed as a petition. We decided that the objection was untimely and had been waived by not having brought it to the Court's attention long ago, or at least before the hearing started. As a result, due to defense counsel's actions, we were limited to the Plaintiff's evidence and the Defendant's cross-examination of Plaintiff's witnesses.

There was no dispute concerning the unpaid monthly maintenance charges. The reasonable amount of the daily fines was, however, an issue at the hearing. We found that the evidence presented by Plaintiff regarding the daily fines was credible and indicated a degree of patience on the part of the Board that is not often seen when these types of disputes end up in court. According to the credible evidence, Defendant had been aware that its deck had not been approved by the Plaintiff, as required, since construction was begun in or before May 2013, more than three years prior to the hearing. Plaintiff did not start assessing fines for the continuing noncompliance until shortly before the instant case was filed in December 2015. See Plaintiff's Ex. D. The default judgment was entered in January 2016. The amount of daily fines claimed, for 20 days in August 2015 plus every day from September 1, 2015 to July 31, 2016, when Defendant finally complied, is much less than could have been imposed and we found it to be reasonable in the circumstances.

Another issue for the Court was whether or not the time spent and the hourly rate charged by now-retired prior counsel for the Board was reasonable. Prior to the hearing, there had been a stipulation reached by e-mail between Plaintiff's current counsel and defense counsel that the work done and the fees charged by prior counsel were reasonable, and the deposition of prior counsel had been cancelled as a result. Defense counsel stated at the hearing that he only stipulated to the reasonable hourly rate charge, but after argument we concluded that the stipulation he agreed to covered both the hourly rate and the time spent. We also noted that the cancellation of prior counsel's deposition was consistent with Plaintiff's version of the stipulation. The additional counsel fees and costs charged by prior counsel, in the amount of \$6,742.51 were therefore added to the judgment amount, along with the then-undetermined fees and costs charged by current counsel plus the unpaid monthly maintenance fees from the date of the default judgment, January 26, 2016, and the daily fines, for a sub-total of \$71,367.12.

The third and last issue for the Court at the hearing was the reasonableness of the fees charged by Plaintiff's current counsel who took over after prior counsel retired from the practice of law. We indicated that we would handle that fee issue in accordance with our usual procedure whereby the attorney entitled to fees submits a detailed affidavit, the opposing party states what is objected to and why, and the Court reviews the affidavit, the objections and reaches a decision on the amount of fees to be awarded. Counsel for Plaintiff submitted his affidavit on November 16, 2016; Defendant did not file any objections. Counsel for Plaintiff later filed a Supplemental Affidavit, which added no additional charges but merely stated that said counsel's hourly rate is within the reasonable range of fees charged in our judicial district. A final order reassessing damages in the total amount of \$86,714.02 was entered on December 5, 2016, and, as previously indicated, is the order now under appeal.

ISSUES RAISED ON APPEAL

Defendant raises the following allegations of error in his Rule 1925(b) Statement:

1. That the claims in the Amended Motion were different from those raised in the original Motion and should have been made in an amended *complaint*, not in a Motion to Re-assess; Defendant contends it was therefore error to consider the claims in the Amended Motion at the hearing.
2. That the Court ignored Defendant's response to the original Motion, which he asserts should, in any case, have been a *petition* since Defendant asserts the Motion contains facts not of record.

3. That “[p]rior to trial the Defendant served several notices to attend and to produce documents which were necessary to Defendant’s defense. The court erroneously ruled that the Plaintiff did not have to either appear or produce the requested documents at trial.”

4. That the court should have allowed counsel for the LLC to testify even though he had formally entered his appearance, simply because he was “the principal” of the LLC and resided in the subject property.

5. That the court failed to sustain multiple unspecified hearsay objections made by Defendant.

6. That the admissible evidence at trial was insufficient to warrant the award made.

7. That the Court should have conducted a second hearing on the counsel fees incurred by Plaintiff so that Defendant could cross-examine on the fees asserted.

8. That by conducting a hearing rather than non-jury trial the Court deprived Defendant of its right to file post-trial motions; also that “by entering judgment” rather than “a Decision” the Court acted erroneously.

9. Defendant also purported to reserve the right to raise additional issues if the transcript reveals any.

We have already addressed item no. 8 in our Interim Partial Opinion filed March 21, 2017. As for item no. 9, where Defendant purports to reserve the right to raise additional issues, the Rules of Court as well as our order requiring the Statement do not permit Defendant to raise any further issues not fairly covered by the eight items summarized above.

We will therefore only discuss items no. 1-7.

DISCUSSION

1. The contention that an Amended Complaint should have been filed by Plaintiff rather than a Motion to Reassess Damages has been waived.

Defendant first raises this issue in his 1925(b) Statement. However, at the beginning of the hearing, his only objection was to the authority for and amount of the daily fines and his contention that they were “ridiculous and excessive” and an abuse of discretion. See Transcript at pages 6-9. No objection along the lines of that stated in item no. 1 was made at any time during the hearing. This issue has been waived.

Even if not waived, the items claimed in the Amended Motion to Reassess Damages are covered by the original Complaint filed, as well as by the original Motion to Reassess. This basis for appeal is without merit.

2. The Court did not “ignore” Defendant’s response to the original Motion to Reassess Damages.

This issue, too, was first raised in Defendant’s 1925(b) Statement and has been waived. Because of settlement attempts by the parties, a *consent* order postponing both the Sheriff’s Sale of the LLC’s real estate and the argument on the original motion and Defendant’s response, was entered on September 30, 2016. Furthermore, Defendant did not ask the Court to consider its response to the original motion after settlement discussions failed or at any time thereafter. Rather Defendant was silent regarding the scheduling of the hearing, and at the hearing itself never asked the Court to consider that response.

3. The undersigned made no ruling or order regarding notices to attend and to produce documents and the Notice of Appeal does not refer to any such order.

We do not understand what Defendant refers to here. We cannot address this issue because it refers to matters we did not decide.

4. It is well settled that trial counsel may not also testify unless replacement trial counsel is retained.

Defense counsel did raise this objection during the hearing. See Transcript p. 18, 11.6-21. However, even though the issue has not been waived, it is without merit. See Rules of Professional Conduct 3.7, quoted in pertinent part below:

Rule 3.7. Lawyer as Witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

Defendant also asserts in this item that *the Court told* Plaintiff’s counsel his affidavit was insufficient. We do not recall ever entering any such order and the docket does not indicate there was one. We certainly never had any communication with anyone regarding the original affidavit. As far as we know, the Supplemental Affidavit was filed on Plaintiff’s counsel’s own initiative. We note that Plaintiff’s counsel filed the first affidavit prior to the entry of our Order November 17, 2016, and it might have been this order that counsel sought to comply with. To the extent Defendant’s counsel is suggesting that there might have been an *ex parte* communication by the court to Plaintiff’s counsel, this is without foundation in reality and is untrue. In any case, the supplemental affidavit merely stated that the hourly rate charged by trial counsel had been held to be reasonable by another judge of coordinate jurisdiction in a different case.

There is no merit to either aspect of item no. 4.

5. The sole hearsay objection made by defendant was sustained.

Defendant fails to specify what inadmissible hearsay he objected to and which of any such objections were improperly overruled. We found only one, at page 40, 1. 24 of the Transcript. That objection was sustained, not overruled. There is no merit to item 5.

6. The admissible evidence at the hearing was credible and was more than sufficient to warrant the amount reassessed.

Defendant does not state what evidence he objected to as inadmissible and, except for the one hearsay objection that was sustained, we did not find any objection to the evidence offered by the Plaintiff. In addition, credibility of witnesses is for the factfinder. The testimony of Plaintiff’s three witnesses was highly credible and demonstrated that Plaintiff had been extremely patient with Mr. Joseph despite his recalcitrance regarding issues with the LLC’s deck.

Mr. Joseph presented no evidence on behalf of his client. He failed to call Leigh Bishop in his own case even though he said he would do so. See Transcript, p. 61, 11.20-21. He had deprived himself of the ability to testify, as discussed above at item 4. We considered all the evidence available to us and found that the amount of the fines was justified given Mr. Joseph's conduct as the "principal" (as he put it) of the LLC.

The credible evidence demonstrated that the daily fines could have been imposed much earlier, in 2013, but the Plaintiff waited two years before doing so. There is no abuse of discretion by the Plaintiff. The abuses were all inflicted by Mr. Joseph upon the Plaintiff and his own LLC. Since May 2013 he has been aware that the Plaintiff wanted the LLC to comply with its Rules and Regulations regarding its deck. He was given several opportunities to file the correct application and bring the deck into compliance. Instead he chose to delay the LLC's compliance for three years, until some time around July 2016. He also caused the LLC not to pay its monthly assessments and, as recently as March 20, 2017, informed the Court that he will continue to withhold those payments until the instant appeal is finally resolved by the appellate courts. The Plaintiff indicated at the hearing that it has only imposed one late fee, rather than one each month, something Defendant did not dispute. Plaintiff also indicated that interest has not yet been included in its claim but "will be calculated at the time of sale" and at a lower rate (6%) than is permitted by the Association documents (8.25%), on himself as well as on the other members of the Plaintiff Association.

The admissible evidence supported Plaintiff's claim. There is no merit to item no. 6.

7. Defendant waived his right to a separate hearing on Mr. Nernberg's counsel fees by not responding to the original affidavit of Plaintiff's counsel.

Defendant chose not to file objections to Mr. Nernberg's affidavit and also chose not to file a counter-affidavit. He has waived his right to complain on appeal. Furthermore, the Court's own review of the affidavit found Mr. Nernberg's fees reasonable both as to time spent and hourly rate charged.

There is no merit to item no. 7.

CONCLUSION

Defendant has waived most of his grounds for appeal. The default judgment against Defendant was reassessed in a proper amount. Mr. Joseph, whether as counsel for the LLC or as its member, caused the judgment to be entered and to reach its current amount.

Our order should be affirmed.

BY THE COURT:
/s/Friedman, J.

Date: March 24, 2017

Judy Torma v. Parrot Construction Corp.; Paul Chambers

Arbitration Clause—Change Orders

The Court determined that a subsequent agreement was a change order to the original contract, not a separate agreement. Thus, the original contract's arbitration clause controlled the dispute and the arbitrator's award was proper.

No. GD-15-017669. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—September 18, 2017.

OPINION

Plaintiff has appealed from our Decision dated June 28, 2017, which was entered after a hearing as directed by the Superior Court. See 1105 WDA 2017. The question to be decided on remand was whether or not the arbitrator had jurisdiction of an Agreement of Understanding (generally referred to as the "Moving Contract") between the parties. His jurisdiction depended on whether or not that agreement was a Change Order to the original contract or a separate agreement unrelated to the original contract.

As we stated in our Decision, the credible evidence shows the following factual background. Plaintiff was acting under a Power of Attorney given to her by her elderly father who was the actual owner of the premises at issue, a commercial building. The premises had been condemned and Plaintiff had contracted with Defendant on May 15, 2014 to correct the serious structural and other deficiencies that led to the condemnation. There was a good deal of junk in the building, such as old tools and other items that had to be removed and scrapped. There were also old vending machines stored in the building by the Plaintiff's father. All those items had to be removed at some point so that other essential work could be done. Plaintiff was well aware of this and we find her assertion that she had not been told that items inside the building had to be removed not credible. Plaintiff believed the vending machines had some value and tried to have the machines removed herself but was unable to find someone to do it. Plaintiff then asked Defendant to remove and scrap the junk and store the vending machines until the work was finished, resulting in the Agreement of Understanding/Moving Contract which was executed on June 6, 2014. We concluded that the Moving Contract was the first of several change orders to the original contract.

Plaintiff filed a Statement of Matters Complained of on Appeal which is a few pages long but raises no basis for Plaintiff's insistence that the arbitrator did not have jurisdiction. There is no complaint about insufficient evidence, for example, nor is there any other error cited. It is therefore a little difficult to draft an opinion and we can only suggest that Superior Court read the Transcript of the hearing. As we indicated in our Decision, the credible evidence showed that the Moving Contract was the first of

several change orders; the reason for the Moving Contract was Plaintiff's failure to remove old vending machines so that the work under the original contract could be performed. We found the testimony of Plaintiff herself be incredible and that of Mr. Chambers to be highly credible and well-supported by the other evidence in the case.

Our finding, on remand, that the Moving Contract was a change order to the original contract was based on credible and sufficient evidence. Our conclusion that it was therefore covered by the arbitration clause in the original contract was proper. The entire arbitration award should be affirmed. As we understand the earlier ruling of the Superior Court, the attack on rest of the award has already been rejected.

BY THE COURT:

/s/Friedman, J.

Date: September 18, 2017

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PLJ

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Commonwealth of Pennsylvania v. Antron Talley

Criminal Appeal—Rule 600—Sentencing (Legality)—Merger—Amendment of Information

Court addresses several issues raised following assault of a correctional officer.

No. CC 2014-1397. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—September 19, 2017.

OPINION

This is a direct appeal from the judgment of sentence entered on May 24, 2017, following a jury trial that took place between April 12, 2017, and April 18, 2017. The Defendant represented himself at the trial. The Defendant was charged with Assault by Prisoner (18 Pa. C.S.A. §2703(a)) at Count One; Aggravated Assault (18 Pa. C.S.A. §2702(a)(2)) at Count Two; Aggravated Assault (18 Pa. C.S.A. §2702(a)(3)) at Count Four; and Simple Assault (18 Pa. C.S.A. §2701(a)(1)) at Count Five.¹ At the conclusion of trial, the Defendant was convicted of all charges. The Defendant waived his right to the preparation of a Presentence Investigation Report, and sentencing was scheduled for May 24, 2017.

Prior to sentencing, on May 2, 2017 and May 16, 2017, the Defendant filed *pro se* post-verdict motions challenging the weight and sufficiency of the evidence supporting his convictions. The *pro se* filings were considered and denied by this court on May 3, 2017, and May 17, 2017, respectively. On May 24, 2017, the Defendant was sentenced at Count One (1) to a period of two (2) to four (4) years of imprisonment, with a consecutive six (6) year term of probation to commence upon his release of imprisonment. Count One (1) was ordered to run consecutively to the sentence imposed at Count Two (2). At Count Two (2), the Defendant was sentenced to a period of six (6) to twelve (12) years of imprisonment, with a consecutive eight (8) year period of probation to commence upon his release from imprisonment. No further penalty was imposed at Counts Four (4) and Five (5) of the information. In sum, the Defendant was sentenced to an aggregate term of imprisonment of eight (8) to sixteen (16) years of imprisonment, with a consecutive eight (8) year term of probation to follow. The Defendant also received 1,210 days of credit for time-served. The Defendant had agreed to allow stand-by counsel, Mr. Brandon Herring, to represent him at the time of sentencing.

On May 26, 2017, the Defendant's stand-by counsel, Brandon Herring, Esq., filed a timely Post-Sentence Motion, as he had agreed to do, on behalf of the Defendant. Mr. Herring subsequently was granted leave to withdraw from representation of the Defendant, and the Office of the Public Defender was appointed to represent the Defendant in connection with his post-sentence and appellate proceedings. On June 27, 2017, the court received notice from appellate counsel that no supplemental post-sentence motion would be filed. On July 13, 2017, after meaningfully considering the Post-Sentence Motion filed on May 26, 2017, the court denied the motion. A Notice of Appeal was filed on July 14, 2017.

On July 14, 2017, the court ordered that the Defendant file a Concise Statement of Errors Complained of on Appeal ("Concise Statement") no later than August 7, 2017. After receiving a brief extension of time, the Defendant, by way of counsel, filed a timely Concise Statement on August 17, 2017, raising the following three (3) issues for review:

a. This Honorable Court erred in denying Mr. Talley's request to dismiss the charges against him based upon a violation of Pa. R. Crim. P. 600 and his concomitant right to a speedy trial under the U.S and Pennsylvania Constitutions. The Commonwealth failed to act with due diligence in bringing this case to trial, despite multiple requests from the defendant to do so.

b. This Honorable Court erred in permitting the Commonwealth to amend the criminal information to include additional charges on the day before trial. The Commonwealth moved to include these charges only after Mr. Talley declined to enter a guilty plea to simple assault. The amendment caused prejudice to Mr. Talley by increasing the grading of the offenses charged, as he had initially been charged with a felony of the second degree, and now was charged with a felony of the first degree. As this is a substantive change to the information, the amendment should not have been permitted.

c. The sentencing court erred and/or abused its discretion when sentencing Mr. Talley to consecutive terms on Counts 1 and 2 of the information. In the context of this case, this is an illegal sentence. Under 42 Pa. C.S. §9765, and the recent case of *Commonwealth v. Shawn Brown*, 159 A.3d 531 (Pa. Super. 2017), when two crimes arise from one criminal act, and all of the statutory elements from one offense is included in the statutory elements of the second offense, the two sentences must merge. As the criminal act in Assault by a Prisoner (18 Pa. C.S. §2703(a)) and Aggravated Assault (18 Pa. C.S. §2702(a)(2)) is the same act, and assault on CO Arlotta, only one sentence may be imposed.

(Concise Statement, pp. 2-3).

The Defendant's allegations of error on appeal lack merit. The court respectfully requests that the Defendant's convictions and sentence be upheld for the reasons that follow.

I. FACTUAL BACKGROUND

On December 19, 2013, at approximately 9:00 a.m., the Defendant, an inmate at the Allegheny County Jail, physically assaulted Jason Arlotta while Mr. Arlotta was engaged in his duties as a Correctional Officer ("CO"). (Jury Trial Transcript ("TT"), 4/12/17 – 4/18/17, pp. 74, 79-84, 91-92, 94, 119, 133, 145, 162, 169). At the time of the attack, CO Arlotta was performing routine searches of the inmates' cells, and Cell 123 was one of the cells subject to the search. (TT, pp. 75-77, 94-95, 204). CO Patti Farrell was present in the area while CO Arlotta conducted the cell searches. (TT, pp. 133-34, 141). Upon conducting his search of Cell 123, CO Arlotta located several items of contraband, such as extra linens, blankets, and a jail-made weight called a "water bag" that inmates use for weightlifting. (TT, pp. 75-76, 91, 96, 134-35). CO Arlotta removed the extra linens and blankets from the cell and then made an announcement for the resident of Cell 123 to return to the cell. (TT, pp. 76-77, 94-95, 135). CO Arlotta did not know who lived in Cell 123, and he had never met the Defendant prior to the day of the incident. (TT, pp. 77, 94).

The Defendant appeared and identified himself as the resident of Cell 123. (TT, pp. 77, 96, 135). The Defendant began picking up the extra linens that CO Arlotta had tossed out of the cell, and the Defendant told CO Arlotta that the CO was not going to

remove the extra linens because they were his items. (TT, pp. 77, 90, 136). CO Arlotta instructed the Defendant to place the linens back down on the ground, but the Defendant “refused several orders” to do so. (TT, pp. 78, 91, 136, 140). The Defendant became aggressive and said “Fuck you, I’ll go to the hole, I’m not afraid to go to the hole.” (TT, pp. 78, 97, 140). The interaction clearly was starting to escalate, prompting CO Arlotta to contact Sergeant Popa via radio for assistance. (TT, pp. 79, 162). After the Defendant refused to obey CO Arlotta’s orders three (3) or four (4) times, CO Arlotta ordered the Defendant to stand against the wall in an attempt to “deescalate the situation” and prevent the Defendant from continuing to pick the items up from the ground. (TT, pp. 79, 92, 136). The Defendant, however, refused to obey the order to stand against the wall, and he began walking away from CO Arlotta. (TT, pp. 79, 136-37).

At that point, CO Arlotta grabbed the Defendant by his shirt and tried to escort him to the wall so that the Defendant would know where was required to stand. (TT, p. 79). Again, the Defendant failed to comply with CO Arlotta’s directives, and he “began pushing back against” CO Arlotta. (*Id.*). Although CO Arlotta ultimately was able to place him against the wall, the Defendant was still combative. (*Id.*). CO Arlotta therefore, decided to place the Defendant in handcuffs in order to prevent the situation from escalating any further. (*Id.*). As CO Arlotta reached for his handcuffs, the Defendant “turned aggressively” and forcefully pushed CO Arlotta. (TT, pp. 79, 215-16). The Defendant assumed a “fighting stance” and, based on his attitude, threatening body language, and refusal to obey orders, it was clear to CO Arlotta that the Defendant was preparing for a physical altercation. (TT, pp. 80, 106, 137).

The Defendant began throwing hand strikes at CO Arlotta, and CO Arlotta defended himself by throwing a hand strike which connected with the Defendant’s head. (TT, pp. 80, 106-07). The two men grabbed hold of each other, and CO Arlotta attempted to bring the Defendant to the ground. (TT, p. 81). However, CO Arlotta slipped on a sheet and blanket that were on the floor outside of the cell, and he fell to the ground. (TT, pp. 81, 100-01). The Defendant took advantage of CO Arlotta’s misstep by grabbing CO Arlotta’s uniform and pulling him inside of the cell. (TT, pp. 81, 137).

Once they were inside of the cell, and away from the surveillance cameras, the Defendant punched CO Arlotta in the face, the side of his head, and his left eye. (TT, pp. 81, 109, 119, 121-22, 163, 202). The Defendant’s punches were so forceful that CO Arlotta’s head was split open, and he suffered a concussion. (TT, pp. 81, 202). Blood began running down the side of CO Arlotta’s head, and he became “woozy.” (TT, p. 82). He also felt pain in his shoulder as he was being attacked. (TT, p. 83). Despite his injuries, CO Arlotta regained his footing and was able to somewhat restrain the Defendant in the back of the cell until assistance arrived. (TT, pp. 82, 130). However, the Defendant was “totally out of control” and was still striking CO Arlotta while CO Arlotta was subduing him. (TT, pp. 147, 153).

Despite his attempts, CO Arlotta was unable to gain full control of the situation until Correctional Officers Parkinson and Hanley responded to the incident. (TT, pp. 83-84, 92, 139, 145-46, 172). When they arrived in the cell, they observed “blood all over the place,” and their “main goal at that point was to get Officer Arlotta out of t[he cell] because he was obviously injured.” (TT, pp. 147, 150-52). The Defendant continued to resist against the officers, and it took the strength of both officers to pull the Defendant off of CO Arlotta and place him in handcuffs. (TT, pp. 84, 131, 146, 148, 156, 172). CO Arlotta emerged from the cell with his face covered in blood. (TT, pp. 92-93, 149, 164). The Defendant, on the other hand, did not have any observable marks or injuries on his body following the attack. (TT, pp. 164, 201-02).

The majority of the Defendant’s assault on CO Arlotta was captured on surveillance video taken from the POD. (TT, pp. 88-92). Although CO Arlotta could not recall how many times that he was hit, he estimated that he was inside of the cell for approximately a minute and a half before help arrived. (TT, p. 82). CO Arlotta stated that he was frightened during the attack, and he felt that he was fighting for his life. (TT, pp. 82, 92, 121). He sought medical attention at Mercy Hospital following the attack, and it was determined that he had suffered a broken shoulder, a concussion, and a laceration above his left eye. (TT, pp. 84, 119, 163).

In the week following the attack, CO Arlotta experienced headaches, dizziness, and pain in his shoulder, which all impaired his ability to not only do his job, but also to engage in other activities in his daily life, like sleeping and driving. (TT, pp. 85-86). He initially was placed on light duty at work for a week. Unfortunately, after he was diagnosed with a concussion, he was unable to work at all for four (4) months. (TT, pp. 84-85). When he finally returned to work, he was placed on light duty for another six (6) months. He was also given permission to leave work as needed during that light-duty period if symptoms from his concussion surfaced. (TT, pp. 85, 87). CO Arlotta was required to call off of work and leave work early during his six (6) month period of light duty work. It should also be noted that the attack left him with a scar above his left eye. (TT, pp. 88, 122).

II. DISCUSSION

A. The Defendant’s Rule 600 motion requesting dismissal of all charges was properly denied by this court.

The Defendant contends that this court erred when it denied his motion to dismiss the charges against him because his rights under Pa. R. Crim. P. 600 and his constitutional rights to a speedy trial were violated in this case. The Defendant’s contention has no merit given the specific facts of this case.

Pa. R. Crim. P. 600 provides in relevant part:

Rule 600. Prompt Trial

(A) Commencement of Trial; Time for Trial

(1) For the purpose of this rule, trial shall be deemed to commence on the date the trial judge calls the case to trial....

(2) Trial shall commence within the following time periods.

(a) Trial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed.

* * * *

(C) Computation of Time

(1) For purposes of paragraph (A), periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in the computation of the time within which trial must commence. Any other periods of delay shall be excluded from the computation. Pa. R. Crim. P. 600 (emphasis added).

The comment to Rule 600 further explains that “the inquiry for a judge in determining whether there is a violation of the time periods in paragraph (A) is whether the delay is caused solely by the Commonwealth when the Commonwealth has failed to exercise due diligence.” Comment to Pa. R. Crim. P. 600. The Comment further provides that

[w]hen the defendant or the defense has been instrumental in causing the delay, the period of delay will be excluded from computation of time. *See, e.g., Commonwealth v. Matis*, [710 A.2d 12 (Pa. 1998)]; *Commonwealth v. Brightwell*, 486 Pa. 401, 406 A.2d 503 (1979) (plurality opinion). For purposes of paragraph (C)(1) and paragraph (C)(2), the following periods of time, that were previously enumerated in the text of former Rule 600(C), are examples of periods of delay caused by the defendant. **This time must be excluded from the computations in paragraphs (C)(1) and (C)(2).** Comment to Pa. R. Crim. P. 600 (emphasis added).

The periods of time previously enumerated in the text of former Rule 600(C) included “any continuance granted at the request of the defendant **or the defendant’s attorney.**” Comment to Pa. R. Crim. P. 600(C) (emphasis added). Accordingly, pursuant to Rule 600, any period of delay that was the result of continuances granted at the request of the Defendant’s attorney must be excluded from the computation of time in which trial must commence.

The Defendant also claims that his constitutional right to a speedy trial was violated. (Concise Statement, p. 2). “Pursuant to the two-step analysis enunciated in [*Commonwealth v. DeBlase*, 665 A.2d 427, 431 (Pa. 1995)], [the court] first consider[s] whether the delay violated Pa. R. Crim. P. 600, and if not, [the court] may proceed to the four-part constitutional analysis set forth in [*Barker v. Wingo*, 407 US. 514, 530 (1972)].” *Commonwealth v. Colon*, 87 A.3d 352, 356-57 (Pa. Super. 2014).

Rule 600 Analysis

The criminal complaint in this matter was filed on January 31, 2014. Therefore, the mechanical run date for purposes of Rule 600 was January 30, 2015, which is 365 days from the date on which the complaint was filed. On March 17, 2014, the Commonwealth filed the criminal information charging the Defendant with a single count of Assault by Prisoner. Attorney Kathleen Miskovich with the Office of the Public Defender was the first attorney assigned to the case, and her appearance was entered on April 3, 2014. The Defendant’s case originally was scheduled as a non-jury trial to be held on June 12, 2014. According to the available postponement forms in the Clerk of Court file, it appears that the Commonwealth requested that the June 12, 2014 date be continued.² (“Motion for Continuance” dated 2/17/15). The next non-jury trial date was scheduled for August 19, 2014. However, on that date, counsel for the Defendant’s co-defendant moved to postpone the trial. (“Motion for Continuance” dated 2/17/15). The postponement was granted, and the non-jury trial was then moved to November 4, 2014. On November 4, 2014, Attorney Miskovich moved again to postpone the trial date, specifically stating that the postponement request was “per [the] client” because he had a pending federal case. (“Motion for Continuance” dated 11/4/14). The postponement was granted, and the case was then listed for a jury trial which was scheduled to take place on February 17, 2015.

On February 17, 2015, Attorney Miskovich submitted another postponement request, again citing the Defendant’s pending federal case as the justification. (“Motion for Continuance” dated 2/17/15). Trial was then listed for May 12, 2015. Prior to the trial date, however, the case was reassigned to Attorney Joe Paletta with the Office of the Public Defender. Attorney Paletta entered his appearance on March 24, 2015. On May 12, 2015, Attorney Paletta submitted a postponement request, stating the following: “This case was just reassigned to this counsel and counsel requests time to prepare. In addition, counsel must discover the status of the federal prosecution which may be proceeding to trial on 5/26/15.” (“Motion for Continuance, dated May 12, 2015). The postponement was granted, and trial was rescheduled for August 25, 2015.

On the next scheduled trial date, August 25, 2015, following a brief hearing, Attorney Paletta was granted leave to withdraw from the case due to a breakdown in communications with the Defendant. On August 26, 2015, Attorney Randall McKinney was appointed to represent the Defendant, and the next trial date was listed for January 25, 2016 in order to provide counsel with time to prepare and time to assess the status of the federal proceedings.

Defense counsel subsequently moved to continue the trial dates scheduled for January 25, 2016 and May 17, 2016. Although the Clerk of Court file did not contain the actual postponement forms from January 25, 2016 or May 17, 2016, this court has a clear recollection from its discussion with the parties that the strategy in the Defendant’s case was to allow the federal case to proceed prior to moving forward with the state court charges in order to prevent the Defendant from potentially receiving an increased sentence in federal court. Additionally, there were ongoing discussions with the Commonwealth of entering a *nolle prosequi* on the state court charges once the Defendant’s federal sentence was imposed. Accordingly, the next trial date was scheduled for July 12, 2016.

On July 12, 2016, defense counsel requested another postponement, citing that he needed additional time to prepare for trial. (“Motion for Continuance, dated 7/12/16). Based on the court’s off the record discussion with the parties, it was revealed that the Defendant had been convicted of the charge in federal court, but had not yet been sentenced. It was unclear when the Defendant’s federal sentencing would take place because the Defendant apparently was litigating post-trial motions. Accordingly, the postponement was granted, and the next trial date was listed for November 29, 2016.

On November 29, 2016, Attorney McKinney submitted the final postponement request in the case, stating that the purpose of the continuance was to “wait for the conclusion of [the] [D]efendant’s federal sentencing.” (Motion for Continuance, dated 11/29/16). The postponement was granted, and the next trial date was listed for April 10, 2017. Shortly thereafter, Attorney McKinney sought leave to withdraw from the case, citing an irreconcilable breakdown with the Defendant. A hearing on Attorney McKinney’s motion to withdraw from representation was held on December 20, 2016. The court granted Attorney McKinney’s motion to withdraw and appointed Attorney Brandon Herring with the Office of Conflict Counsel to represent the Defendant.

At the time of his trial on April 10, 2017, the Defendant insisted on representing himself. After conducting the appropriate colloquy, the court granted his request to proceed *pro se* and ordered Attorney Herring to serve as stand-by counsel. The Defendant proceeded to trial on April 11, 2017 and was convicted on April 18, 2017.

Summary of Rule 600 Computation:**Complaint filed:**

1/31/14

Mechanical Run Date:

1/30/15

Trial Date	Party Requesting Continuance
6/12/14	Commonwealth
8/19/14	Counsel for Co-Defendant
11/4/14	Defendant
2/17/15	Defense Attorney
5/12/15	Defense Attorney
8/25/15	Defense Attorney
1/25/16	Defense Attorney
5/17/16	Defense Attorney
7/12/16	Defense Attorney
11/29/16	Defense Attorney
4/10/17	Trial Commenced

Excludable Time Periods²:

11/4/14 to 4/10/17 → 888 days, resulting from continuances granted at the request of Defendant and Defendant's Attorneys

The relevant inquiry in this case is whether the Defendant was brought to trial within 365 days of the date on which the complaint was filed, accounting for all periods of excludable time. Pa. R. Crim. P. 600(A)(2)(a). Even giving the Defendant the benefit of the doubt,⁴ no Rule 600 violation occurred in this case because the vast majority of the continuances granted in this case were at the request of the Defendant and the Defendant's attorneys, and such continuances are excludable under Rule 600(C)(1).

Indeed, the only time included in the Rule 600 computation is the time between 1/31/14, the date the complaint was filed, and 11/4/14, when the Defendant's attorney submitted her first postponement, for a total of 277 days. This calculation also gives the Defendant the benefit of the doubt because it assumes for the sake of argument that the delay caused by the Commonwealth's first postponement on 6/12/14 was solely the result of a lack of due diligence. Delays caused by co-defendants are not excludable under the rule, so the time between the 8/19/14 postponement occasioned by the co-defendant's counsel and the 11/4/14 trial date is not excludable under Rule 600(C), and, therefore, the delay caused by that postponement is included in the calculation.

The time between 11/4/14 and 4/10/17, or 888 days, is excludable pursuant to Pa. R. Crim. P. 600(C)(1) because the period of delay resulted from continuances which were granted at the request of the Defendant's attorneys. *See Commonwealth v. Jones*, 886 A.2d 689, 702 (Pa. Super. 2005). The overwhelming majority of these postponements were requested as part of a reasonable trial strategy to await the Defendant's federal sentencing so as to try to limit his federal sentencing exposure⁵ and to potentially seek dismissal of the state court charges altogether.

Moreover, a few of the postponements were occasioned by the difficulty that the Defendant's attorneys had in working with him, as well as the Defendant requiring the appointment of new trial counsel on three (3) separate occasions. In sum, from the date the complaint was filed (1/31/14), until the date trial commenced on 4/10/17, 1,165 days passed. However, when 888 days occasioned by defense postponements are subtracted from the calculation as excludable time, 277 days remain, which is well within the 365-day timeframe to bring the Defendant to trial. In no way was the delay in bringing the Defendant to trial solely caused by the Commonwealth or any lack of due diligence on its part. Courts must remain mindful that Rule 600 was "adopted by Supreme Court 'to prevent unnecessary prosecutorial delay in bringing a defendant to trial.'" *Colon, supra*, at 357 (emphasis added). Thus, the Defendant's Rule 600 rights were not violated in this case.

Analysis of the four factors set forth in *Barker, supra*, also demonstrates that the Defendant's constitutional rights to a speedy trial were not violated as a result of the delay in bringing him to trial. *Colon, supra*, at 357. "In *Barker*, the United States Supreme Court identified the following four factors to be considered in determining whether an unconstitutional speedy trial violation had occurred: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of his rights; and (4) the prejudice to the defendant." *Colon, supra*, at 356. While the length of delay in this case was not insignificant, and while the Defendant did file a *pro se* motion⁶ indicating his desire to proceed to trial notwithstanding his attorney's trial strategy, the reason for the delay, and the lack of prejudice to the Defendant, heavily weigh against a finding that his constitutional rights were violated. As noted, all of the defense attorneys in the case had a legitimate concern that the Defendant's federal sentence would be impacted if the state charges proceeded first. Furthermore, there had also been some discussions with the Commonwealth regarding a complete dismissal of the state court charges once the Defendant was sentenced in federal court. The trial strategy employed by the defense attorneys was more than reasonable given the implications that a state court conviction could have on his federal sentence.

To that end, a strong argument exists that his defense attorneys could be deemed ineffective had they *not* considered the impact that a state court conviction could have on his federal sentencing. Additionally, the defense strategy to try to wait out the federal sentencing was also completely reasonable given the strength of the Commonwealth's evidence against the Defendant in state court. As noted in the factual recitation, the Defendant's brutal assault on CO Arlotta was captured on surveillance video, and the attack, and its aftermath, was observed by several witnesses. Thus, the reason for the delay in bringing the Defendant to trial far outweighs the length of the delay and any desire from the Defendant to proceed to trial.

Moreover, the delay in bringing the Defendant to trial did not result in any discernable prejudice to the Defendant. The delay did not cause any evidence to be lost or destroyed, and it did not prevent any defense witnesses from appearing at trial or other-

wise impact the Defendant's ability to prepare and present a defense at trial. To that end, the court notes that the only defense employed by the Defendant at his trial was to claim that the Commonwealth and its witnesses were liars. The Defendant at all times was incredibly involved in the investigation of his case, and, to date, he has failed to articulate how the delay in bringing him to trial impacted his ability to proceed to trial once it commenced. The court also notes that, since the Defendant had a federal case during the pendency of the state court charges, the delay in resolving his state court charges did not prevent him from having peace of mind from criminal charges that were hanging over his head. Accordingly, for all the reasons just stated, the Defendant was not entitled to dismissal of charges because his speedy trial rights under *Barker* and his rights under Rule 600 were not violated, and this contention should be rejected on appeal.

B. This court did not err by granting the Commonwealth's motion to amend the information.

The Defendant originally had been charged in a one (1) count information with Assault by a Prisoner under 18 Pa. C.S.A. § 2703(a). On October 21, 2014, the Commonwealth filed its first motion to amend the information so as to include Count Two (2): Aggravated Assault under 18 Pa. C.S.A. § 2702(a)(2). While that motion was still pending, the Commonwealth filed a second motion to amend the information on May 21, 2015, seeking to include Count Three (3): Aggravated Harassment by Prisoner under 18 Pa. C.S.A. § 2703.1; Count Four (4): Aggravated Assault under 18 Pa. C.S.A. § 2702(a)(3); and Count Five (5): Simple Assault under 18 Pa. C.S.A. § 2701(a)(1).

The Commonwealth's motions remained pending for some time because, as explained above, there was a possibility that the motions would become moot as soon as the Defendant was sentenced in federal court. However, given the years-long delay in the federal court proceedings, and the uncertainty surrounding the timing of the federal sentencing, the parties ultimately decided to proceed with the state charges. The court, therefore, addressed the Commonwealth's motions to amend the information on April 10, 2017, prior to the commencement of trial. The court granted the amendments as to counts Two (2), Four (4), and Five (5), and denied the amendment as to Count Three (3).

In determining whether an amendment to the information was properly granted, our appellate court has explained that

the Court will look to whether the appellant was fully apprised of the factual scenario which supports the charges against him. **Where the crimes specific in the original information involved the same basic elements and arose out of the same factual situation as the crime added by the amendment, the appellate is deemed to have been placed on notice regarding his alleged criminal conduct and no prejudice to defendant results.**

Commonwealth v. Sinclair, 897 A.2d 1218, 1222 (Pa. Super. 2006) (emphasis added); *Commonwealth v. Beck*, 78 A.3d 656, 660 (Pa. Super. 2013). In determining whether a defendant was prejudiced by an amendment to the information, the reviewing court looks to the following factors:

(1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during a preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

Id. at 1223; *Beck*, *supra*, at 660. Out of these six (6) factors, none of them favor a finding of prejudice in the Defendant's case. As noted, the Commonwealth filed the motions seeking the amendments in October of 2014 and May of 2015, years before the Defendant's trial commenced. The Defendant, thus, had ample notice of the Commonwealth's intent to amend the information to add these charges. The Defendant does not claim that the amendments added any substantively new and previously unknown facts; he does not claim that the amendments vitiated any defense strategy that he was seeking to employ; and he cannot claim that the timing of the Commonwealth's motions to amend the information deprived him of any meaningful opportunity to prepare for trial because the factual allegations underlying the amendments were identical to the original crime charged.

Indeed, the Defendant's sole claim of prejudice is that the amendments "increas[ed] the grading of the offenses charged." (Concise Statement, p. 3). However, the "mere possibility that amendment of an information may result in a more severe penalty due to the additional charge is not, of itself, prejudice." *Sinclair*, *supra*, at 1224 (citing *Commonwealth v. Picchianti*, 600 A.2d 597, 599 (Pa. Super. 1991)). The Defendant cannot demonstrate that he suffered any prejudice in this case because the original crime of Assault by a Prisoner "involved the same basic elements and arose out of the same factual situation" as the crimes of Aggravated Assault and Simple Assault that were added by the amendments. *Id.* at 1222. As noted, the Commonwealth's motions were not filed on the eve of trial, but rather years before, so the Defendant had ample notice regarding his alleged criminal conduct, and he makes no assertion to the contrary.

The court also notes that the Defendant's bare-boned and unfounded claim that the amendments were filed in retaliation for his failure to plead guilty to simple assault is nothing more than speculation and conjecture. (Concise Statement, p. 3). Given the serious nature of the Defendant's alleged crimes, *i.e.* his physical assault on a prison guard, the Commonwealth acted well within its discretion to bring forth additional charges so as to more comprehensively address the egregious nature of the Defendant's criminal conduct. Accordingly, the Defendant's second allegation of error respectfully should be rejected on appeal because this court did not commit error by granting the Commonwealth's motions to amend the information. *Id.* at 1222.

C. The Defendant's aggregate sentence was legal and was not an abuse of discretion by this court.

Finally, the Defendant's challenge to his sentence should be rejected on appeal. The Defendant contends that this court imposed an illegal sentence because it sentenced the Defendant to consecutive terms of imprisonment for his Assault by a Prisoner (Count One) and Aggravated Assault (Count Two) convictions. (Concise Statement, p. 3). The court notes that the Defendant never raised a merger claim at the time of sentencing or in any post-sentence motion. (See Sentencing Hearing Transcript ("ST"), 5/24/17, pp. 9-11); (Post-Sentence Motion, 5/26/17, pp. 1-4). In any event, the Defendant's claim that the offenses at Counts One (1) and Two (2) of the information should have merged for purposes of sentencing is without merit.

Pursuant to 42 Pa. C.S. §9765,

No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act **and all of the statutory elements of one offense are included in the statutory elements of the other offense.** Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher [-] graded offense.

42 Pa. C.S. §9765 (emphasis added). “Accordingly, merger is appropriate only when two distinct criteria are satisfied: (1) the crimes arise from a single criminal act; **and** (2) **all** of the statutory elements of one of the offenses are included within the statutory elements of the other.” *Commonwealth v. Raven*, 97 A.3d 1244, 1249 (Pa. Super. 2014) (emphasis added).

The Assault by Prisoner statute, set forth in 18 Pa. C.S.A. §2703(a), provides, in relevant part:

A person who is confined in or committed to any ... county detention facility ... located in this Commonwealth is guilty of a felony of the second degree if he, while so confined ... intentionally or knowingly, commits an assault upon another ... by any means or force likely to produce serious bodily injury.

18 Pa. C.S.A. §2703(a). The crime of Aggravated Assault under 18 Pa. C.S.A. §2702(a) (2) provides, in relevant part:

A person is guilty of aggravated assault if he . . . attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other [enumerated persons], in the performance of duty.

While the two offenses arose from the same criminal act, the offenses were not subject to merger at sentencing because all of the statutory elements of Assault by Prisoner offense are not included within the statutory elements of Aggravated Assault, or vice versa. See 42 Pa. C.S. §9765. To be sure, the crime of Assault by a Prisoner under §2703(a) requires the defendant to be a prisoner, but Aggravated Assault – attempting to cause/serious bodily injury to an enumerated person under §2702(a)(2), does not require the defendant to be a prisoner. The Assault by a Prisoner statute also does not require that the assault be committed upon an enumerated person; for example, the offense can be established if the assault is committed upon another inmate. On the other hand, Aggravated Assault under §2702(a)(2), requires that the assault be committed or attempted on an enumerated person. Thus, the Assault by a Prisoner statute focuses on the Defendant’s status as a prisoner, while Aggravated Assault under §2702(a)(2) focuses on the victim’s status as an “enumerated person” under §2702(a)(2) and §2702(c). Moreover, Aggravated Assault under §2702(a)(2) can be established with a mere attempt, while Assault by a Prisoner requires a defendant to actually commit the assault.

Although the Defendant cites “the recent case of *Commonwealth v. Shawn Brown*, 159 A.3d 531 (Pa. Super. 2017),” in support of his merger argument, nothing about that case, or its holding, alters the conclusion that Assault by a Prisoner under §2703 and Aggravated Assault under §2702(a)(2) do not merge at sentencing. Indeed, the *Brown* case simply held that the offenses of Rape of a Child (18 Pa. C.S.A. §3121(c)) and Involuntary Deviate Sexual Intercourse with a Child (18 Pa. C.S.A. §3123(b)), merged for sentencing purpose when they are based on one underlying act of oral sex. *Brown*, *supra*, at 533-34. In reaching this conclusion, the Superior Court still analyzed the offenses pursuant to the merger statute set forth in 42 Pa. C.S.A. §9765. *Id.* at 532-33.

Accordingly, because all of the statutory elements of Assault by a Prisoner are not included within the statutory elements of Aggravated Assault under §2702(a)(2), the offenses were not subject to merger for purposes of sentencing, and the Defendant’s challenge to the legality of his sentence is without merit.

Although the Defendant argues that the court “erred and/or abused its discretion when sentencing [him] to consecutive terms on counts 1 and 2 of the information,” the Defendant’s challenge to his sentence is strictly focused on the merger issue. The Defendant fails to offer anything more than a bare-boned and conclusory statement that the consecutive sentencing scheme was an abuse of discretion. Additionally, aside from his merger claim, he does not state with any specificity how or why his aggregate sentence was an abuse of discretion in this case. For that reason, any challenge to the discretionary aspect of sentencing should be deemed waived on appeal, as the lack of specificity precludes this court from meaningfully responding to that sentencing argument. See *Commonwealth v. Dowling*, 778 A.2d 683, 686-87 (Pa. Super. 2001).

In the event that this sentencing claim is deemed preserved for appellate review, it nevertheless is without merit. 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 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).

“[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) (emphasis added). 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.

As noted, the Defendant’s sentencing argument appears to focus solely on the fact that this court exercised its discretion in imposing consecutive sentences, and a challenge to the imposition of consecutive sentences ordinarily does not suffice to raise a substantial question for appellate review. *See Raven, supra*, at 1253. In this court’s estimation, the Defendant has failed to raise a substantial question that the sentence imposed was inappropriate under the Sentencing Code. However, even if his bald claim of excessiveness due to the consecutive sentencing scheme were to raise a substantial question, he cannot demonstrate that the sentence was unduly harsh, considering the nature of the criminal conduct and the length of imprisonment imposed.

Indeed, the serious nature of the Defendant’s crimes, coupled with his background, history, need for rehabilitation, all justified a serious sentence in this case. This is not the Defendant’s first violent offense, nor is it his first one that involved a physical assault on an officer. Other, less serious sentences did not suffice to deter the Defendant from criminal activity and violent behavior. The fact that he not only committed an assault while incarcerated, but that he did so upon a correctional officer, also evinces his lack of respect for authority figures and the law, which, in turn, creates a substantial need to protect the public from his behavior. He also failed to meaningfully take responsibility for his actions, even though the assault was captured on video surveillance. The Defendant has failed to show remorse for his actions. Defendants are not entitled to a volume discount for their crimes, and the Defendant in this case certainly was not deserving of one. Accordingly, for all these the reasons, the consecutive sentencing scheme in this case was not an abuse of discretion, and the Defendant’s challenge to his sentence is without merit.

III. CONCLUSION

Based on the foregoing, the Defendant’s allegations of error on appeal are without merit. The court did not err by denying the Defendant’s Rule 600 motion because the Defendant’s rights to a speedy trial were not violated in this case. The court did not err by allowing the Commonwealth to amend the information because the Defendant had ample notice of the amendments, the amendments involved the same facts as the original charge, and the Defendant was not prejudiced by their addition. Finally, the consecutive sentencing scheme imposed was lawful and warranted by the facts of this case. Accordingly, this court respectfully requests that the Defendant’s convictions and sentence in this case be upheld.

BY THE COURT:

/s/Lazzara, J.

Date: September 19, 2017

¹ On April 10, 2017, the court denied the Commonwealth’s motion to amend the information to include Count Three – Aggravated Harassment by a Prisoner (18 Pa. C.S.A. §2703.1)

² For reasons that remain unclear, the Clerk of Court file does not contain all of the postponement forms submitted in this case. However, information regarding the dates that trial was postponed, and the party requesting the postponement, is able to be gleaned from the postponement forms which are located in the file.

³ All dates were calculated using the date calculator on CPCMS.

⁴ The postponement form dated 2/17/15 lists the Commonwealth as the movant who requested the continuance of the 6/12/14 trial date, while the postponement form dated 11/29/16 lists the Defendant as the movant for the 6/12/14 trial date. The court notes that the actual postponement form from 6/12/14 is not in the file.

⁵ The parties were concerned that if the Defendant was convicted and sentenced on his state court charges prior to the imposition of his federal sentence, then his state sentence would be included in the federal sentencing guideline calculation. That, in turn, could have affected the Defendant’s criminal history category and/or otherwise increased the Defendant’s sentencing range under the federal sentencing guidelines and/or triggered any federal statutory sentencing enhancements pursuant to the Armed Career Criminal Act. *See* U.S.S.G. §4A1.2(a), Application Note 1. The court also notes that the procedural history surrounding the Defendant’s federal case at 2:14-CR-00265-CB-1 is quite protracted. The Defendant was indicted on 11/18/14 and charged with being a Felon in Possession of a Firearm, in violation of 18 U.S.C. §§922(g)(1) & 924(e) & (2). The Defendant originally was represented by the Federal Public Defender’s Office, but he subsequently was granted leave to proceed *pro se* and waived his right to a jury trial. The Defendant’s *pro se* bench trial was held on 5/26/15, and he was convicted on 8/13/15. Although the Defendant’s sentencing hearing originally was scheduled to take place on 12/8/15, the sentencing hearing was rescheduled nine (9) times. Specifically, the Defendant’s sentencing dates were scheduled for 12/8/15; 1/19/16; 2/17/16; 3/18/16; 3/21/16; 4/6/16; 6/28/16; 6/23/16; 9/27/16; and 10/14/16. To date, the Defendant has yet to be sentenced in federal court, and there is no scheduled sentencing date on the federal docket. It appears that the delay in imposing the Defendant’s federal sentence is due to the fact that the Defendant has challenged the applicability of certain sentencing enhancements and has filed *pro se* post-trial motions that are still pending as of the date of this Opinion.

⁶ *See* Pro Se Motion filed on March 17, 2015,

Commonwealth of Pennsylvania v. Adriene Williams

Criminal Appeal—Homicide—Sufficiency—Weight of Evidence—Sentence (Discretionary Aspects)—Malice—Inflammatory Photographs—Narration of Surveillance by Police Officer—Expert Testimony

Multiple Issues in connection with a Mother’s conviction for third-degree murder of her young child.

No. CP-02-CR-9769-2015. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—November 22, 2017.

OPINION

This is a direct appeal in which the defendant appeals the Judgment of Sentence of August 26, 2016. After a jury trial, the defendant was found guilty of Third Degree Murder, Abuse of a Corpse and Tampering With Physical Evidence. Relative to the conviction for Third Degree Murder, this Court sentenced the defendant to a term of imprisonment of not less than 20 years nor more than 40 years. No further penalty was imposed at the remaining counts. This timely appeal followed in which the defendant alleges numerous allegations of errors in the trial court.

The credible facts adduced at trial established that the following relevant events transpired on June 14, 2015:

Between 4:00 and 5:00 p.m., the defendant dropped off her three-year-old daughter, Adrionna, at the defendant's mother's house. The defendant's mother, Lucille Williams, routinely watched Adrionna while the defendant was at work. The defendant was a security guard. She had arrived at her mother's house wearing casual clothing and she changed into her security guard uniform at her mother's house. While at Lucille Williams' house, Adrionna asked to eat some watermelon. The defendant went to the kitchen to get some watermelon for her daughter. After a few minutes, Lucille Williams went to the restroom. Family members noticed Adrionna run from one room toward the front door of the residence to give the defendant a kiss before she left for work. When Lucille Williams came out of the bathroom, the defendant was gone. Lucille Williams believed that the defendant had left for work. Adrionna was also missing from the residence. The last anyone saw of Adrionna was when she left one room of the residence and ran toward the front door to give her mother a kiss. Lucille Williams and two other occupants of the residence began looking around the residence for Adrionna without success. The family members frantically attempted to call and send text messages to the defendant to inquire if she knew anything about Adrionna's location. The defendant did not answer her phone or respond to any text messages for approximately ten to fifteen minutes. When the defendant finally responded to the efforts to reach her, the defendant claimed that Adrionna was not with her and she did not know Adrionna's location. Additional calls and text messages to the defendant went unreturned for approximately 30 minutes. The defendant then returned to Lucille Williams' residence. The defendant changed clothes and began to look for her daughter.

At approximately 7:50 p.m., about an hour after Adrionna went missing, Adrionna's body was discovered by someone walking her dog about three miles from Lucille Williams' residence. Adrionna's body was found lying on the side of a dirt pile strewn with rocks, road debris and downed trees. Bright, multi-colored paper clips were found near Adrionna's body. Emergency personnel were summoned to the scene and Adrionna was confirmed dead. Trial testimony indicated that Adrionna had died from asphyxiation. She had redness and abrasions above her right eye and forehead area.

A police investigation ensued. Upon being questioned about her whereabouts at the time Adrionna went missing, the defendant advised detectives that she was at work. She acknowledged that she responded via a text message that Adrionna was not with her. She explained that by the time she had made contact with her family, she was driving in her car, on her way to her mother's residence to help find Adrionna. When she returned to her mother's house, the defendant's shoes were mud-covered. The defendant's car was searched and bright, multi-colored paper clips were found in the car. The paper clips were of the same type (size and color) that were found at the location where Adrionna's body was found. Also found was a notebook in which the defendant complained of the difficulties of single-parenting. The defendant's work shirt was recovered from her vehicle and there was a stain on the shoulder area of the shirt. That shirt was sent to the Allegheny County Crime Lab for analysis. Results of testing revealed that the stain on the work shirt was from watermelon.

Cell phone tower data was admitted at trial. This evidence showed that at the time defendant claimed she was at work, her cell phone "pinged" a cell phone tower located in an area near where Adrionna's body was found. Furthermore, surveillance videos of the area where Adrionna's body was found disclosed that a vehicle fitting the description of the defendant's vehicle traveled near, and generally in the direction of, the area where Adrionna's body was found.

At the conclusion of the trial, the defendant was convicted as set forth above. She filed an appeal and raises many meritless claims.

Defendant claims that there was insufficient evidence to convict her of any of the offenses of conviction. 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 claims that the evidence relied on to convict her of Third Degree Murder was legally insufficient. "Third degree murder occurs when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice." *Commonwealth v. Kling*, 731 A.2d 145, 147 (Pa. Super. 1999), appeal denied, 560 Pa. 722, 745 A.2d 1219 (1999) (citing 18 Pa.C.S.A. § 2502(c)). Importantly,

The elements of third degree murder, as developed by case law, are a killing done with legal malice but without specific intent to kill required in first degree murder. Malice is the essential element of third degree murder, and is the distinguishing factor between murder and manslaughter.

Commonwealth v. Cruz-Centeno, 668 A.2d 536, 539 (Pa. Super. 1995). appeal denied, 676 A.2d 1195 (Pa. 1996).

[E]vidence of intent to kill is simply irrelevant to third degree murder. The elements of third degree murder absolutely include an intentional act, but not an act defined by the statute as intentional murder. The act sufficient for third degree is still a purposeful one, committed with malice, which results in death, clearly one can conspire to such an intentional act.

Commonwealth v. Fisher, 80 A.3d 1186, 1191 (Pa.2013), *cert. denied sub nom. Best v. Pennsylvania*, 134 S.Ct. 2314, 189 L.Ed.2d 192 (2014) (emphasis in original).

“Malice exists where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured.” *Id.*, at 147-148 (citation and quotation marks omitted). *Commonwealth v. Tielsch*, 934 A.2d 81, 94, (Pa.Super.2007). As set forth in *Commonwealth v. Thomas*, 594 A.2d 300, 301-302 (Pa. 1991):

[m]alice was defined in *Commonwealth v. Drum*, 58 Pa. 9, 15 (1868), as follows:

The distinguishing criterion of murder is malice aforethought. But it is not malice in its ordinary understanding alone, a particular ill will, spite or a grudge. Malice is a legal term, implying much more. It comprehends not only a particular ill will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Murder, therefore, at common law embraces cases where no intent to kill existed, but where the state or frame of mind termed malice, in its legal sense, prevailed.

The crime of third degree murder under the Crimes Code incorporates the common law definition of malice. *Commonwealth v. Hinchcliffe*, 479 Pa. 551, 556, 388 A.2d 1068, 1070, *cert. denied*, 439 U.S. 989, 99 S.Ct. 588, 58 L.Ed.2d 663 (1978). The question is whether the evidence in this case supports a finding of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty sufficient to constitute legal malice.

Malice has been deemed present where a defendant only intended only to “scare” a victim by shooting at the victim when the conduct nevertheless unjustifiably creates an extremely high degree of risk, thereby evincing a wanton and reckless disregard for human life. Intentionally aiming a gun at another “exhibit[s] that type of cruel and wanton conduct of which legal malice is made.” *Commonwealth v. Young*, 494 Pa. 224, 228-229, 431 A.2d 230, 232 (1981). Evidence showing that a defendant acted with “recklessness of the consequences”, had “a mind with no regard for social duty”, and that a defendant “consciously disregarded an unjustified and extremely high risk that his actions might cause serious bodily injury” is sufficient to establish malice. *Commonwealth v. DiStefano*, 2001 PA Super 238, 782 A.2d 574, 582 (Pa. Super. 2001). Furthermore, the Commonwealth may prove third degree murder by reasonable inferences drawn from the circumstances of the killing, and malice may also be inferred from the use of a deadly weapon upon a vital part of the body. *Commonwealth v. Cruz-Centeno*, 668 A.2d 536, 540 (Pa.Super. 1995), appeal denied, 676 A.2d 1195 (Pa. 1996).

The evidence in this case was sufficient to convict the defendant of Third Degree Murder. Circumstantial evidence clearly pointed to the defendant as the person who killed Adrianna. The evidence clearly demonstrated that Adrianna was asphyxiated by another person. She was a three-year-old child who was in otherwise good health. The defendant was the last person to have had contact with Adrianna. Cell phone data from the relevant time period placed the defendant’s vehicle close to the area where Adrianna was found. It did not place the defendant at her place of work as the defendant falsely related during her interview. Video surveillance from the relevant time period placed a vehicle having the same characteristics as defendant’s vehicle near the scene where Adrianna’s body was discovered. A notebook found in the defendant’s vehicle contained the defendant’s own words lamenting her difficulties with being a single parent. Adrianna clearly had eaten watermelon just before the defendant “left for work” and, presumably, that watermelon was still in Adrianna’s stomach at the time of her death. Stains consistent with the contents of Adrianna’s stomach were found on the shoulder area of the defendant’s work shirt. This circumstantial evidence was sufficient to permit the jury to find that the defendant killed Adrianna.

Additionally, the evidence in this case provided a sufficient showing of malice. The defendant’s actions in taking the steps necessary to apply sufficient force to suffocate her three-year-old daughter amply demonstrated that the defendant acted with a “hardness of heart” or a “recklessness of the consequences”, and that she had “a mind with no regard for social duty”. These actions of the defendant were also sufficient to show that the defendant consciously disregarded an unjustified and extremely high risk that her actions would result in serious bodily injury. The defendant’s action in killing her young child coupled with her attempts to cover her crime amply proved the requisite malice. Accordingly, the evidence presented in this case was sufficient to prove Third Degree Murder.

The evidence was also sufficient to convict of abuse of a corpse. The Crimes Code makes it an offense to “treat [] a corpse in a way that [one] knows would outrage ordinary family sensibilities[.]” 18 Pa.C.S.A. § 5510 (defining the crime of abuse of a corpse). In Pennsylvania, a person who knowingly leaves a corpse to rot, without making arrangements for a proper burial, commits abuse of a corpse. *Commonwealth v. Hutchison*, 164 A.3d 494, 499 (Pa.Super. 2017); *Commonwealth v. Smith*, 567 A.2d 1070, 1073 (Pa.Super. 1989). As set forth above in more detail, the circumstantial evidence in this case was sufficient to demonstrate that the defendant killed Adrianna and left her in the area where Adrianna’s dead body was found. The jury was free to believe that the defendant placed Adrianna’s dead body at that location and left it there to rot. This claim should quickly be rejected.

The evidence was likewise sufficient to convict of Tampering With Evidence. Tampering with physical evidence is defined at section 4910 of the Crimes Code, in relevant part, as follows:

A person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation[.]

18 Pa.C.S.A. § 4910(1). To establish the offense of tampering with evidence, the Commonwealth must prove three interrelated elements: (1) the defendant knew that an official proceeding or investigation was pending (or about to be instituted); (2) the defendant altered, destroyed, concealed, or removed an item; and (3) the defendant did so with the intent to impair the verity

or availability of the item to the proceeding or investigation. *Commonwealth v. Jones*, 904 A.2d 24, 26 (Pa. Super. 2006).

This Court is not completely certain of the nature of defendant's sufficiency claim relative to the tampering charge. The tampering charge in this case related to the defendant's attempts to conceal the shirt found in her vehicle containing watermelon stains. The evidence clearly supported this conviction. Curiously, in her 1925(b) statement, the defendant does not challenge the proof regarding any element of the offense of conviction. Instead, she appears to assert some semblance of a claim that her initial refusal to permit a search of her vehicle was constitutionally protected and presumably, the Commonwealth should not have been permitted to rely on her initial reluctance to permit the search at trial. This Court does not believe that this claim challenges the legal sufficiency of the Commonwealth's proof relating to any of the elements of the offense of conviction. Instead, it is more akin to the litigation of a suppression motion, which is not a part of the instant appeal. Therefore, this claim should be rejected.

Defendant's next claim of error is that the guilty verdicts were against the weight of the evidence because (1) the Commonwealth did not present sufficient evidence to establish that the defendant perpetrated a homicide and with what intent such an act had been committed because the medical examiner could not determine the means through which the victim was asphyxiated, that the record was devoid of evidence that the defendant acted recklessly and that no medical opinion could be rendered as to the location or time of death; (2) that the guilty verdict for tampering with physical evidence was against the weight of the evidence because she consented to the search of her vehicle where her clothing was found thereby refuting the Commonwealth's theory that the defendant attempted to conceal this evidence; and (3) that the guilty verdict for abuse of a corpse was against the weight of the evidence because no eyewitnesses were able to place the defendant at the location where the victim was discovered.

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)).

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).

Defendant's first claim that the guilty verdict of Third Degree Murder was against the weight of the evidence because the evidence was insufficient to demonstrate that the defendant perpetrated a homicide and that the defendant had the requisite intent to commit such a crime is wholly meritless. As set forth above, a claim that a verdict was against the weight of the evidence concedes that the evidence was legally sufficient to convict. With legal insufficiency being the only basis to attack the weight of the Third Degree Murder conviction, this claim is baseless.

Defendant next claims that the guilty verdict for tampering with evidence was against the weight of the evidence because the defendant eventually consented to the search of the area where the shirt was found. This claim does not provide any basis to find that the verdict would shock one's sense of justice. As the record reflects, the defendant did not originally agree to permit a search of her vehicle. It was only at the behest of her sister that the defendant agreed to the search of her vehicle. The jury was presented with the circumstances of the defendant's consent to search her vehicle was entitled to treat that evidence as it saw fit. Obviously, it rejected the defense's interpretation of the circumstances of her consent. This claim is, likewise, baseless.

Defendant next claims that the guilty verdict for abuse of a corpse was against the weight of the evidence because there were no eyewitnesses that placed the defendant at the scene where Adrionna's body was found. Though factually accurate, this claim ignores the overwhelming circumstantial evidence set forth above linking the defendant to the scene where Adrionna's body was found. Accordingly, this claim fails.

Defendant's next claim of error relates to this Court's rulings concerning the admission of photographs of Adrionna's body where it was found on the dirt pile. Pa.R.E. 403 provides:

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence

"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.

The Supreme Court has held that “the admissibility of photographs of a crime scene is within the sound discretion of the trial court and only an abuse of the discretion will constitute reversible error.” *Commonwealth v. Brown*, 711 A.2d 444, 453 (Pa. 1998). In *Commonwealth v. Marinelli*, 547 Pa. 294, 690 A.2d 203 (Pa. 1997), the Supreme Court proclaimed a two-step test to determine the admissibility of photographs of a victim. First, a court must determine whether the photograph is inflammatory. 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.” 690 A.2d at 216.

The photographs at issue depicted two different angles of Adrionna’s body as it was found on the dirt pile. The defendant claims that the prejudicial value of the photographs substantially outweighed the probative value of the photographs because admission of the photographs only inflamed the passions of the jury because they are photographs of a three-year-old child lying dead. The Commonwealth claimed that the photographs were probative because a portion of the Commonwealth’s case was that the defendant hastily disposed of Adrionna’s deceased body, thus they are relevant to the charge of Abuse of a Corpse. This Court agrees with the Commonwealth that the positioning of Adrionna’s body is probative of the circumstances of her disposal on the dirt pile and the manner in which she was left there. This Court further believes that the photographs are also relevant to the charge of Criminal Homicide as they have some probative value as to a showing of malice. This Court does not view the prejudicial value of the photographs to substantially outweigh the probative value of the photographs. This Court believed the photographs also corroborated eyewitness testimony concerning the type and color of clothing Adrionna was wearing at the time of her disappearance. This Court did provide a cautionary instruction to the jury that they should not permit any passion or emotion caused by the admission of the photographs to affect their judgment in this case. Accordingly, there is no error regarding the admission of the photographs in this case.

Defendant next claims that this Court erred in allowing Detective Feeney to narrate surveillance video that was being played to the jury over a defense objection grounded in the Best Evidence Rule. However, the Superior Court has explained that a police officer is permitted to narrate videotaped surveillance. *Commonwealth v. Cole*, 135 A.3d 191, 194-195 (Pa.Super. 2016). As set forth in *Cole*:

The admission of videotaped evidence is always within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Commonwealth v. Stark*, 363 Pa.Super. 356, 526 A.2d 383 (1987). “Admissibility depends on relevance and probative value. 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.” *Commonwealth v. Drumheller*, 570 Pa. 117, 808 A.2d 893, 904 (2002) (quoting *Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 117-118 (2001)).

In ruling that a police detective could narrate a videotape, the *Cole* court explained

Upon review, we conclude that admission of Detective Satler’s narration did not violate our rules of evidence. Detective Satler’s testimony was based on his experience, his perceptions, and his personal knowledge of Elmore Square. His testimony was relevant to the jury’s understanding of the timing, the actors, and the location of events depicted in the video. Moreover, his testimony did not cause unfair prejudice or undue delay, confuse the issues, mislead the jury, or needlessly present cumulative evidence. Thus, we discern no abuse of the trial court’s discretion in admitting Detective Satler’s testimony.

135 A.3d at 196.

In this case, the Commonwealth presented Detective Feeney to testify that he reviewed surveillance videotapes taken from various points along a course of traffic where a “vehicle of interest” was observed shortly after Adrionna’s disappearance. Detective Feeney testified observed a “vehicle of interest” having characteristics similar to the defendant’s vehicle traveling near the area where Adrionna’s body was found during the relevant time period. This Court advised the jury that the purpose of Detective Feeney’s testimony was to explain what he evaluated to determine why the video may be relevant in this case. The Court instructed the jury that Detective Feeney was not testifying that the vehicle depicted in the video was actually the defendant’s vehicle. The actual determination of the contents of the video, this Court instructed, was for the jury alone. The videotapes were admitted as evidence at trial. The defendant and the Commonwealth entered stipulations that the various entities provided the surveillance video to law enforcement depicting surveillance during the relevant time periods and that the videos were accurate as to what was depicted.

This Court does not believe that allowing Detective Feeney to narrate the videotapes was error. The videotapes were admitted at trial without objection and the defendant stipulated that the videotapes were authentic and accurate. This Court instructed the jury that it was their observations from the video that controlled in this case. Detective Feeney’s narration simply provided

information concerning the timing of the events of that evening and it described the locations and area when the vehicle of interest travelled. There was nothing improper about the admission of this testimony.

Defendant next claims that this Court should have granted a mistrial after the defendant became aware of a witness who could have provided exculpatory evidence in this case. As set forth in *Commonwealth v. Brooker*, 103 A.3d 325, 332 (Pa.Super. 2014) (citation omitted):

The review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will ... discretion is abused. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.

There was no basis to declare a mistrial in this case. During the trial, a county detective was approached in the courthouse hallway by a person claiming to have information that Lucille Williams, the defendant's mother, had previously served as a foster parent in Buffalo, New York. This person advised that a young child had died while in Lucille Williams' custody and that Lucille Williams had been abusive to foster children approximately 20 years prior to trial. This Court recessed the trial and granted the defendant an opportunity to investigate the matter. Defense counsel initially advised the Court that this information, if corroborated, could be used to impeach Lucille Williams' trial testimony and that it would provide a basis for the defendant to argue that Lucille Williams may have been the perpetrator of Adrianna's death. The Commonwealth also dispatched one of its detectives to conduct its own investigation into this matter. After a court recess, it was determined that the person in New York was no longer willing to speak with anyone about the issue and was not willing to come forward as a witness. It was also determined that a young child did, indeed, perish while in Lucille Williams' foster care in New York. However, the information provided to the Court indicated that the child died from complications of Hepatitis C and that there was never an investigation into the circumstances of the child's death. Despite the oral motion for a mistrial, there was no credible admissible evidence presented to this Court that Lucille Williams was abusive toward foster children. The defense also presented no evidence that could have been admitted by the defendant either to impeach Lucille Williams or which would have any exculpatory effect benefitting the defendant. This Court was only provided with hearsay and uncorroborated, speculative assertions that a Commonwealth witness may have engaged in conduct approximately 20 years ago. This Court could not conceive how such information would have been admissible in this case. There was no basis to conclude that the denial of the motion for a mistrial would have deprived the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. Accordingly, the denial of the motion for a mistrial was proper.

Defendant next claims that this Court erred in permitting an expert witness to testify and compare the stomach contents of the victim and a stain on the defendant's shirt because the expert lacked proper training and was not qualified as an expert. "Generally speaking, the admission of expert testimony is a matter left largely to the discretion of the trial court, and its rulings thereon will not be reversed absent an abuse of discretion." *Commonwealth v. Brown*, 408 Pa.Super. 246, 596 A.2d 840, 842 (1991), *appeal denied*, 532 Pa. 660, 616 A.2d 982 (1992) (quoting *Palmer v. Lapp*, 392 Pa.Super. 21, 572 A.2d 12, 15-16 (1990)). The "standard for qualifying an expert is a liberal one: the witness need only have a reasonable pretension to specialized knowledge on a subject for which expert testimony is admissible." *Commonwealth v. Kinard*, 95 A.3d 279, 288 (Pa.Super. 2014) (*en banc*) (citation omitted). Further, "[t]he witness's expertise may be based on practical, occupational, or other experimental training; it need not have been gained through academic training alone." *Id.* An expert's testimony is admissible when it is based on facts of record and will not cause confusion or prejudice. *Brown, supra*.

This Court permitted Pamela Woods to testify as an expert witness in this case. Ms. Woods was employed by the Allegheny County Medical Examiner in the Trace Evidence Department. At the time of trial, she had been employed in that office for 21 years. She possessed a Bachelor of Science Degree in Chemistry from Duquesne University and a Masters Degree in Forensic Chemistry from Duquesne University. She has taken multiple training courses at the Federal Bureau of Investigation and she receives continuing education in her field. She had previously testified between 45 and 55 times as an expert witness. Among her duties was to microscopically examine materials to determine whether they are related in some way using Fourier Transform Infrared Spectrometry. She has had prior experience analyzing vegetative materials such as marijuana. She did not, however, have any formal botany training at the time of her testimony. Importantly, in this case, Ms. Woods did not testify that the watermelon taken from Adrianna's stomach matched the stain from the defendant's shirt. Ms. Woods testified that the substance taken from Adrianna's stomach may have shared a source of origin with the substance taken from the stain on the defendant's shirt.

This Court believes the admission of Ms. Woods's testimony was proper. Ms. Wood conducted specialized testing relying on her educational background and her specific training with Fourier Transform Infrared Spectrometry. She analyzed two samples of substances believed to be watermelon using techniques with which she was familiar. This Court believes her specialized knowledge concerning the implementation of the testing relied upon in this case warranted her admission as an expert witness.

Defendant's final claim is that this Court imposed an excessive sentence. Notably the sentence imposed on the defendant was within the standard range of the sentencing guidelines. 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 A.2d 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).

In *Commonwealth v. Fiascki*, 886 A.2d 261, 263-264 (Pa.Super. 2005), the Superior Court noted that the following framework governs merit review of the aspects of defendant's sentence:

The appellate court, in reviewing the discretionary aspects of a sentence on appeal, shall affirm the trial court's sentence unless it finds: (1) that the guidelines were erroneously applied; (2) that the sentence, even though within the guidelines, is "clearly unreasonable"; or (3) that the sentence, if outside the guidelines, is "unreasonable." In any one of these three circumstances, we are required to vacate the trial court's sentence and remand the case with

instructions. 42 Pa.C.S.A. § 9781(c). In determining whether a particular sentence is clearly unreasonable or unreasonable, the appellate court must consider the defendant's background and characteristics as well as the particular circumstances of the offense involved, the trial court's opportunity to observe the defendant, the presentence investigation report, if any, the Sentencing Guidelines as promulgated by the Sentencing Commission, and the findings upon which the trial court based its sentence.

See also *Commonwealth v. Dodge* 859 A.2d 771, 778 (Pa. Super. 2004).

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).

Moreover, "the sentencing court must state its reasons for the sentence on the record." *Boyer*, supra at 154, citing 42 Pa.C.S.A. § 9721(b). The sentencing judge can satisfy the requirement that reasons for imposing sentence be placed on the record by indicating that he or she has been informed by the presentence 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, the law expects court was aware of relevant information regarding defendant's character and weighed those considerations along with any mitigating factors).

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. When a judge imposes a sentence that deviates from the sentencing guideline range, "[a] sentencing judge must state of record the factual basis and specific reasons which compelled him or her to deviate from the guideline ranges. When evaluating a claim of this type, it is necessary to remember that the sentencing guidelines are advisory only." *Commonwealth v. Griffin*, 804 A.2d 1, 8 (Pa.Super. 2002), appeal denied, 868 A.2d 1198 (Pa. 2005), cert. denied, 545 U.S. 1148 (2005), citing *Commonwealth v. Eby*, 784 A.2d 204 (Pa.Super. 2001). 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 pre-sentence report, a reviewing court will not consider a sentence excessive.

The record in this case supports the sentence imposed by this Court. This Court carefully considered the defendant's conduct in this case and was guided by the Presentence Report prepared in this case. This Court considered that the defendant took her daughter from a place of protection, i.e. the defendant's mother's home, and suffocated her. This Court recognized on the record that it considered the defendant's need for rehabilitation, protection of the public, deterrence and the interests of the victims. It considered that the victim was a young child and was totally dependent on the defendant for care and nurturing. This Court noted that had the defendant wanted to yield custody of her child to someone else, she could easily have chosen to have her mother care for the child. Instead, she suffocated the child. This Court considered the expert testimony of Alice Applegate, who testified that the defendant suffered from severe mental health issues. Dr. Applegate also testified that, in her opinion, the defendant could have been rehabilitated with mental health treatment in conjunction with a prison sentence of not less than 10 nor more than 20 years. However, this Court did not believe that, considering the fact that the defendant took her daughter from a place of security and intentionally suffocated her, her mental health issues warranted a sentence at the low-end of the sentencing guidelines. Accordingly, the sentence should not be disturbed.

For the foregoing reasons, the Judgment of Sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: November 22, 2017

Commonwealth of Pennsylvania v. Bryan Hill

Criminal Appeal—DUI—Suppression—Sufficiency—Prosecutorial Misconduct—Destruction of Evidence

Defendant suggests police improperly destroyed dash cam video of DUI stop but trial court finds that no tape existed.

No. CC 2016-07301. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Bigley, J.—December 6, 2017.

OPINION

This is an appeal from a judgment and order of sentence entered on December 13, 2016, which followed a Suppression Hearing and non-jury trial before this court¹. The Defendant was found guilty of Driving Under the Influence (DUI), 3802 §A1 (Refusal –

Breath Testing), § 3802 §A1 General Impairment and violation of the Motor Vehicle Code § 3736 Reckless Driving. The Defendant was sentenced at Count 1 to three (3) to six (6) days in the Allegheny County Jail, six (6) months probation and this court imposed the mandatory minimum \$1000.00 fine. The Defendant was also ordered to follow the recommendations of his drug and alcohol evaluation and complete the alcohol highway safety school². Post Sentence Motions were timely filed on December 27, 2016, and denied on April 27, 2017. This timely appeal followed. The Defendant's Rule 1925(b) Concise Statement of Errors Complained of on Appeal raises the following issues on appeal:

1. This Honorable Court committed reversible error by failing to grant Mr. Hill's Motion to Suppress, allowing the Commonwealth to introduce Mr. Hill's statements obtained in violation of the Fifth Amendment to the United States Constitution. Mr. Hill was subject to custodial interrogation at the time he made these statements, but he was not apprised of his Miranda rights, by the police. As such, Mr. Hill's statements required suppression.
2. This Honorable Court erred as a matter of law in denying trial counsel's request for dismissal relating to the Commonwealth's intentional misconduct in destroying the video evidence in this case based on the following:
 - a. Officer Yurek and Sargeant Blaze confirmed on the record before this Honorable Court on October 14, 2016, that the police cruisers involved in this case had the ability to, and did indeed, record the incident on video on dashboard cameras.
 - b. Although these police officers confirmed that there was video of this incident, they were unable to confirm whether or not his video was in existence at the pretrial motions hearing before this Honorable Court on October 14, 2016.
 - c. Sargeant Blaze told this Honorable Court that the Penn Hills Police Department had unilaterally made the decision that there was 'no dash cam video that would be relevant to this case.'
 - d. Further, because no request for that video had been made for this non-traditional DUI stop, no tape had been created. As such, that video was "likely not" preserved as it was "probably" taped over. TT6. Beyond these representations, these officers did not testify that any other efforts were made to preserve the video or even confirm whether or not it existed at that time.
 - e. On November 8, 2016, Penn Hills Police Chief Howard Burton confirmed in an email to an investigator for the Allegheny County Public Defender's Office that the video no longer existed as the video was recorded over after 30 days from the incident.³
 - f. The decision not to preserve the video was made unilaterally by an inherently biased entity, The Penn Hills Police Department.
 - g. The Commonwealth was careless, arrogant, and cavalier in its mishandling of the video evidence, even after this Honorable Court ordered them to turn it over to the defendant. In face of that order by this Honorable Court, the Commonwealth could not confirm that this video was deleted on October 14, 2016.
 - h. This lack of due diligence in preserving this exculpatory recording is tantamount to intentional misconduct by the Commonwealth.
 - i. Such prosecutorial misconduct required a dismissal of Mr. Hill's case, as no other remedy would cure the misconduct.
 - j. To allow the unfettered destruction of potentially exculpatory evidence under the sole possession and control of the Commonwealth by police to go unpunished would be akin to indirectly cosigning such misconduct. Without judicial intervention, such misconduct will repeat itself without consequence in the future.
 - k. The Commonwealth's failure to provide the dashboard camera footage amounted to violations of Pa. R. Crim.P. 573, the Due Process Clause of the Fifth Amendment of the United States Constitution, and Article 1, §9 of the Pennsylvania Constitution.
3. The evidence was insufficient as a matter of law to convict Mr. Hill of DUI. The Commonwealth failed to prove beyond a reasonable doubt that Mr. Hill was operating a vehicle prior to interactions with police.

For the reasons set forth below, denial of the Motion to Suppress was not in error and the verdict and judgment of sentence should be affirmed.

The evidence presented at the suppression hearing and trial established that in the early morning hours of April 22, 2016, numerous officers from the Penn Hills Police Department were in the area of Frankstown Road in Penn Hills in response to a shots fired call. Officers were investigating and attempting to locate the shooter. Sgt. Blaze was driving on Robinson Blvd crossing over Frankstown through that intersection where he had a green light to proceed. He heard tires squealing and looked to his left and saw a dark gray vehicle driving toward him on Frankstown Road at a very high rate of speed. The vehicle proceeded into the intersection in an uncontrolled skid, the back wheels locked and a great amount of smoke was coming from the rear wheel wells. T.T. 9-10' Sgt. Blaze's cruiser made it through the intersection avoiding the collision. He turned around to pursue the vehicle which continued Eastbound on Frankstown Road at a very high rate of speed. Officer James Yurek was in the area as well and was in a stationary position at the Fire Hall. He saw the near collision and immediately pursued the vehicle. By the time Sgt. Blaze caught up the vehicle it was in a driveway of a residence on Frankstown Road approximately 1/2 mile away. The defendant was walking away from the vehicle and toward the front door of the residence. He appeared to be highly intoxicated, smelled strongly of alcohol, had difficulty with balance and had urinated in his pants. Officers asked him to stop so that they could talk to him but he proceeded to the front of the house, pounding on the front door, disregarding commands to remove his hands from his pockets. T.T. 15-16.

The defendant then walked up to Officers stating "I didn't almost hit you", "I wasn't going too fast", and "I made it home and you guys don't have me on video." T.T. 14-15. Allegheny County CLEAN/NCIC dispatch showed the defendant's vehicle as reported stolen. The defendant was then handcuffed as police investigated the status of the vehicle. After establishing that the vehicle was registered to the defendant and that the stolen car report was a report that should have been cleared previously, the defendant was

taken to the police station for chemical testing. Field sobriety testing was not possible at the scene due to the defendant's condition and his lack of cooperation. At the station the defendant continued to be loud, boisterous, belligerent, and uncooperative. He refused breath testing and was released to the care of his mother around 4:30 a.m.. Approximately five minutes after being released to his mother he returned to the lobby of the police station, refusing to leave unless his mother gave him the keys to his car. Given his condition his mother would not comply and he was held until his grandmother came to pick him up around 5:50 a.m.. T.T. 17-19.

The standard of review in determining whether the trial court erred in denying a suppression motion is whether the record supports the factual findings and whether the legal conclusions drawn from these facts are correct. *Commonwealth v. Stevenson*, 894 A.2d 759, 769 (Pa. Super. 2006). The defendant does not argue in terms of a vehicle stop, instead he challenges the interaction with officers and the statements he made.

The Supreme Court of Pennsylvania has defined three types of police citizen interaction: a mere encounter, an investigative detention, and a custodial detention. *Commonwealth v. Boswell*, 554 Pa. 275, 721 A.2d 336, 340 (1998). A mere encounter between police and a citizen "need not be supported by any level of suspicion, and carr[ies] no official compulsion on the part of the citizen to stop or to respond." *Commonwealth v. Riley*, 715 A.2d 1131, 1134 (Pa. Super. 1998). An investigatory stop, which subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute an arrest, requires a reasonable suspicion that criminal activity is afoot. See *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A custodial search is an arrest and must be supported by probable cause. *Id.*

Commonwealth v. Kendall, 976 A.2d 506 (Pa. Super. 2009)

In evaluating whether an interaction rises to the level of an investigative detention, "the court must examine all the circumstances and determine whether police action would have made a reasonable person believe he was not free to go and was subject to the officer's orders." *Commonwealth v. Stevenson*, 832 A.2d 1123, 1127 (Pa. Super. 2003).

The Fourth Amendment to the United States Constitution protects the people from unreasonable searches and seizures. *Com. v. Chase*, 960 A.2d 80, 89 (Pa. 2008) citing *In the Interest of D.M.*, 781 A.2d 1161, 1163 (Pa. 2001). In the context of automobiles, vehicle stops constitute seizures under the Fourth Amendment. *Id.* citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996). In determining if a seizure is constitutional, the key question is the reasonableness of the seizure. *Id.* citing *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990). Although a warrantless seizure is presumptively unreasonable under the Fourth Amendment, there are a few well-established and well-delineated exceptions. *Horton v. California*, 496 U.S. 128, 133 n.4 (1990). One such exception permits the police to briefly detain individuals for an investigation and to maintain the *status quo*. *Id.* citing *Terry v. Ohio*, 392 U.S. 1 (1968). Under the Fourth Amendment, police are permitted to stop and question motorists when they witness or suspect a violation of traffic laws, even if it is a minor offense. *Id.* citing *United States v. Booker*, 496 F.3d 717, 721-22 (D.C. Cir. 2007). The United States Court of Appeals for the Third Circuit summarized this area of law:

Terry and *Whren* stand for the proposition that a traffic stop will be deemed a reasonable "seizure" when an objective review of the facts shows that an officer possessed specific, articulable facts that an individual was violating a traffic law at the time of the stop. In other words, an officer need not be factually accurate in her belief that a traffic law had been violated but, instead, need only produce facts establishing that she reasonably believed that a violation had taken place.

United States v. Delfin-Colina, 464 F.3d 392, 398 (3d Cir. 2006). In the context of suspected DUI, the Pennsylvania Superior Court noted that such a vehicle stop was "a scenario where further investigation almost invariably leads to the most incriminating type of evidence, i.e., strong odor of alcohol, slurred speech, and blood shot eyes." *Com. v. Sands*, 887 A.2d 261, 270 (Pa. Super. 2005). The Pennsylvania Supreme Court echoed this notion, "...[W]hen the existence of reasonable suspicion combines with the expectation that the stop will allow light to be shed on the relevant matters, the stop is not unconstitutional." *Chase*, 960 A.2d at 94. Likewise, the Pennsylvania legislature has codified the reasonable suspicion standard at 75 Pa. C.S. § 6308(b).⁵ The Pennsylvania Supreme Court held that this statute is constitutional under the Fourth Amendment and Article I, § 8. *Chase*, 960 A.2d at 102. To justify a stop for a violation of the Motor Vehicle Code the officer must articulate specific facts that provide probable cause to believe that the driver was in violation of some provision of the code. *Chase*, 960 A.2d at 116.

In the instant case, Penn Hills police approached the defendant after his vehicle was parked. They had probable cause to effectuate a stop for violation of the Motor Vehicle Code but were unable to catch up to his vehicle and he was already out of his vehicle when they approached to investigate the reckless driving and near collision with Sgt. Blaze's police cruiser. Immediately upon observing the defendant, officers reached the conclusion that he was obviously impaired and had operated his vehicle while impaired. The defendant was not subject to custodial interrogation when he walked up to officers and stated that he was not driving too fast, that he didn't almost hit the police vehicle and that they didn't have him on video. The fact that dispatch listed his vehicle as stolen was resolved at the scene and he was taken to the station for breath testing.

The defendant's claim that his spontaneous statements should have been suppressed should be rejected.

The defendant also claims that this court erred in denying his Motion to Dismiss for failure to provide discovery, specifically a nonexistent dash cam video. The defendant's Motion for Discovery was filed October 3, 2016 and trial was scheduled for October 7, 2016. The defendant had already been provided discovery in his Phoenix Court packet at his formal arraignment on August 1, 2016. On October 7, 2016, trial was rescheduled to October 14, 2016 and this court addressed the defendant's Discovery Motion on October 11, 2016, directing the Commonwealth to provide defense counsel with any discovery not given to the defendant in his packet at formal arraignment.⁶ On the trial date defense counsel asserted that a video existed that was not provided in Discovery. The District Attorney stated that there was no video. After much discussion I asked the officers on the record whether any dash cam existed. Sgt. Joseph Blaze testified that police did not receive a request for video prior to the filing of the defendant's Motion, that he did not believe that a video existed, and that his dashcam would not have captured the incident due to the location of his cruiser in relation to the defendant's vehicle. This court accepted the assertion that video would not have been captured under these circumstances and that no video of the incident existed so there was no discovery violation. That motion was properly denied.

Finally, the defendant claims that there was insufficient evidence as a matter of law to convict the defendant of DUI as the Commonwealth failed to prove beyond a reasonable doubt that the defendant was operating a motor vehicle prior to his interactions with police. After the denial of the Motion to Suppress both the Commonwealth and defense agreed to incorporate the testi-

mony from the Suppression Hearing and proceed with the non-jury trial. Officer James Yurek testified that his police car was in a stationary position at the Fire Hall. The windows in his vehicle were down and he was in the process of clearing the shots fired call. He saw Sgt. Blaze's vehicle proceeding through the intersection with a steady green light. At the same time he heard a vehicle travelling at a high rate of speed and saw the defendant's dark gray vehicle an uncontrolled skid, smoke billowing from the rear wheel wells. The defendant's vehicle nearly struck Blaze's police cruiser and proceeded through the intersection. T.T. 34-35. It continued eastbound on Frankstown travelling directly in front of his patrol car. Officer Yurek left his parked position to pursue the vehicle. He radioed that he was in pursuit and he noticed Officer Dustin Hess was in pursuit as well. The vehicle was out of sight for a moment as they travelled at a high rate of speed to catch up. He saw the tail lights as the defendant's vehicle turned onto Duffield and radioed to Officer Hess because he was travelling too fast to stop. He turned around and proceeded up Duffield where he observed Sgt. Blaze and Officer Hess approaching the defendant. He also testified to the observations of the defendant's intoxication and his statements at the scene, as well as his refusal to comply with breath testing at the station.

Officer Hess testified that he was stationary on Champion Street when the defendant's vehicle passed him at a very high rate of speed. As he was going to pursue he saw Officer Yurek in pursuit and he pulled out behind Officer Yurek's cruiser. Officer Hess proceeded on Duffield when Yurek reported that the vehicle turned onto that street. Officer Hess arrived at the same time as Sgt. Blaze and saw the defendant walking from the vehicle toward the residence. He ordered the defendant to stop so that they could speak with him but the defendant proceeded to the residence and began pounding on the front door. The defendant said "I made it home, you guys can't stop me", he was barely able to stand and smelled strongly of alcohol. He also observed his glassy eyes and the fact that defendant's pants were wet with urine. T.T. 50.

It is exclusively within the province of the trial court to determine the witness credibility and the weight to be accorded their testimony. *Commonwealth v. Fitzpatrick*, 666 A.2d 323, 325 (Pa Super 1996). The trier of fact while passing on 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). Moreover, it is in within the province of the trial judge, who had the opportunity to observe the witnesses' credibility to determine the weight to be accorded their testimony. *Commonwealth v. Gallagher*, 896 A.2d 583, 584-585 (Pa.Super.2006).

Considering all of the evidence presented at trial this court was convinced beyond a reasonable doubt that the defendant operated his vehicle recklessly, nearly striking Sgt. Blaze's patrol car. Officers pursued the defendant's vehicle and caught up with him after he had parked his car. He exhibited signs of intoxication and his condition was such that it was unsafe to perform field sobriety tests. He refused to submit to a breath test and was under the influence of alcohol to a degree which would render him incapable of safely operating a motor vehicle.

FOR ALL ABOVE REASONS, the verdict and Judgment of sentence should be affirmed.

BY THE COURT:
/s/Bigley, J.

¹ The Suppression Motion and Non-Jury trial were heard on October 14, 2016.

² No further penalty was imposed at the remaining counts and the defendant was given permission to complete the DUI Alternative to Jail program in lieu of complying with his jail sentence.

³ There was no Exhibit "A" attached to the Concise Statement.

⁴ T.T. refers to the Trial Transcript of October 14, 2016, followed by the page number(s).

⁵ "Authority of police officer. Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title." 75 Pa. C.S. 6308(b).

⁶ Defendant's Motion for Discovery was a typical boilerplate discovery motion and requested things that were previously provided in the defendant's discovery packet.

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**This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*

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OPINIONS

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**Commonwealth of Pennsylvania v.
Robert Williams***

Criminal Appeal—Evidence—Weight of the Evidence—Sexual Abuse of 14-Year-Old—No Victim Testimony at Prelim—Admission of Forensic Interview

Father argues that absence of victim, his 14-year-old daughter, from the preliminary hearing was a due process violation.

No. CC 201601710. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—December 4, 2017.

OPINION

The Defendant has appealed from the judgment of sentence entered on May 23, 2017. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with Rape,¹ Aggravated Indecent Assault,² Incest of a Minor,³ Unlawful Contact,⁴ Corruption of Minors⁵ and Indecent Assault⁶ in relation to a series of incidents between the Defendant and his then-14 year old daughter. A jury trial was held before this Court from August 22 to 24, 2016 at which the Defendant represented himself with stand-by counsel from the Public Defender's Office. At the conclusion of trial, the Defendant was found not guilty of the Rape, Aggravated Indecent Assault and Incest of a Minor charges, but was convicted of the Unlawful Contact, Corruption of Minors and Indecent Assault charges. He appeared before this Court on November 9, 2016 and was sentenced to a term of imprisonment of 10 to 20 years at the Unlawful Contact charge. Post-Sentence Motions *Nunc Pro Tunc* were filed on March 1, 2017 (after this Court granted the Defendant's Emergency Petition to Reinstate), alleging that this Court erred in grading the Unlawful Contact charge as a first-degree felony. After reviewing the record, this Court granted relief in the form of a re-sentencing hearing, which was held on May 23, 2017. At that hearing, this Court vacated its prior sentence, corrected the grading of the Unlawful Contact charge to a third-degree felony and sentenced the Defendant to a term of imprisonment of three and one half (3 1/2) to seven (7) years. Timely Post-Sentence Motions were filed and were denied by this Court on June 22, 2017. This appeal followed.

Briefly, the evidence presented at trial established that, beginning when she was 14, J.W. was repeatedly sexually assaulted by her father, the Defendant. He began by unhooking her bra and touching her breasts, and progressed to touching her vagina with his hand. On several occasions, he used his penis to touch her vagina and attempted to penetrate her.

On appeal, the Defendant raises two (2) claims of error which are addressed as follows:

1. Due Process Violation at Preliminary Hearing

Initially, the Defendant argues that this Court erred in denying his pretrial motion regarding a due process violation at the preliminary hearing. He avers that because J.W. did not testify at the preliminary hearing, he had no opportunity to cross-examine her to obtain impeachment evidence for trial. This claim is meritless.

It is well-established that "[a]t the pre-trial stage of a criminal prosecution, it is not necessary for the Commonwealth to prove the defendant's guilt beyond a reasonable doubt; but rather, its burden is to put forth a prima facie case of the defendant's guilt... A prima facie case exists where the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense... The evidence need only be such that if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury... Moreover, inferences reasonable drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case." *Commonwealth v. Nieves*, 876 A.2d 423, 424 (Pa.Super. 2005), internal citations omitted. Additionally, "once appellant has gone to trial and been found guilty of the crime, any defect in the preliminary hearing is rendered immaterial." *Commonwealth v. Tyler*, 587 A.2d 326, 328 (Pa.Super. 1991).

At the preliminary hearing, the following occurred:

DISTRICT JUDGE RIAZZI: Hold on one second. All those testifying in this matter, raise your right hand to be sworn.

(All potential witnesses were duly sworn by District Judge Riazzi)

MR. WILLIAMS: Your Honor, may I ask the Commonwealth a question? My paperwork says Sergeant Ralph Johnson. Is it Lieutenant, or Detective?

DISTRICT JUDGE RIAZZI: He's a Lieutenant.

MR. WILLIAMS: And the declarant is not going to be here?

MS. GOLDFARB: That's correct, Your Honor. We are proceeding under Commonwealth versus Richter [sic] where it allows hearsay at a preliminary hearing based upon where she is and why she's unavailable due to emotional distress as a result of the defendant's actions, we're proceeding in this manner.

MR. WILLIAMS: It's my understanding the Commonwealth can - the young lady can be in video. She doesn't have to appear and -

DISTRICT JUDGE RIAZZI: Under Commonwealth v. Richter [sic], hearsay is admissible at a preliminary hearing but not at trial in Pittsburgh.

MR. WILLIAMS: She doesn't have to be - she can't be in video?

DISTRICT JUDGE RIAZZI: She doesn't have to be on video or anything else.

MR. WILLIAMS: Okay.

DISTRICT JUDGE RIAZZI: It could be strictly hearsay.

MS. GOLDFARB: Your Honor, for the purposes of the record, we will have her available at trial, so that's clear for the defendant.

DISTRICT JUDGE RIAZZI: Okay.

(Preliminary Hearing Transcript, p. 3-4).

In *Commonwealth v. Ricker*, 120 A.3d 349 (Pa.Super. 2015), our Superior Court held that hearsay evidence alone may be establish a prima facie case at a preliminary hearing. *Commonwealth v. Ricker*, 120 A.3d 349, 357 (Pa.Super. 2015). It further held that “the accused does not have the right to confront witnesses against him at his preliminary hearing” pursuant to the confrontation clauses of both the United States and Pennsylvania Constitutions. *Id.* at 362. Here, as Assistant District Attorney Goldfarb stated, J.W. was unable to attend the preliminary hearing due to her emotional distress over the assaults. Instead, McKeesport Police Department Lieutenant Ralph Johnson, who attended J.W.’s forensic interview, testified regarding her disclosures of abuse. His testimony was more than sufficient to establish the prima facie elements of the charges and District Judge Riazzi properly held those charges for court. Insofar as *Ricker* is clear that there is no confrontation clause requirement that the victim testify at the preliminary hearing, the Defendant’s argument fails in this respect.

In his Concise Statement, the Defendant also references the grant of appeal in *Ricker* by our Supreme Court to address whether there exists a due process right to confront witnesses at a preliminary hearing. However, review of *Ricker*’s procedural history reveals that the appeal was dismissed as improvidently granted, thus leaving no open question regarding due process implications of a victim’s testimony at a preliminary hearing. See *Commonwealth v. Ricker*, 170 A.3d 494 (Pa. 2017). Given the dismissal of the appeal, *Ricker* cannot be used to support a due process claim and so the Defendant’s claim in this respect must also fail.

2. Admission of Forensic Interview

Next, the Defendant argues that this Court erred in admitting the video of the forensic interview at trial. Again, this claim is meritless.

It is well-established that “[t]he admissibility of evidence is a matter addressed to the sound discretion of the trial court and...an appellate court may only reverse upon a showing that the trial court abused its discretion.” *Commonwealth v. Collins*, 70 A.3d 1245, 1251 (Pa.Super. 2013), internal citations omitted. “In determining the admissibility of evidence, the trial court must decide whether the evidence is relevant and, if so, whether its probative value outweighs its prejudicial effect... ‘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 the existence of a material fact.’” *Commonwealth v. Hawk*, 709 A.2d 373, 376 (Pa. 1998).

During the direct examination of Lieutenant Johnson at trial, the following occurred:

Q. (Ms. Goldfarb): And the disk that you observed that I’ve marked as Commonwealth’s Exhibit 1, is that a true and accurate representation of the forensic interview as it was conducted on September 14?

A. (Lt. Johnson): Yes, it is.

MS. GOLDFARB: Your Honor, at this time I would move to admit Commonwealth’s Exhibit 1 into evidence.

THE COURT: It will be admitted.

THE DEFENDANT: I object to that, to the video being entered. The testimony of the police officer is enough hearsay upon hearsay. The child has testified. And the video itself, what’s the nature of it? If the child is testifying to - she’s not going to be able to testify again to what she said on the video. I can’t cross-examine the child after we review the video to articulate is this what you said or not said because the child is dismissed at this time. So I wouldn’t -

THE COURT: Your objection is overruled.

(T.T., p. 77-78).

Our Superior Court specifically addressed the admissibility of forensic interviews in *Commonwealth v. Shelton*, 170 A.3d 549 (Pa.Super. 2017). In *Shelton*, the Court held that a video recording of a forensic interview was admissible at trial under the recorded recollection exception to the hearsay rule. *Commonwealth v. Shelton*, 170 A.3d 549, 553 (Pa.Super. 2017).

Here, the forensic interview took place a few months after she reported the assaults - and almost a year before the trial took place. The video of the interview was significantly closer in time to the abuse than the trial, when the events were fresher in her memory. Though J.W. did not testify that she had forgotten the details of the assaults, the Defendant’s pro se cross-examination was scattered and combative. Given J.W.’s reluctance to subject herself to questioning by the Defendant (she did not attend the Preliminary Hearing due to emotional distress issues and absconded from her foster home the night before trial was originally scheduled to begin), the forensic interview was useful to the jury in that it was her complete recitation of the events effectuated by a neutral questioner. Under these circumstances, akin to the facts of *Shelton*, this Court did not err in admitting the video of the forensic interview into evidence and allowing it to be played to the jury. This claim must also fail.

3. Weight of the Evidence

Finally, the Defendant argues that the guilty verdicts were against the weight of the evidence due to J.W.’s inability to give exact dates of the assaults and her failure to report the assaults to CYF or the police sooner. This claim is meritless.

It is well-established that the “scope of review for [a weight of the evidence] claim is very narrow. The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court, and [the appellate court] will not disturb that decision absent an abuse of discretion. Where issues of credibility and weight are concerned, it is not the function of the appellate court to substitute its judgment based on a cold record for that of the trial court. The weight to be accorded conflicting evidence is exclusively for the fact finder, whose findings will not be disturbed on appeal if they are supported by the record. A claim that the evidence presented at trial was contradictory and unable to support the verdict requires the grant of a new trial only when the verdict is so contrary to the evidence as to shock one’s sense of justice.” *Commonwealth v. Knox*, 50 A.3d 732, 737-8 (Pa.Super. 2012).

Moreover, “when the challenge to the weight of the evidence is predicated on the credibility of trial testimony, [appellate] review of the trial court’s decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, those types of claims are not cognizable on appellate review.” *Commonwealth v. Bowen*, 55 A.3d 1254, 1262 (Pa.Super. 2012).

“Where the trial court has ruled on the weight claim below, an appellate court’s role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably

abused its discretion in ruling on the weight claim.” *Commonwealth v. Shaffer*, 40 A.3d 1250, 1253 (Pa.Super. 2012). “A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence.” *Commonwealth v. Moreno*, 14 A.3d 133, 136 (Pa.Super. 2011).

Here, a careful examination of the record reveals that J.W.’s testimony regarding the dates of the assaults was appropriately clear, but that the Defendant repeatedly attempted to confuse her and other witnesses with his listing of specific dates. Any discrepancy in the dates of events was merely the product of the Defendant’s attempts to obfuscate and confuse.

Neither does J.W.’s failure to report the assaults sooner provide a basis for a weight of the evidence challenge. J.W. testified that she did tell her mother, but her mother took the Defendant’s side (See T.T., p. 48), though it is of note that J.W. was removed from her mother’s care by CYF and her mother was criminally charged in relation to a physical (non-sexual) assault on her. (See T.T., p. 54-57). Given her difficult circumstances, J.W.’s failure to report sooner does not render the guilty verdicts pure conjecture or otherwise unreliable.

Because the Defendant properly raised his weight of the evidence claim on Post-Sentence Motions, the appellate court’s review is only directed to this Court’s discretion in denying the motion. See *Shaffer*, *supra*. After reviewing the record and the evidence discussed above, it cannot be said under any analysis that the testimony presented at trial was “so unreliable and/or contradictory as to make any verdict based thereon pure conjecture,” see *Bowen*, *supra*. A review of the evidence as a whole clearly demonstrates Defendant’s perpetration of the crimes. Given the evidence presented at trial and discussed above, there is no question that the verdict was appropriate and not “shocking” to the conscience. This claim must fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered by this Court on May 23, 2017 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

¹ 18 Pa.C.S.A. §3121(a)(1)

² 18 Pa.C.S.A. §3125(a)(1)

³ 18 Pa.C.S.A. §4302(b)(2)

⁴ 18 Pa.C.S.A. §6318(a)(1)

⁵ 18 Pa.C.S.A. §6301(a)(1)(ii)

⁶ 18 Pa.C.S.A. §3126(a)(1)

*This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

Commonwealth of Pennsylvania v. Billy Williams*

Criminal Appeal—Expert Testimony—Sentencing (Discretionary Aspects)—Aggravated Assault—Child Abuse—Denial of Continuance—404(b)

Serious injury to 2-month-old child results in multiple convictions for father and a sentence of 7 ½ to 15 years.

No. CC 201601885. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—December 4, 2017.

OPINION

The Defendant has appealed from the judgment of sentence entered by this Court on December 6, 2016. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with two (2) counts of Aggravated Assault¹ and one (1) count each of Endangering the Welfare of a Child² and Recklessly Endangering Another Person.³ He appeared before this Court for a jury trial from September 19-26, 2016 and at its conclusion, he was convicted of one (1) count of Aggravated Assault, Endangering the Welfare of a Child and Recklessly Endangering Another Person. He next appeared before his Court on December 6, 2016, when he was sentenced to consecutive terms of imprisonment of five (5) to 10 years at the Aggravated Assault charge and three and one half (3 1/2) to seven (7) years at the Endangering the Welfare of a Child charge, for an aggregate sentence of eight and one half (8 1/2) to 17 years. Post-Sentence Motions were not initially filed, but after this Court granted the Defendant’s Emergency Petition to Reinstate his post-sentence motion rights *nunc pro tunc* on December 22, 2016, Post-Sentence Motions were subsequently filed and were denied on May 15, 2017. This appeal followed.

Briefly, the evidence presented at trial established that D.W., born on October 13, 2015, was the daughter of I.M. and the Defendant. She lived with her mother and her 10-year old sister in an apartment on Memory Lane in the Hill District section of the City of Pittsburgh. The Defendant did not live there, but would come to the apartment on Friday evening and care for D.W. over the weekend while her mother rested. He would leave on Monday morning to go to work.

On Tuesday, November 10, 2015, when she was four (4) weeks old, D.W. was seen by her pediatrician, Dr. Cindy Cook, for a linear bruise on her back. Dr. Cook was unable to determine a cause for the bruise.

On Monday, November 16, 2015, D.W. was seen by Dr. Cook for a subconjunctival hemorrhage in her left eye. She was referred to the Child Advocacy Center of Children’s Hospital of Pittsburgh for a non-accidental trauma assessment, but the physicians there were unable to determine the cause of the hemorrhage.

On Sunday evening, November 22, 2015, D.W. was taken to the Emergency Room at Children's Hospital for subconjunctival hemorrhages in both eyes, petechia (burst blood vessels) around her eyes and a facial rash. She was admitted to the hospital but was later discharged when the doctors were unable to find a medical explanation for her injuries.

On Sunday, December 27, 2015, D.W. was again taken to the Emergency Room at Children's Hospital. Upon examination, she was found to have subconjunctival hemorrhages and petechia in both eyes, bruising to her chest and abdomen and a healing fracture to her left 6th rib. She was examined by Dr. Jennifer Wolford, the attending physician at the Child Advocacy Center, who determined that D.W.'s rib fracture was caused by a squeezing motion and the subconjunctival hemorrhages were caused when blood vessels ruptured while she was struggling to breathe. Dr. Wolford concluded that D.W. was the victim of child abuse and contacted the police and Children, Youth and Families.

At trial, I.M. testified that she had caused D.W.'s broken rib in an accident one month prior, when she had fallen asleep with the baby on her chest and the baby fell. I.M. testified that she woke suddenly and caught the baby between her knees. Dr. Wolford testified that this was medically impossible, insofar as the type of rib fracture D.W. had can only be caused by squeezing and the incident described by I.M. would have broken more than one rib and in a different location from D.W.'s injury. I.M. also testified that the eye hemorrhages were due to D.W.'s milk allergy, although she conceded that once the Defendant was in custody, D.W. continued to have the milk allergy issues but suffered no further eye hemorrhages.

When he was interviewed by the police, the Defendant admitted to squeezing D.W. and demonstrated how he did so. His demonstration matched Dr. Wolford's description of how the injury occurred.

On appeal, the Defendant raises multiple claims of error, which are addressed as follows:

1. *Exclusion of Steven Koehler*

Initially, the Defendant argues that this Court erred in granting the Commonwealth's Motion in Limine to Bar Expert Testimony of Steven A. Koehler, MPH, PhD". A review of the record reveals that this claim is meritless.

On September 7, 2016, 12 days before the start of trial, the Commonwealth received the proposed expert report of epidemiologist Steven Koehler and forensic nurse consultant Karen Applegate. The report purported to adopt I.M.'s recitation of events as a "alternative explanation" for D.W.'s rib fracture after conducting a "doll re-enactment", though the "doll re-enactment" was only perfunctorily described as follows:

FMI provided a doll with an approximate location of the skeletal structure superimposed over the infant (Figure 1). Using this doll we asked I.M. to demonstrate to us how she caught the infant between her thighs that caused the rib fracture.

(p. 4).

The bulk of the report, however, was a wide-ranging and sometimes vitriolic personal criticism of Dr. Jennifer Wolford, at times calling her conduct unethical, repeatedly insisting she made decisions based on "dogma" and "instituted bias", asserting that she was prejudiced against I.M. and was abusive to her:

Without any formal testing or investigation she concluded instantly that the rib fracture was due to physical abuse. I.M., the infant's mother attempted to explain the most likely cause of the rib fracture. She stated after she fed D.W. the baby had fallen asleep on her upper chest while she was sitting on the couch. She had dozed off herself and the infant slid down her body and she caught her between her thighs preventing the infant from hitting the floor. Dr. Jennifer Wolford totally dismissed this explanation and kept accusing her of physical abuse of the infant. Furthermore, Dr. Jennifer Wolford [sic] actions, statements, and over-all attitude violated doctor-patient principles of ethics. Dr. Jennifer Wolford's personal and professional beliefs made her incapable of considering the possibility that this rib fracture was caused by anything other than abuse. This mindset also resulted in her unethical and highly unprofessional treatment of I.M. This included unfounded and uninvestigated statements that, "If this child is returned to a violent home she is at risk for serious life threatening injuries including death. She could be killed."

(p. 1);

Dr. Jennifer Wolford at CHP immediately upon discovery of the rib fracture concluded that the only possible cause was child abuse. Dr. Wolford began to make unsubstantiated claims that the infant was being abused and was in mortal danger. She was making these inflammatory statements in the presence of I.M.'s 10 year old minor daughter, L.M. At one point I.M. was so upset that she was on the floor crying. Dr. Jennifer Wolford a claimed child abuse expert failed to investigate any other possible explanations for the rib fracture. I.M., the mother attempted to offer an explanation [sic] how the rib fracture occurred however the Dr. verbally abused I.M. back. Dr. Jennifer Wolford would not even consider the explanation provide [sic] by I.M. She contacted an [sic] on-call CYF caseworkers Zachary Stewart and Maria Duranti regarding the 2 month old with injuries who arrived and conducted an investigation. The deceives from the city police received reports from Pittsburgh Child Advocacy Center at Children's Hospital of Pittsburgh, UPMC. Her actions resulted in the infant and the 10 year old being removed from the family home.

(p. 2-3);

Dr. Jennifer Wolford' [sic] conclusion that the rib fracture was caused by abuse was based on (1) generalized features not the specific case, (2) and instituted bias and dogma, and (3) unwillingness to explore alternative explanations. In addition, Dr. Jennifer Wolford failed to conduct and form [sic] of formal investigation into the cause of the rib fracture.

(p. 11);

Based on the information contained in the medical records and interviewing the [sic] I.M., the mother of the infant, Dr. Wolford failed to conduct any form of investigations [sic] in to [sic] the cause of the rib fracture and failed to explore ALL other possible explanation [sic] for the injuries before labeling the case, abuse. Dr. Wolford's interpretations, responses, and professional biases to the discovery of the rib fracture appears [sic] to violate the basic fundamental principle of medicine, mainly [sic] differential diagnosis. In addition, she made unsubstantiated claims and the [sic] used generalized concepts and "dogma" over case specific information. Dr. Wolford reinforced the child advocate position that "all rib fractures equal abuse." This dogma permeates the staff at CHP and they have a tendency of jumping to [sic] often

to unsubstantiated conclusions of infant abuse without conducting any form of formal investigations, in-home visits, interviewing the family, forensic testing, or evaluations

(p. 13);

In this case based on the available information it did not appear that Dr. Wolford followed the fundamental principle of medicine that of the differential diagnosis process. The physician failed one of the core principles of medicine weighting [sic] the strengths of association of all other possible explanation [sic] for the rib fractures [sic]. The physician's opinion that there are no other explanations for the injuries reflects an unwillingness to explore or even consider other possible mechanisms for the rib fracture. The mother attempted to explained [sic] to Dr. Jennifer Wolford how the rib fracture occurred when the infant was squeezed between the mother's thighs. Dr. Jennifer Wolford completely refuse [sic] to hear the facts from the mother, the only witness to the event.

(p. 14);

Dr. Wolford failed to conduct herself in a professional and responsible manner towards I.M., her infant, her minor 10 year old daughter and other members of her family. The Dr's [sic] reactions to the rib fracture were biased and prejudicial [sic] triggered by her belief that a rib fracture equal abuse. Her unsubstantiated claims of abuse to a [sic] upset and traumatized mother did not adhere to the principles of ethics relating to respect the rights and protect those most vulnerable. HIPAA regulations were violated. Her method of communication was one way and Dr. Jennifer Wolford' way and that was abusive toward I.M.. She failed to respect I.M. by dismissing her explanation of how the rib fracture occurred.

(p. 15);

Aside from the scientific based [sic] alternative explanations, the physician overseeing this case, Dr. Wolford, failed to follow the standard medical practice of forming a differential diagnosis, made unsubstantiated statements describing how the rib fracture occurred that were not supported by biomechanics of force, the type of injuries documented, or the circumstances of the case. In addition, Dr. Wolford failed to conduct a comprehensive investigation into **all** possible alternative explanations before classifying the case as child abuse. In addition, she appeared to be basing her conclusions the generalized dogma that permits child abuse advocate literature that all rib fractures equal abuse. Any medical investigation into the case of a disease or injury relies on the differential diagnosis methodology. However, in this case the discovery of the rib fracture caused the immediate conclusion that it had to be abuse, without any consideration of other possible causes. In this case, the most simply [sic] and logical case for the isolated rib fracture was completely ignored by Dr. Wolford. It appears that the physician is blinded to the possibility that a rib fracture among infants can have any other possible cause other than abuse. This is supported by the rapid actions taken by Dr. Wolford upon the discovery of the rib fracture and the unwillingness to donut tests of any type or to investigate other possible causes for the fracture. The treatment of the mother, I.M. was unjust.

(p. 16-17); and

The diagnosis by Dr. Wolford of child abuse, direct trauma and making unfounded statements that the infant is at risk of future serious life threatening [sic] injuries, even being killed where [sic] without foundation and not grounded in fact or supported by any scientific testing. Her conclusions were medically and biomechanically unsubstantiated and appeared based on a generalized profile of injury patterns reported in child advocacy literature. Dr. Wolford, a child abuse advocate, interpretation [sic] of the rib fracture as a sign of abuse appeared to be bases solely on the dogma permeating the child abuse literature or a reflection of her personal bias.

(p. 17).

It is well-established that "the admission of expert testimony is a matter left largely to the discretion of the trial court and its rulings thereon will not be reversed absent an abuse of discretion... Where the evidentiary question involves a discretionary ruling [the appellate court's] scope of review is plenary in that the appellate court may review the entire record in making its decision." *Commonwealth v. Huggins*, 68 A.3d 962, 966 (Pa.Super. 2013). Additionally, "Pennsylvania continues to adhere to the *Frye* test, which proves that 'novel scientific evidence is admissible of the methodology that underlies the evidence has general acceptance in the relevant scientific community'... The *Frye* test is a two-step process... First, the party opposing the evidence must show that the scientific evidence is 'novel' by demonstrating 'that there is a legitimate dispute regarding the reliability of the expert's conclusions'... If the moving party has identified novel scientific evidence, then the proponent of the scientific evidence must show that 'the expert's methodology has general acceptance in the relevant scientific community' despite the legitimate dispute." *Commonwealth v. Foley*, 38 A.3d 882, 888 (Pa.Super. 2012).

This Court held arguments on the Commonwealth's Motion to Exclude on September 19, 2016, before the jury was selected. At that hearing, the following occurred:

MR. SHARIF: Just because the DA disagrees with the opinion of Dr. Koehler does not mean that he is not an expert. He is an expert forensic, and that's what we are calling him or her. After looking at his CV, I don't even know how she can say he's not an expert.

THE COURT: Well, he may be an expert, but not a medical expert.

MR. SHARIF: He's not a medical expert. This is not a medical question.

THE COURT: Sure, it is.

...

THE COURT: Okay. Well, first of all, I find his report to be one of most the [sic] unprofessional, libel reports I have ever read. For instance, I just opened it ups saying that the child at 10 months had difficulty walking. Then this is a quote: "These injuries may be related to the procedures conducted at CHP to obtain blood. It is Mrs. Applegate's strong recommendation that the infant have - to be evaluated by a pediatric ortho." That's on page 16 of the report.

So I find that this is so offensive and unprofessional. His feeling about Dr. Wolford is not a matter that an expert can testify, unless you are an expert on Dr. Wolford. But my problem here, my really big probably [sic] is that it says on page 1, and I am assuming that this is true, on Page 1 of Dr. Koehler's report: That upon examination and full workup of x-rays and CAT scans, it was discovered that the two-month old, D.W., had a healing rib fracture on the left side, number six, and subconjunctival hemorrhages, right lateral side and infraorbital petechia around her eyes.

The second two injuries were never discussed in Dr. Koehler's summary not once. The whole summary is based on the single rib fracture. If you have something otherwise, I would be glad to look at it. I am just assuming that is the correct diagnosis; is that correct?

MS. NECESSARY: That is correct, Your Honor. Based on the Children's Hospital opinion.

MR. SHARIF: So what happened, Your Honor, that's the issue. It's the rib fracture that is at issue and -

THE COURT: No. All of the injuries are at issue.

...

MR. SHARIF: But I am not questioning whether she [Dr. Wolford] is an expert in child abuse. I am just stating that she didn't do any testing in this particular case, and for the DA to question my expert and the method that he used in testing is not acceptable.

She hasn't presented any authority to support that, and we have given her the name of the authority, which she did use to rely upon the doll reenactment. That's the point I am making.

In other words, she is just coming in and saying the doll reenactment, that's not accepted by the profession. Okay. She can't say that without something.

THE COURT: Well, he's a qualified expert in epidemiology and forensic epidemiology. Those are two things that he put together. He's not a medical expert. He is not a physician or somebody who is capable of making these kinds of decisions.

According to the *Frey* [sic] case, he can testify as to epidemiology and forensic epidemiology, but he cannot be classified as an expert in the area of child abuse, from what I read on his CV.

MR. SHARIF: Okay. We don't need child abuse. As long as he can testify about the case of injury. That's all we're doing it for.

THE COURT: I need child abuse. I need an expert in child abuse. Can an expert in bugs testify about what cause an injury in this case?

...

THE COURT: His entire conclusion is based on the single rib fracture. So what I really need to do is find out whether or not this kid was diagnosed either in November or on December 27th with more than one injury.

I mean, infraorbital petechia, I would think, is only caused by losing your breath or being strangled or being squeezed. It's not something that happens ordinarily.

MR. SHARIF: In the meantime, I just want to quote to you, so you can have it. Page 15, 9 and 10. We're dealing with one rib fracture, Your Honor. That is Dr. Wolford's testimony.

THE COURT: Okay. I will look at it.

Well, this clearly states that injury [sic], which I just said, were in the consultation of 12/27 of 2015.

I find that they were, therefore, not considered by Dr. Koehler, and for the reason of incomplete information and the basis of his unprofessional decision as to Dr. Wolford and the people at Children's Hospital, I am not going to classify him as an expert, and he will not testify as such.

(T.T., pp. 9, 10-11, 13-14, 15-16).

As this Court noted at the argument, reproduced at length above, the proposed report discussed only D.W.'s fractured rib and completely ignored her infraorbital hemorrhages and petechia. The medical records produced by the Commonwealth demonstrate a pattern of injuries involving squeezing/strangulation on the days of or immediately after the Defendant was caring for her, initially subconjunctival hemorrhages and petechia, bruising on her chest and back and, ultimately, a fractured rib. The central questions of the trial was, therefore, whether D.W.'s constellation of injuries and the pattern of their occurrence constituted abuse and whether the Defendant was the individual who inflicted those injuries. The report proposed by the Defendant did not address either of these issues and in fact did not even mention the subconjunctival hemorrhages, the petechia or the bruising. Neither did the report mention the Defendant's admission that he squeezed D.W. or his demonstration of how he did so. (See T.T., p. 130). Instead, the report was almost exclusively a personal criticism of Dr. Wolford and the other physicians and staff at Children's Hospital. To the extent that the report did purport to posit an "alternative explanation" for D.W.'s rib fracture, it also failed entirely to consider (or even mention) her other injuries and any common causation or interrelation between them. The report was purposefully deceptive in this omission and allowing it to be presented to the jury would have been tantamount to a fraud on the court. Therefore, this Court was well within its discretion in excluding it. This claim must fail.

2. Denial of Request for Continuance

Next, the Defendant argues that this Court erred when it denied his request for a continuance after excluding Dr. Koehler's report. Again, this claim is meritless.

"The grant of a continuance rests within the sound discretion of the trial court and... the decision to deny the continuance will not be reversed unless a clear abuse of discretion is shown'... Moreover, an appellate court will not find an abuse of discretion if the denial of the continuance did not prejudice the appellant." *Commonwealth v. Pettersen*, 49 A.3d 903, 914 (Pa.Super. 2012).

As discussed in great detail above, prior to beginning jury selection, this Court held arguments on the Commonwealth's Motion to Exclude Dr. Koehler's report and testimony. At the conclusion of the arguments, this Court granted the Commonwealth's Motion and excluded his testimony and then the following occurred:

MR. SHARIF: Without having him it jeopardizes the case for today.

THE COURT: I understand your objections, but I don't think I can hear it again. I have your report. So the motion en [sic] limine is granted.

MR. SHARIF: Is there any way we can ask for a continuance?

THE COURT: No.

...

MR. SHARIF: I just want to place this on the record. Without some type of medical or some type of expert testimony to counter the Commonwealth's case, this is prejudice in our case, Your Honor, and we would ask for a continuance. I think you denied that.

THE COURT: If there is nothing new that has come up, I see no need for a continuance. We'll proceed to jury selection.

(T.T. p. 17, 18).

As reflected in the record, defense counsel had ample time to obtain a proper expert report. In fact, the record reflects that he had already identified Dr. Koehler as his potential expert by July, 2016, when he sought funds from this Court to retain him. However, as discussed in great detail, above, the report submitted by Dr. Koehler was woefully deficient and failed to consider all of D.W.'s injuries. The report's blatant deficiencies should have been immediately apparent to counsel upon its receipt in August, 2016 and if more time was required to obtain alternate expert review, counsel's request should have been made at that time. Said another way, there is no possible way any attorney could have found Dr. Koehler's report acceptable and so this Court's decision to exclude it should not have come as a surprise. Rather, counsel delayed the report's production to the Commonwealth and so ran the risk of a "game-day" decision on the inevitable Motion to Exclude.

Moreover, the record reflects that this Court's denial of a continuance did not change the outcome of the case. Defense counsel had several months to secure expert review and produced only the report from Dr. Koehler. Given D.W.'s multiple injuries and the pattern of their occurrence it seems unlikely that any physician would not have classified the injuries as child abuse or that the Defendant could otherwise have easily secured an expert to that effect. Thus, more time would have served no further purpose, nor would it have changed the verdict. It is further clear from the record that Attorney Sharif was well-prepared for trial, that he engaged in thoughtful and effective cross-examination and made cogent arguments to the jury. Under these circumstances, this Court was well within its discretion in denying the Defendant's request for a continuance immediately prior to jury selection. This claim must also fail.

3. Defendant's Prior Conviction

Next, the Defendant argues that this Court erred in allowing the Commonwealth to present evidence of his prior conviction for simple assault pursuant to Pa.R.Evid. 404(b). Again, this claim is meritless.

It is well-established that the "standard of review regarding the admissibility of evidence is an abuse of discretion. 'The admissibility of evidence is a matter addressed to the sound discretion of the trial court and...an appellate court may only reverse upon a showing that the trial court abused its discretion'... 'An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law.'" *Commonwealth v. Collins*, 70 A.3d 1245, 1251 (Pa.Super. 2013), internal citations omitted. "In assessing whether challenged evidence should be admitted, 'the trial court must weigh the evidence and its probative value against its potential prejudicial impact.'" *Commonwealth v. Dillon*, 863 A.2d 597, 601 (Pa.Super. 2004). The appellate court's "scope of review is limited to an examination of the trial court's stated reason for its decision." *Id.*

Rule 404 of the Pennsylvania Rules of Evidence addresses the admissibility of evidence of other crimes or acts. It states, in relevant part:

Rule 404. Character Evidence; Crimes or Other Acts

...(b) *Crimes, Wrongs or Other Acts.*

(1) *Prohibited Uses. Evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.*

(2) *Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.*

Pa.R.Evid. 404.

In expounding on Rule 404(b), our Courts have held that "even where evidence of other crimes is prejudicial, it may be admitted where it serves a legitimate purpose... Pursuant to the Pennsylvania Rules of Evidence, these other purposes include, inter alia, proving: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the other; or (5) to establish the identity of the person charged." *Commonwealth v. Wattle*, 880 A.2d 682, 685 (Pa.Super. 2005).

Prior to trial, the Commonwealth filed notice of its intent to introduce the Defendant's prior conviction into evidence. On March 10, 2014, the Defendant pled guilty to Simple Assault in relation to various injuries in relation to his deceased five (5) month old son, C.W., who died of pneumonia, but on autopsy was found to have rib and skull fractures, petechia and scleral subconjunctival hemorrhages. The following occurred during argument on the Commonwealth's Motion:

MS. NECESSARY: Your Honor, the Commonwealth filed a 404B notice.

THE COURT: I was just reading it. I don't have the police report.

MS. NECESSARY: Actually, the Defendant pled guilty to one count of simple assault several years ago. The victim in that case was an infant, who was found to have rib fractures and skull fractures. The Children's Hospital doctor, Dr. Squires, would testify that this was a result of child abuse with a very similar mechanism to this case, which would be squeezing. Also, I believe, the child has petechia hemorrhages and scleral subconjunctival hemorrhages as well.

MR. SHARIF: You Honor, I would object to that. If that's the case, the District Attorney's Office would never have agreed to a three to six month sentence on this case. What happened is -

THE COURT: On what case?

MR. SHARIF: On the 2013 case. That's what happened. He got three to six months for that simple assault plea. In that case, the child died of pneumonia. It was one or two things that happened to the child.

The Defendant either put the child in bed with him and he feel [sic] asleep and rolled over on the child. That was one explanation. The other explanation was when he found that the child wasn't breathing, because of the pneumonia, he tried to give the child CPR and accidentally cracked one of the ribs. It was one of two reasons.

THE COURT: But that's not what he pled guilty to. He pled guilty to causing bodily injury to the child. The fact that the DA's office offered three to six months is up to the DA's office to do.

I would not have accepted that in my Courtroom; however, but apparently someone else did.

So I will allow the 404B evidence to be presented because of the similarity.

MR. SHARIF: Could we have that description? Because it's one thing that the statement was in the police report and it's another thing that was concluded upon at the end.

I think it's very prejudicial to state the allegations from the police report, and then as the case goes on, new information comes in and then people change their mind and treat this in a different way.

THE COURT: I don't know how you're going to get that. I don't know anything about this case. This was the first I am hearing of it.

MS. NECESSARY: Your Honor, actually I have Dr. Squires' medical report dated 5/28/13. The victim in that case was C.W. She states among other things the three-half-month-year-old presenting with two events of brown emesis and one day history of conjunctival hemorrhage.

Also, finding of facial bruising present in the distribution of fingers across cheeks. A finding of left conjunctival hemorrhage, and then the child died on 5/26/13.

The findings from Children's Hospital were healing posterior rib fractures, and almost a definitive finding of child abuse, skull fractures and multiple medical encounters, which are of concern. This was Janice Squires, M.D.

MR. SHARIF: Again, that -

THE COURT: Okay. Let's not be repetitive. I note your objection for the record, Mr. Sharif. Okay.

(T.T. p. 18-21).

A review of the record demonstrates that this Court's decision was well within its discretion. His plea to Simple Assault for causing injuries including rib fractures (caused by the mechanism of squeezing) and eye hemorrhages to his three (3) month old son is reflective of an inherent similarity and the absence of mistake or lack of accident contemplated by Rule 404(b). Neither was the evidence unduly prejudicial. By its very nature, all evidence presented by the Commonwealth is prejudicial to a criminal defendant. However, evidence regarding the prior plea was not so overly prejudicial that it justified exclusion. Ultimately, the evidence was more vastly more probative than prejudicial and so this Court correctly allowed its admission. This claim must fail.

4. Medical Records of C.W.

Next, the Defendant argues that this Court erred in admitting C.W.'s medical records over counsel's objection. Again, this claim is meritless.

At trial, the Commonwealth presented the testimony of Dr. Janet Squires, who was the director of the Child Advocacy Center at Children's Hospital in 2013, when the Defendant's son, C.W., died, and who had consulted on his case. During her testimony, the following occurred:

Q.. (Ms. Necessary): Dr. Squires, were you called into the consult on a child named C.W.?

A.. (Dr. Squires): I did not see C.W. C.W. was a child that came to our emergency room on the Sunday of Memorial Day weekend in 2013. The child died, and that day, I was on call. So I received a phone call that day from the emergency room doctor on call. I gave some advice.

The next day, Memorial Day, I came in and went through all the records and then I made some phone calls, but I personally never saw that child.

MS. NECESSARY: I am going to show Counsel what I have marked as Commonwealth Exhibit No. 6, and these are records of Children's Hospital kept in the ordinary course of business and certified and I would offer them into evidence at this time.

MR. SHARIF: I am going to say objection to relevance. It has no relevance to this case at all.

THE COURT: They will be admitted.

(T.T. p. 147-148).

As this Court had previously ruled that the Defendant's conviction for Simple Assault to his three- (3) month old son, C.W. was admissible (see discussion, above), the Commonwealth was, through the testimony of Dr. Squires, establishing what those injuries were. Given the admissibility of the prior conviction, C.W.'s medical records were certainly relevant and counsel's objection to them on this basis was properly overruled. This claim is meritless.

5. Excessive Sentence

Finally, the Defendant argues that his sentence was excessive and an abuse of discretion, and that this Court erred in failing to properly consider the relevant sentencing factors in imposing its sentence. Again, his claims are meritless.

It is well-established that "sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. *Commonwealth v. Hardy*, 939 A.2d 974, 980 (Pa.Super. 2007). "An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. In more expansive terms... an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness or partiality, prejudice, bias or ill-will, or such lack of support as to be clearly erroneous." *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa.Super. 2008). "The Sentencing Code requires a trial judge who intends to sentence outside the guidelines to demonstrate, on the record, his awareness of the guideline ranges... Having done so, the sentencing court may, in an appropriate case, deviate from the guidelines by fashioning a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant and the gravity of the particular offsets as it relates to the impact on the life of the victim and the community. In doing so, the sentencing judge must state of record the factual basis and specific reasons which compelled him or her to deviate from the guideline ranges... When evaluating a claim of this type, it is necessary to remember that the *sentencing guidelines are advisory only*." *Commonwealth v. Griffin*, 804 A.2d 1, 7-8 (Pa.Super. 2002), *emphasis added*. Further, "while it is impermissible for a court to consider factors already included within the sentencing guidelines as the *sole* reason for increasing or decreasing a sentence to the aggravated or mitigated range, a trial court may 'use prior conviction history and other factors already included in the guidelines *if they are used to supplement other extraneous sentencing information*.'" *Commonwealth v. Rush*, 162 A.3d 530, 545 (Pa.Super. 2017), *internal citation omitted*.

At the sentencing hearing, this Court noted that it had read and considered a Pre-Sentence Investigation report prepared behalf of the Defendant. (Sentencing Hearing Transcript, p. 2, 11). "Where pre-sentence reports exist, [the appellate court] shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. *Commonwealth v. Macias*, 968 A.2d 773, 778 (Pa.Super. 2009). Defense counsel then noted the sentencing guidelines for the record:

MR. SHARIF: Your Honor, I have reviewed the guidelines provided to me by the District Attorney's Office, and the standard range for the aggravated assault is 9 to 16 months, endangering the welfare of a child is 6 to 14 months, and the recklessly endangering another person is probation of 6 months.

(S.H.T., p. 2). After considering the arguments of counsel and the testimony of the Defendant's grandmother and cousin, this Court placed its reasons for imposing sentence on the record:

THE COURT: I ordered, read and considered a presentence report. I have the guidelines. And, Mr. Williams, you obviously come from a loving family. You said that you have one brother and then you told us you have three brothers and four sisters, and your grandmother said you had two brothers. But, nevertheless, the people who have spoken here today, obviously, are very caring. They love you. They think you're a good person.

I don't know that you are an evil person. What I do think is that you lost your temper, you got angry, and you let the whole situation get away from you. You caused serious injury to a two month old child. And the records indicate that you squeezed your daughter who was two months old causing fractured ribs, subconjunctival hemorrhages, right lateral side, and infraorbital petechia. The baby also had a fractured right fibula. Now, that is one thing.

The second thing that concerns me beyond belief is that you were charged with the prior aggravated assault on your five-month old son. I believe he was found by you to be unresponsive. It showed that he had healing ribs, he had a skull fracture. I believe technically he died of pneumonia but the doctors found both old and new injuries. I don't think you should ever be around a child. I don't know, I'm just beyond words on your case.

So, at count one - and I will recognize that Mr. Sharif is kind man and can find good in anybody. That's not to be taken as a fault but as a compliment. At count one, as a felony, I order you to serve not less than five years nor more than ten years, to have no contact with your daughter when you are released with credit from January 7 of 2016.

At count three, I order you to serve three-and-a-half to seven years consecutive to the sentence I just imposed. This sentence is not a mandatory sentence. The Defendant is not RRRI eligible.

(S.H.T. p. 11-13).

As the record reflects, this Court appropriately read and considered the pre-sentence investigation report and numerous letters in support of the Defendant, considered the factors and severity of the present offense, evaluated the Defendant's potential for rehabilitation and imposed a sentence which took all of these factors into consideration. This Court does concede counsel's point that Dr. Squires did indicate that C.W. was not ultimately found to have a skull fracture, despite an area of concern on his x-rays, however, that was not the determinative factor in crafting this sentence and so it does not require resentencing.

However, the record does reflect great deliberation and consideration in the formulation of the sentence. Under the circumstances, the sentence was appropriate and well below the statutory maximum. The Defendant's unhappiness with the length of his sentence does not mean it is excessive or otherwise inappropriate and this Court was well within its discretion in imposing it. This claim must also fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on December 6, 2016 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

¹ 18 Pa.C.S.A. §2702(a)(8) and §2702(a)(9)

² 18 Pa.C.S.A. §4304(a)(1)

³ 18 Pa.C.S.A. §2705

Commonwealth of Pennsylvania v. Keith Johnson

*Criminal Appeal—Sentencing (Discretionary Aspects)—Juvenile Lifer—Maximum Life Sentence—Excessive Minimum Sentence
Former juvenile convicted of murder is re-sentenced to 35 years to life in prison.*

No. CP-02-CR-0005882-1985. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—January 9, 2018.

OPINION

On October 18, 1985, a jury convicted Appellant, Keith Johnson, of first-degree murder for a crime he committed while he was 16 years old. On July 23, 1986, Appellant was sentenced to the mandatory sentence of life without the possibility of parole.¹

In an opinion dated April 6, 2016, the Superior Court of Pennsylvania remanded for resentencing based on *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718 (2016). *Commonwealth v. Johnson*, 2020 WDA 2013 (Pa. Super. Apr. 6, 2016). On August 4, 2017, this Court re-sentenced Appellant on one count of Murder of the First Degree to 35 years to life imprisonment. Appellant filed a Notice of Appeal on September 6, 2017 and a Statement of Errors Complained of on Appeal on November 27, 2017.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges that this Court erred in sentencing Appellant based on the Court's belief that it was required to impose a maximum life sentence. (Statement of Errors to be Raised on Appeal, p. 2). Appellant further alleges that this Court abused its discretion in not imposing a finite term of years at the maximum end of Appellant's sentence. *Id.* Lastly, Appellant alleges that this Court abused its discretion in not imposing a shorter minimum sentence. *Id.*

DISCUSSION

Appellant first alleges that this Court erred in believing that it was required to impose a maximum life sentence. Appellant acknowledges in his Concise Statement that *Commonwealth v. Seskey*, 170 A.3d 1105 (Pa. Super. 2017) interpreted *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) (*Batts II*) to require a court to set a life sentence as the maximum. By raising the issue, Appellant concedes that he seeks to preserve a challenge to the holding in *Seskey*.

The Superior Court in *Seskey* vacated a 26 year maximum sentence and held that the lower court was required to impose a maximum term of life imprisonment. 170 A.3d at 1109. This Court is bound by *Seskey* and as a result neither committed legal error nor abused its discretion in imposing a life maximum sentence. Therefore, Appellant's first and second issues are without merit.

Lastly, Appellant allege that this Court abused its discretion by imposing an excessive minimum sentence of 35 years. In order to address an alleged sentencing error, Appellant must first establish a substantial question that his sentence is 1) inconsistent with a specific provision of the Sentencing Code; or 2) contrary to the fundamental norms which underlie the sentencing process. *Id.* at 364. 42 Pa.C.S. §9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa. Super. 1995). This determination is evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa. Super. 1988). It is appropriate to allow an appeal "where an appellant advances a colorable argument that the trial judge's actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Commonwealth v. Losch*, 535 A.2d 115, 119-120 n. 7 (Pa. Super. 1987). Generally, a bald claim of excessiveness will not raise a substantial question. *See Commonwealth v. Moury*, 992 A.2d 162, 171-172 (Pa. Super.2010). However, "[a] claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question." *Commonwealth v. Derry*, 150 A.3d 987, 995 (Pa. Super. 2016). Appellant baldly alleges that this Court erred in sentencing him to 35 years at the minimum range, which fails to advance a colorable argument that this Court's actions were inconsistent with the sentencing code or contrary to the norms underlying the sentencing process. Although it would appear that Appellant has failed to raise a substantial question, in an abundance of caution, this Court will address the merits of Appellant's claim.

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

When imposing a sentence, this Court is required to consider, among other things, the protection of the public, the gravity of the offense in relation to the impact on the victims and community and the rehabilitative needs of the defendant. 42 Pa.C.S. § 9721(b). Appellant's mere unhappiness with his sentence does not constitute grounds for relief. "Since the court more than adequately considered the pertinent sentencing factors and merely weighed them in a manner inconsistent with Appellant's desires, we find his [only] issue does not entitle him to relief." *Commonwealth v. Dodge*, 77 A.3d 1263, 1276 (Pa. Super. 2013).

Appellant was originally sentenced on July 23, 1986 to the then-mandatory term of life imprisonment for his conviction of Murder of the First Degree. In response to the U.S. Supreme Court's holding in *Miller*, Pennsylvania enacted 18 Pa.C.S. § 1102.1, which provides the mandatory minimum sentences for juvenile murderers. A court is required to sentence a juvenile between ages 15-18 who is convicted of Murder in the First Degree to at least 35 years to life imprisonment. 18 Pa.C.S. § 1102.1(a) (1).

Pursuant to the holding in *Batts II*, this Court resentenced Appellant upon consideration of the sentencing factors outlined in *Knox* and *Miller* with § 1102.1 providing additional guidance. The Court in *Knox* listed several factors to consider at resentencing:

Therefore, although *Miller* did not delineate specifically what factors a sentencing court must consider, at a minimum it should consider a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Commonwealth v. Knox, 50 A.3d 732, 745 (Pa. Super. 2012).

At the August 4, 2017 resentencing hearing, this Court considered the sentencing factors in *Knox* and *Miller*, the 18 Pa.C.S. § 1102.1(a) (1) factors, as well as the totality of information presented to fashion an individualized sentence. (Transcript of Resentencing Hearing, August 4, 2017, hereinafter "RT" at 19, 31-32) This Court considered as mitigating factors that Appellant completed his GED and his HVAC certification, has a supportive family, and lacked a prior juvenile record prior to his commission of this offense at age 16. (RT 30) However, Appellant showed a lack of remorse and blamed his associates for his criminal conduct. (RT 31) He attacked with a knife an individual who had bumped into him or one of his friends and was walking away from Appellant. *Id.*

This sentence is thoroughly reflective of the gravity of the offense as it relates to the 17 year old victim, who was robbed of his life, and of the need to protect the community, yet allows the possibility for Appellant to reenter society as a rehabilitated man after having served his sentence of 35 years to life.

CONCLUSION

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

BY THE COURT:

/s/Rangos, J.

¹ For a more detailed procedural history, see *Opinion*, July 31, 2014, at 2-3.

² *Commonwealth v. Batts*, 66 A.3d 286, 295 (Pa. 2013).

Commonwealth of Pennsylvania v. Rico Murphy

Criminal Appeal—Suppression—Rule 600—Weight of the Evidence—Aggravated Assault—Show Up—Frye Challenge to Gunshot Residue—Defendant Appears in an Unnecessary Wheelchair

Multiple issues in case of aggravated assault which occurred when a man riding a bike was shot.

No. CC 201410514. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Mariani, J.—January 17, 2018.

OPINION

This is a direct appeal in which the defendant appeals the Judgment of Sentence of November 21, 2016 that became final when this Court denied post-sentencing motions on April 13, 2017. After a jury trial, the defendant was found guilty of two counts of aggravated assault, one count of possession of a firearm by a prohibited person and one count of recklessly endangering another person. Relative to the conviction for aggravated assault, this Court sentenced the defendant to a mandatory term of imprisonment of not less than 10 years nor more than 20 years. Relative to the firearms conviction, this Court sentenced the defendant to a consecutive term of imprisonment of not less than 2 ½ years nor more than 5 years. No additional punishment was imposed at the remaining convictions. This timely appeal followed in which the defendant alleges numerous allegations of errors in the trial court.

The credible facts adduced at trial established that the following events transpired:

On June 17, 2017, Richard Palmer was riding a bicycle in the Hazelwood section of the City of Pittsburgh when he suffered two gunshot wounds. One shot hit him in the back and penetrated vertebrae. The other shot entered his stomach. After surgery, Mr. Palmer had difficulty walking. He had to use a cane. He had very little memory of the day of the shooting. He testified that he never saw the shooter.

Diedre Riemenschneider testified that she was with her mother leaving a Rite Aid store in her mother's Ford Mustang in the Hazelwood section of Pittsburgh. As she and her mother were driving down Tecumseh Street she looked to her left and observed Mr. Palmer riding a bicycle. As she watched Mr. Palmer, she observed the defendant approach Mr. Palmer and shoot Mr. Palmer two times. She had an unobstructed view of the defendant and clearly identified him as the shooter. She saw Mr. Palmer fall to the ground and her mother accelerated their vehicle, attempting to pursue the defendant as he fled from the scene. They observed the defendant flee down a pathway near the scene of the shooting. Ms. Riemenschneider, fearing that the defendant had a gun, convinced her mother to discontinue pursuit of the defendant and return to Mr. Palmer to render first aid. They attended to Mr. Palmer and called 911. Ms. Riemenschneider's mother talked to Mr. Palmer in an effort to keep him calm while emergency personnel were en route.

After emergency personnel arrived, Ms. Riemenschneider was interviewed by the police. She informed officers that she saw the firearm used in the shooting. She described it as blue or purple. She provided a description of the shooter's clothing as a white t-shirt with long black basketball shorts. She also described the shooter as a skinny, tall black male wearing a hat. Approximately ten minutes after the police arrived and had apprehended the defendant, Ms. Riemenschneider was taken to Lytle Street, where the defendant was in custody, and she identified the defendant as the person who shot Mr. Palmer. He did not have a white t-shirt on at the time. He also was not wearing a hat. He was, however, wearing a tank top.

Detective Douglas Butler testified that he was one of the initial responders to the scene. Relying on information supplied to him when he arrived on scene, he and two other officers began canvassing the area looking for the shooter. As he was walking on Lytle

Street, he was greeted by a hysterical resident claiming that while her two sons were playing in the back yard, a black male jumped her fence and the black male was holding a blue gun. The residents ran into the house. Detective Butler, Detective Fetty and Detective O'Dille continued to canvass the area. Detective Butler eventually located the defendant lying face down in some brush, attempting to hide from the police. The defendant told Detective Butler that he had thrown the firearm. Detective Fetty, who responded to the scene, observed the defendant just prior to his apprehension. The defendant was holding an object wrapped in a white t-shirt. Detective Fetty observed the defendant attempting to hide the item and the white t-shirt under a fence. After the defendant was placed in custody, a blue Cobra Enterprise .380 caliber firearm wrapped in the white t-shirt was recovered from the area where the defendant was observed trying to hide it. Bullet casings from .380 caliber ammunition were found at the scene and trial testimony established that the casings were fired from the firearm recovered in this case.

After the defendant was taken into custody, he was interviewed by Detective Timothy Rush. The defendant initially told Detective Rush that he did not shoot Mr. Palmer and he was in the area of the shooting because he had to go to the bathroom. The defendant claimed he became tired and laid down in the area where he was arrested. He also denied shooting Mr. Palmer. After being confronted with the evidence that had been developed in this case, the defendant advised Detective Rush that he didn't want to go back to prison. He also asked Detective Rush "how much time [he] would get" if he were convicted of the charges relating to this incident.

Gun shot residue was found on the defendant's right hand, front and back. The defendant was placed under arrest and ultimately convicted as set forth above.

Defendant's first claim is that this Court erred in denying his motion to suppress the identification of him by Ms. Riemenschneider at the scene of his arrest. At the suppression hearing, the evidence established that Ms. Riemenschneider had clearly observed the shooting and, after the defendant turned toward her after the shooting, she was able to specifically observe the defendant's face at that time. She provided a description of the shooter to the 911 dispatcher and to the police officers who responded to the scene. She described the shooter as a young, tall, skinny black male who was wearing a white t-shirt at the time of the shooting. Approximately 20 minutes after the shooting, she was advised by police officers that they had apprehended a person running through a nearby yard and asked her if she could view that person to determine if he was the shooter. Noting that he was no longer wearing a white t-shirt, she made a positive identification that the person in custody was, indeed, the person who shot Mr. Palmer.

In *Commonwealth v. Bruce*, 717 A.3d 1033, 1036-1037 (Pa.Super. 2014), the Superior Court stated:

Generally, "in reviewing the propriety of identification evidence, the central inquiry is whether, under the totality of the circumstances, the identification was reliable." *Commonwealth v. Meachum*, 711 A.2d 1029 (Pa.Super.1998). The question for the suppression court is whether the challenged identification has sufficient indicia of reliability to warrant admission, even though the confrontation procedure may have been suggestive. *Commonwealth v. Thompkins*, 311 Pa.Super. 357, 363, 457 A.2d 925, 928 (1983) (citation and footnote omitted).

Suggestiveness in the identification process is a factor to be considered in determining the admissibility of such evidence, but "suggestiveness alone does not warrant exclusion." A pretrial identification will not be suppressed as violative of due process rights unless the facts demonstrate that the identification procedure was so infected by suggestiveness "as to give rise to a substantial likelihood of irreparable misidentification."

Commonwealth v. Sample, 321 Pa.Super. 457, 462, 468 A.2d 799, 801 (1983) (citations and quotations omitted). In determining whether a particular identification was reliable, the suppression court should consider "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Commonwealth v. Monroe*, 373 Pa.Super. 618, 622, 542 A.2d 113, 115 (1988), *appeal denied*, 522 Pa. 574, 559 A.2d 36 (1989) (citation omitted). The opportunity of the witness to view the actor at the time of the crime is the key factor in the totality of the circumstances analysis. *Commonwealth v. Spiegel*, 311 Pa.Super. 135, 145, 457 A.2d 531, 536 (1983) (citation omitted).

The identification of the defendant at the scene of his arrest was reliable. Ms. Riemenschneider had an unobstructed view of the shooting and was clearly able to observe the face of the shooter as he turned toward her. She and her mother initially gave chase. She was able to describe the shooter's clothing and she relayed an accurate description of the shooter to the 911 dispatcher and to the police officers who responded to the scene. Within 20 minutes of the shooting she was taken to the area where the defendant was being held in custody and she was able to positively identify the defendant by observing his face. Her identification was corroborated by the white t-shirt and blue firearm found near the scene of the defendant's arrest. There is nothing about the identification that was unreliable or unduly suggestive and the defendant's motion to suppress was properly denied.

Defendant next claims that this Court erred in not granting a hearing on the gunshot residue testing pursuant to *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). Specifically, the defendant asked to have a *Frye* hearing to challenge the manner in which the gunshot residue evidence was collected. At the hearing, the defendant acknowledged that the method of gunshot residue testing used by the Commonwealth was based on a nationwide standard. Based on these representations, this Court denied the request for a *Frye* hearing because the defendant's request did not involve a challenge to novel scientific evidence. In *Commonwealth v. Jacoby*, 170 A.3d 1065, 1090-1091 (Pa. 2017), the Supreme Court explained:

The *Frye* standard, first adopted by this Court in *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977), is used to determine the admissibility of novel scientific evidence, and is incorporated into Rule 702. *Grady v. Frito-Lay Inc.*, 576 Pa. 546, 839 A.2d 1038, 1043 (2003). *Frye* permits novel scientific evidence to be admitted at trial "if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Walker*, 92 A.3d at 789 (citation omitted). Once it is established that the scientific evidence in question is novel, "the proponent must show that the methodology is generally accepted by scientists in the relevant field, but need not prove the conclusions are generally accepted." *Id.* at 790 (citation omitted). The burden is on the proponent of the evidence to demonstrate its admissibility. *Id.* A *Frye* hearing is not required in every instance that a party wants to introduce scientific evidence. Rather, a hearing is warranted only when the trial court "has articulable grounds to believe that an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions." *Id.* (citation omitted).

Based upon this caselaw, it is clear that the defendant's challenge to the collection methods relating to gunshot residue evidence was a challenge to the weight and/or credibility of the collection practices and not a challenge to novel scientific evidence. The defendant was clearly not challenging the science behind the determination of the existence of gunshot residue on a person's hands. This claim, thus, fails.

The defendant next claims that this Court erroneously denied the defendant his right to be present at jury selection. It is true that the right of an accused to participate in the selection of the jury is "an essential ingredient of a jury trial" under the Pennsylvania Constitution. *Commonwealth v. Williams*, 454 Pa. 368, 312 A.2d 597 (1973). The United States Supreme Court has explained, though, that this Sixth Amendment right is not absolute.

[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) Additionally, "when a defendant is abusive and disruptive to the proceedings, the trial judge does not abuse his discretion in having him removed from the courtroom." *Commonwealth v. Thomas*, 879 A.2d 246, 255 (Pa.Super. 2005) citing *Commonwealth v. Basmore*, 525 Pa. 512, 524-27, 582 A.2d 861, 867-68 (1990), cert. denied, 502 U.S. 1102, 112 S.Ct. 1191, 117 L.Ed.2d 432 (1992).

During the pretrial course of this case, the defendant engaged in multiple acts designed to disrupt and abuse the judicial process. The circumstances that gave rise to the instant appellate issue were caused by the defendant's appearance for a pretrial conference on August 24, 2016, in a wheelchair. Defendant was detained at this time and he was to participate in jury selection on that date. He had minor hernia surgery about two weeks before the pretrial conference. He began complaining to jail personnel that he could not walk. However, the defendant was examined by a doctor at the Allegheny County Jail on August 24, 2016 and the doctor opined in a written correspondence to the Court that the defendant did not require the use of a wheelchair for medical reasons. A deputy sheriff testified at the pretrial conference that the defendant's unnecessary use of the wheelchair created a burden on his office because it created a security risk in his office due to the fact that the defendant would not be able to be restrained as other pretrial inmates are. Videotape taken at the jail showed that the defendant could walk normally without the use of a wheelchair after the surgery. The defendant had a history of threats of violence and he had previously threatened his prior counsel with physical harm. He had also made many false claims about his mental capacity. With these circumstances in mind, this Court was very concerned about security issues if the defendant was transported to and from the courthouse in a wheelchair that was not medically necessary. This Court did not bar the defendant from jury selection, it simply advised the defendant that if he would not vacate the wheelchair, he would not be taken to jury selection and, instead, he'd be returned to the county jail. The defendant refused to vacate the wheelchair and he was returned to the county jail. The defendant made the conscious decision to remain in the wheelchair. This Court views the defendant's decision of his voluntary forfeiture of his right to attend jury selection. Notably, after the defendant exhibited an ability to conform his conduct to the norms of reasonableness, he was permitted to remain in the courtroom through the duration of trial which occurred over the following week. He was able ambulate well. It was the defendant's own voluntary disruptive and abusive actions which resulted in his absence from jury selection. Accordingly, this claim fails.

The defendant next claims that this Court should have granted his Rule 600 motion. Pursuant to Pa.R.Crim.P. 600(A)(2)(a), "[t]rial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed." Pursuant to Pa.R.Crim.P. 600(C)(1),

For purposes of paragraph (A), periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in the computation of the time within which trial must commence. Any other periods of delay shall be excluded from the computation.

The period of time resulting from any continuance granted at the request of the defendant or the defendant's attorney is also excluded from the Rule 600 calculation. *Commonwealth v. Booze*, 953 A.2d 1263, 1272 (Pa.Super. 2008). The Superior Court has explained:

Rule 600 serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of Rule 600 was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.

So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule 600 must be construed in a manner consistent with society's right to punish and deter crime. In considering these matters ..., courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

Commonwealth v. Ramos, 936 A.2d 1097, 1100 (Pa.Super. 2007) (*en banc*) (quoting *Commonwealth v. Hunt*, 858 A.2d 1234, 1238 (Pa.Super. 2004) (*en banc*)).

Excusable delay is not counted against the speedy trial clock:

"Excusable delay" is not expressly defined in Rule 600, but the legal construct takes into account delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence.

Commonwealth v. Booze, 953 A.2d 1263, 1272-1273 (Pa.Super. 2008).

In determining whether the Commonwealth acted with due diligence, it is noted that "[d]ue diligence is fact-specific, to be determined case-by-case; it does not require perfect vigilance and punctilious care, but merely a showing the Commonwealth has put forth a reasonable effort." *Commonwealth v. Selenski*, 994 A.2d 1083, 1089 (Pa. 2010).

This Court denied the defendant's Rule 600 motion because it believed the Commonwealth acted with due diligence in bringing this case to trial. The criminal complaint was filed in this case on June 17, 2014. Due to the fact that Mr. Palmer was

hospitalized as a result of the serious injuries caused by the defendant, the preliminary hearing did not occur until August 4, 2014. On September 17, 2014, the Commonwealth filed an information alleging the crimes against the defendant. The defendant was formally arraigned on September 18, 2014. A pretrial conference was held on October 10, 2014 and this case was first listed for trial on February 3, 2015. On December 12, 2014, this Court ordered that the defendant submit to an evaluation by the Behavior Assessment Unit of the Allegheny County Jail based on a request from the defendant's then defense counsel. This request was made, in part, because defense counsel complained that the defendant was not participating in the defense of his case. The defendant then requested a continuance of the February 3, 2015 trial and a new trial date of May 11, 2015 was set by this Court. On May 1, 2015, the defendant filed a motion to suppress. On May 11, 2015, this Court convened a suppression hearing. At the conclusion of that hearing, defense counsel requested additional time to prepare a post-hearing brief. That request was granted and the May 11, 2015 trial date was reset to August 3, 2015. The suppression motion was denied on August 3, 2015. The defendant then requested another postponement of the trial date. That request was granted and a new trial date of October 13, 2015 was set by this Court. On September 15, 2015, the defendant filed a motion for a *Frye* hearing. On October 13, 2015 the defendant requested yet another continuance and a hearing on the *Frye* motion was set for December 3, 2015 and the trial date was reset for December 9, 2015. On December 9, 2015, the defendant appeared in court and claimed to have been "hearing voices". As a result, defense counsel requested another continuance and the trial was reset for March 28, 2016. On that date, the Commonwealth submitted a request for a continuance due to the fact that a necessary Commonwealth witness was unavailable. This Court continued the trial and reset the trial date for May 16, 2016. Due to the fact that a necessary Commonwealth witness, a police officer, had been injured and was unavailable for the trial on May 16, 2016, the Commonwealth submitted another continuance request. This Court granted that request and the trial date was set forth August 23, 2016. The defendant filed a motion to dismiss this case based on Rule 600 on August 1, 2016. Trial occurred on August 23, 2016.

This Court does not find a violation of Rule 600. There are substantial windows of time that do not count against the Commonwealth for purposes of a Rule 600 calculation. The complaint was filed in this case on June 17, 2014. Trial commenced on August 23, 2016. This period spanned 798 days. The preliminary hearing did not occur until August 4, 2014 due to the unavailability of the victim due to injuries caused by the defendant. This delay was not caused by any action of the Commonwealth and was necessary. This time, 47 days, does not count against the Rule 600 clock. Additionally, On February 3, 2015, defense counsel requested a continuance which was granted. Defense counsel then requested various other continuances resulting in a trial date of March 28, 2016. This period of time, 419 days, is excludable from the Rule 600 clock. See Pa.R.Crim.P 600(C)(3)(b). Regardless of whether the any of the additional events that delayed the trial resulted in excludable time, excising the time caused by the unavailability of the victim and continuances caused by the defendant (466 days) from the time period between the filing of the complaint and trial (798 days), only 332 days elapsed on the Rule 600 clock.¹ No violation occurred. This claim is meritless.

Defendant claims error relating to this Court's rulings concerning the admission of certain evidence of the defendant's conduct at the time of his arrest. "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.

Generally, evidence that a defendant committed other crimes, wrongs, or acts is inadmissible to prove that a defendant acted in conformity therewith. Pa. R. Evid. 404(b)(1). This type of evidence is admissible, however, when it is offered for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident so long as the trial court concludes the probative value of the evidence outweighs its potential for prejudice. Pa. R. Evid. 404(b)(2), (3). See *Commonwealth v. Henkel*, 938 A.2d 433, 444 (Pa.Super. 2007).

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.

Defendant first argues that the Court erred in admitting into evidence the statements the defendant made to Detective Rush concerning the fact that he had just gotten out of prison and he did not want to go back and his inquiry into how much jail time he would receive for the crimes for which he was arrested. The defendant claims that these statements violated Rule 404(b), the statements were more prejudicial than probative and that they weren't relevant. This Court disagrees.

The defendant made a number of different statements to Detective Rush. The defendant initially told Detective Rush that he didn't participate in the shooting and the only reason he was in the area where he was arrested was because he had to urinate. He then claimed he was tired and that was why he was found lying in high grass. He also told Detective Rush that his relationship with his daughter would suffer because of the shooting. He also stated that he threw the firearm toward a roof despite the fact that the firearm was recovered in a different area. After Detective Rush confronted him with the evidence against him, the defendant made the statements concerning his recent release from prison and not wanting to return and he made the statement inquiring about the potential sentences he faced.

This Court did not admit the evidence for the purpose of showing the defendant's propensity to commit crimes. Instead, this Court believed the statements were probative to provide context to Detective Rush's interview of the defendant. From the Commonwealth's perspective, considering the firm evidence in this case, the defendant's initial statements were nonsensical. The defendant's motivation for claiming that the only reason he was in the area where he was arrested was to urinate and then he laid down because he was tired was certainly questionable. His comments about his relationship with his daughter are similarly strange. These comments are given context when defendant's additional statements are admitted. The crux of these comments are that the defendant does not want to return to prison and he's concerned about the duration of any possible prison sentence. These concerns offer some explanation as to why he would make the outlandish statements he made to Detective Rush. In this Court's view, the defendant's concerns about returning to prison and the duration of any possible prison stay provided context to his initial statements. For that reason, the statements were properly admitted.² Additionally, even if there existed some colorable basis to assert error, the error was harmless. Based on the other evidence admitted against the defendant, admission of the challenged evidence did not prejudice the defendant.

Defendant also claims that this Court impermissibly permitted Detective Butler to testify as to double hearsay testimony and it permitted Detective Rush to testify as to his understandings of defendant's statement. This Court has reviewed the record and cannot locate where this issue was preserved with the lodging of an objection. This Court does not believe these issues were properly preserved and are, therefore, waived. See Pa.R.A.P. 302(a) (stating that "issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); *Commonwealth v. Lawson*, 789 A.2d 252, 253 (Pa. Super. 2001)(explaining that "even issues of constitutional dimension may not be raised for first time on appeal."); *Commonwealth v. Cain*, 906 A.2d 1242, 1244; (Pa. Super. 2006).

The defendant claims that this Court erred when it denied defense counsel the opportunity to examine police officer witnesses about gunshot residue evidence. Though not specifically couched in such terms in the concise statement, the record discloses that defendant's argument relates to this Court's refusal to permit defense counsel to inquire of police witnesses into possible sources of gunshot residue transfer from the handcuffs used on the defendant. It is true that this Court did not permit defense counsel to inquire into this area *during cross-examination* of the police officers. However, this Court based its refusal on the fact that the Commonwealth had not elicited any evidence at that point in trial relating to gunshot residue evidence at that time. At that juncture, gunshot residue evidence was not relevant. On the record, this Court specifically acknowledged that it would revisit the issue if such evidence was later admitted by the Commonwealth. Later in trial, the Commonwealth did elicit testimony concerning gunshot residue testing on the defendant's hands. Defense counsel vigorously cross-examined two of the defendant's scientific witnesses. Curiously, however, defense counsel never requested to recall the police witnesses nor did he take any other steps to revisit the issue after the Commonwealth had raised it at trial. Defense counsel surely could have recalled those officers. His decision to abandon that issue renders his claim baseless.

Defendant next challenges the sufficiency of evidence to convict of all charges claiming that there was insufficient evidence linking him to the firearm recovered in this case and because contradictory evidence existed as to the color of the firearm. This claim is frivolous. 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).

It is patently clear that the evidence in this case established that the defendant was observed by an eyewitness pointing a blue firearm at the victim and shooting the victim in the back. The defendant was identified by the eyewitness and the defendant was observed fleeing the scene. Police officers then searched for the defendant and found the defendant in the area to which he fled. While in pursuit of the defendant, police officers observed the defendant attempt to hide the firearm, wrapped in a t-shirt, under a fence. The firearm was recovered and ballistics matched the firearm to the shell casings found at the scene. The defendant's right hand tested positive for gunshot residue. A very short time transpired during the entire incident. This evidence created an undeniable link between the defendant and the firearm. The evidence was clearly sufficient to convict.

Defendant's final claim is that the verdict was against the weight of the evidence because "the evidence failed to link the defendant to the firearm recovered in this case and that there was contradictory evidence admitted at trial relative to the color of the firearm. 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)).

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).

This Court has reviewed the trial record and it is clear that the verdict was not against the weight of the evidence. As set forth above, the defendant was specifically identified as the shooter in this case and the defendant was specifically observed attempting to hide the firearm used in the shooting within minutes of the shooting. This claim is meritless.

For the foregoing reasons, the Judgment of Sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: January 17, 2018

¹ Arguably, the continuances of trial requested by the Commonwealth were necessary despite its due diligence and caused by circumstances beyond the control of the Commonwealth. A necessary police officer witness had been injured and was unavailable for the scheduled trial date.

² This Court also provided a curative instruction to the jury that they first had to determine whether the defendant even made the statements attributed to him. It also cautioned that the statements were admitted only for the purpose of evaluating the context and credibility of the statements attributed to the defendant and that the statements could not be used to suggest that the defendant was guilty in this case because he had previously been in prison.

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PLJ

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OPINIONS

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Commonwealth of Pennsylvania v. Antoine Darnell Morris

Criminal Appeal—VUFA—Suppression—Terry Stop—Mistaken Identity—Mistake of Fact

If police officer's decision to do a Terry stop and frisk is based on suspect's identity, any reasonable mistake in the identification will support the stop.

No. CC 201415656. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Manning, P.J.—January 25, 2018.

OPINION

The defendant, Antoine Darnell Morris, was charged by criminal information, at count one, with Persons Not to Possess a Firearm (18 Pa. C.S.A. § 6105(a), (a.1) and (1) and, at count two, with Carrying a Firearm Without a License (18 Pa. C.S.A. § 6106). Defendant filed a Motion to Suppress Evidence. Following a hearing on the Motion to Suppress held on March 22, 2017, the Motion was denied. Defendant appeared on April 11, 2017, waived his right to a jury trial, and proceeded to a stipulated non-jury trial.

At trial, the Commonwealth reducing the grading of the offense charged at count one to a misdemeanor of the first degree. Based upon the stipulated facts, the Court then adjudged the defendant guilty at both charges. On July 21, 2017, he was sentenced to not less than eighteen (18) nor more than thirty-six (36) months incarceration at count two and no further penalty at count one. Defendant filed a Notice of Appeal and, pursuant to this Court's Order, a Concise Statement of Matters Complained of on Appeal indicating he intended to challenge this Court's denial of his suppression motion. He claimed that denial was in error because:

1. The initial detention of the defendant was not supported by reasonable suspicion that he was engaged in a criminal activity and/or there was not probable cause to arrest him;
2. The mistake of fact as to the defendant's identity, which led to the initial detention, was not reasonable or understandable under the circumstances;
3. The search of his person was not supported by reasonable suspicion that he was presently armed and dangerous or otherwise a threat to the safety of law enforcement nor was it incident to a lawful arrest.

The Commonwealth presented one witness at the preliminary hearing, Deputy United States Marshal Derrick Berger. He testified that on September 17, 2014 he and other members of the Fugitive Task Force received information that Price Montgomery, for whom a federal warrant has been issued, would be in the 3500 block of Forbes Avenue in the Oakland section of Pittsburgh, near the Allegheny County Department of Health building. (H.T.¹ 4-5) He and the other members of the task force were shown the warrant² and provided with a copy of a photograph of Montgomery. ³(H.T. 5). The warrant was for a charge of distributing a kilo of cocaine. (H.T. 7). Berger was also aware that Montgomery was known to carry guns and should be approached as if he were armed and dangerous. (H.T. 7).

They proceeded to the area in three separate vehicles and parked where each could observe the area. Deputy Berger was in a parking lot across the street from the leave the building and walked down Forbes Avenue to his left. One of the other task force members said over the radio something like, "That's him. That's Price Montgomery. We need to stop him." (H.T. 6). They exited their vehicles and approached the individual, later identified as the defendant, as he walked down Forbes Avenue. The defendant was wearing a "larger, black leather coat" despite it being a warm, sunny day. (H.T. 6-7).

Deputy Berger approached the defendant, wearing a tactical vest marked "U.S. Marshal" and with his badge visible on a chain around his neck. (H.T. 8). He asked him to stop and asked him if he had any identification. (H.T. 8). He could not remember his precise words, but believed he said, "Excuse me. Do you have ID?" (H.T. 12). The defendant said he did not have ID and then reached into his pockets. (H.T. 8). Deputy Berger asked him to stop. (H.T. 8). He then informed the defendant that he would pat him down for officer safety. When Deputy Berger patted the outside of the defendant's coat, he felt what he believed to be a gun. He reached into the pocket and removed a handgun. (H.T. 8). The defendant was then placed in cuffs. At that time, the defendant told them his name and provided his birthdate. (H.T. 9). Deputy Berger explained why he decided to pat down the defendant: "I mean, we thought we were encountering Price Montgomery, who is considered armed and dangerous, so I don't want him reaching for a weapon when there's myself and my team there, too." (H.T. 15).

The Pennsylvania Supreme Court, in *Commonwealth v. Lyles*, 97 A.3d 298 (Pa. 2014), discussed interactions between citizens and law enforcement:

Article I, Section 8, of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution both protect the people from unreasonable searches and seizures. *Commonwealth v. Smith*, 836 A.2d 5, 10 (Pa.2003) (citation omitted). Jurisprudence arising under both charters has led to the development of three categories of interactions between citizens and police. *Id.* (citations omitted). The first, a "mere encounter," does not require any level of suspicion or carry any official compulsion to stop or respond. The second, an "investigative detention," permits the temporary detention of an individual if supported by reasonable suspicion. The third is an arrest or custodial detention, which must be supported by probable cause. *Id.* (citations omitted).

97 A.3d, 298 at 302. When a Court is asked to determine which of these interactions between an officer and defendant is involved, it must examine all of the circumstances surrounding the encounter. *Commonwealth v. Strickler*, 57 A.2d 884, 889 (Pa. 2000). This test centers on whether the suspect has been, in some way, subject to coercive police authority. It is an objective test which must determine whether a reasonable person would have felt free to leave or otherwise terminate the encounter under the circumstances established by the evidence. *Commonwealth v. Lyles*, at 303.

Applying these tests, it is clear that at the time the gun was discovered this interaction was an investigative detention. Believing that the defendant was, in fact, Price Montgomery, for whom they had an arrest warrant, it is clear that the defendant would not have been free to leave unless it was determined that he was not Price Montgomery. Thus, the detention had to have been supported by reasonable suspicion in order to be valid. Clearly, if the facts were as Deputy Berger believed them to be, that the individual they approached was, in fact, Price Montgomery, then there is no question that the stop, pat down, seizure of the gun and arrest would have been completely valid. Where, however, it turns out that the officers making the stop were, in fact, mistaken, the question becomes whether that mistake makes their determination that reasonable suspicion existed a nullity. The law is clear that it does not.

The Superior Court held:

In ascertaining whether reasonable suspicion exists, a reviewing court must examine the totality of the circumstances to discern whether the officer has a particularized and objective basis for suspecting the individual stopped of criminal activity.¹⁰ *Commonwealth v. Johnson*, 444 Pa. Superior Ct. 289, 663 A.2d 787 (1995). If the officer is found to have such a basis, he or she may make an investigatory stop where he or she reasonably believes that criminal activity may be afoot, *Commonwealth v. Valenzuela*, 408 Pa. Superior Ct. 399, 597 A.2d 93 (1991), *even if that belief later turns out to have been mistaken* or the defendant is not ultimately convicted of the suspected crime. *See, e.g., McElroy*.

Commonwealth v. Rachau, 670 A.2d 731 (Pa. Super 1996) (emphasis added). The Third Circuit Court of Appeals reached a similar conclusion in *United States v. Delfin-Colina*, 464 F.3d 392 (3rd. Cir. 2006):

Taken together, then, *Terry* and *Whren* stand for the proposition that a traffic stop will be deemed a reasonable “seizure” when an objective review of the facts shows that an officer possessed specific, articulable facts that an individual was violating a traffic law at the time of the stop. In other words, an officer need not be factually accurate in her belief that a traffic law had been violated but, instead, need only produce facts establishing that she reasonably believed that a violation had taken place. Consequently, a reasonable mistake of fact “does not violate the Fourth Amendment.” *Chanthasouvat*, 342 F.3d at 1276; *see also Illinois v. Rodriguez*, 497 U.S. 177, 185, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (noting that factual determinations made by government agents need not “always be correct,” but they always have to be “reasonable”); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir.2005).

at. 398.

Deputy Berger testified that he believed that the defendant was, in fact, Price Montgomery, when he approached him. Another member of the team, the unidentified officer who said, over the radio, “That’s him. That’s Price Montgomery. We need to stop him”, also clearly believed that the defendant was Price Montgomery. The defense presented nothing that would suggest that this belief, that the person exiting the Health Department building was Price Montgomery, was not honestly held and reasonable. In fact, defense counsel essentially conceded this, “...at the time the testimony and evidence is clear that this deputy and the other deputies felt as though they had a Mr. Price Montgomery and not Antoine Morris, so they stopped him.” (H.T. 16). Defense counsel also said, “Very briefly, we are not arguing that there’s no similarity between Price Montgomery and Antoine Morris that would make an inquiry reasonable. We are not arguing that. What we are arguing is that the next step, the *Terry* search, was not justified.” (H.T. 20). Defense counsel was right. It was reasonable for the officers to suspect that the man they saw that day was Price Montgomery and, therefore, reasonable for the officers to stop him to either confirm or dispel those suspicions. Accordingly, the defendant’s claim on appeal that the stop was not supported by reasonable suspicion is without merit.⁴

It must also follow, however, that if the officers reasonably believed that they were detaining Price Montgomery; then they were permitted to consider his reputation as being armed and dangerous in deciding to pat him down for officer safety. Since they believed the person they were detaining was Price Montgomery, they had more than reasonable suspicion of criminality; they had an arrest warrant that established probable cause to believe he had engaged in criminal conduct. Moreover, unless and until their suspicion that the man they were detaining was Price Montgomery was dispelled, they had every right to treat him as if he were Price Montgomery. The fact that Price Montgomery was known to carry firearms gave them reasonable suspicion that he posed a threat which justified the pat down for officer safety. The Pennsylvania Supreme Court summarized the law in this area:

The United States Supreme Court addressed the constitutionality of protective searches in *Terry v. Ohio*, *supra*. Recognizing that “American criminals have a long tradition of armed violence,” the Court departed from traditional notions of Fourth Amendment jurisprudence and held that a law enforcement officer who approaches a citizen in the course of an investigation may conduct a pat down search for weapons if the officer reasonably believes that the person is “armed and presently dangerous to the officer or to others.” *Id.* at 23-24, 88 S.Ct. 1868. In adopting the reasonable suspicion standard, which enables police to stop and frisk suspects without probable cause, the Supreme Court stressed that a protective search cannot be premised on a good-faith belief that a threat of armed resistance existed; the arresting officer must be able to point to specific facts which support an objectively reasonable determination that the suspect was armed and dangerous. *Id.* at 21-22, 88 S.Ct. 1868. This indispensable requirement protects citizens from governmental overreaching because the officer’s conduct, viewed in light of the attendant circumstances, must withstand judicial scrutiny in order for a search or seizure to be upheld.⁵ *Id.* at 21, 88 S.Ct. 1868.

Commonwealth v. Grahame, 7 A.3d 810, 815 (Pa. 2010). The officers believed that they were dealing with a wanted felon known to carry firearms; when they encountered him, he reached into his pockets; he was wearing a heavy coat in summer weather. These facts warranted the belief, that the person they were detaining, posed a threat permitting the pat down that revealed the presence of the illegally possessed firearm.

For these reasons, the denial of the Motion to Suppress was proper and the judgment of sentence should be affirmed.

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

Date: January 25, 2018

¹ The initials “H.T.” refer to the transcript of the suppression hearing held on March 22, 2017.

² Admitted as Commonwealth Exhibit 1. (H.T. 6).

³ Admitted as Commonwealth Exhibit 2. (H.T. 6).

⁴ The Court had the opportunity to observe the defendant in Court and to compare his appearance then and his appearance on the date of his arrest with the photograph of Price Montgomery and concludes that their physical appearances are similar enough to make the mistaken identity reasonable.

**Commonwealth of Pennsylvania v.
Linda Sherrell Jones**

Criminal Appeal—Sufficiency—Justification Defense—Weight of the Evidence—Waiver—Physical Abuse of a Child—Excessive Punishment/Discipline—Electrical Cord—Aggravated Assault

Mother routinely hit child with electrical cord as discipline; excessive discipline is contrary to the welfare of a child, even if justifiable.

No. CC 13820-2015. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—January 22, 2018.

OPINION

This is a direct appeal wherein the defendant appeals the Judgment of Sentence of August 10, 2017 that became final on August 21, 2017 when her post-sentence motions were denied. After a non-jury trial, Defendant was convicted of aggravated assault and endangering the welfare of children. She was sentenced to a term of imprisonment of not less than 9 months nor more than 18 months relative to the aggravated assault conviction and she was paroled forthwith. No further penalty was imposed at the remaining count. This direct appeal followed.

At trial, the defendant's seven-year old son ("the child-victim") testified that he would get "beaten" by the defendant when he would break the rules. The child-victim testified that the defendant would hit him in the "bum" and sometimes in his legs with "a cord." The child-victim testified that "it hurted" when his mother would hit him with the cord. He would get "scratches" when he was struck. He testified that he would get "beat" by the defendant when he would take food from the refrigerator without permission or when he was told he did something wrong.

Trial testimony of Kaitlyn Leo, a family services caseworker for the Allegheny County Department of Children, Youth and Families, established that the child-victim first disclosed the abuse in April, 2015, when he was five years old. 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 Children's 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. The child-victim had been examined at the Children's Hospital of Pittsburgh in April of 2015 and none of these marks existed on the child-victim at that time. Dr. Eichman opined that the child-victim was the victim of physical abuse.

Defendant claims that the evidence relied on to convict her was legally insufficient because the Commonwealth failed to disprove the defense of justification. In 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 an electrical cord when he would take food from the refrigerator or was otherwise convinced 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 electrical cord inflicted extreme pain or mental distress to the child-victim. 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. This Court did not view the punishment inflicted by mother as an appropriate response to the alleged misdoings of her child. In short, this Court did not believe that the force used by the defendant on her young child "fit the misconduct" the child was alleged to have committed.

Defendant also argues that she was entitled to an acquittal because the Commonwealth failed to prove that the allegations against her 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 the child-victim first disclosed abuse in April of 2015 when taken in conjunction with Dr. Eichman's testimony that she observed injuries in September of 2015 that did not exist in early April, 2015 was sufficient to prove that the abuse occurred within the time period set forth in the Information. This claim, thus, fails.

Defendant next claims the verdict was against the weight of the evidence for the same reason she 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. She 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 the verdict does not shock any sense of justice.

The defendant next claims that the child-victim was not competent to testify at trial. Unfortunately for defendant, she did not lodge an objection to the competency of the child-victim at trial. Pa.R.A.P. 302(a) provides that only issues properly raised and preserved in the trial court shall be addressed on appeal. It is axiomatic that "[a] claim which has not been raised before the trial court cannot be raised for the first time on appeal." *Commonwealth v. Lopata*, 754 A.2d 685, 689 (Pa.Super.2000) (citing *Commonwealth v. Gordon*, 528 A.2d 631 (Pa.Super.1987)). Furthermore, trial courts must be given an opportunity to correct errors when they occur. A party may not complain of alleged error at a later time, when that party did not object at a time when the trial court could have corrected the alleged error. *Commonwealth v. Strunk*, 953 A.2d 577, 579 (Pa.Super. 2008). This claim is, therefore, waived.

For the foregoing reasons, the judgment should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: January 22, 2018

Commonwealth of Pennsylvania v. Zachery Threats

Criminal Appeal—Homicide—VUFA—Evidence—Hearsay—Sufficiency—Suppression—Burglary—Harmless Error?

Multiple issues in first-degree murder case, including suppression issues and sufficiency issues.

No. CC 12686-2014. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Mariani, J.—January 22, 2018.

OPINION

This is a direct appeal wherein the defendant appeals the Judgment of Sentence of January 17, 2017. After a jury trial, the defendant was found guilty of first degree murder, of violating the Uniform Firearms Act ("VUFA") and one count of burglary. Relative to the first degree murder convictions, this Court sentenced the defendant to a mandatory term of life imprisonment. Relative to the burglary conviction, this Court sentenced the defendant to a consecutive term of imprisonment of not less than 10 years nor more than 20 years. Relative to the VUFA conviction, this Court sentenced the defendant to no further penalty. This timely appeal followed and the defendant alleges numerous allegations of errors in the trial court.

The evidence adduced at trial established the following:

On July 4, 2014, Dionna Palmer ("Ms. Palmer") was at her residence at 7710 Tioga Street in the Homewood section of the City of Pittsburgh at approximately 3:00 p.m. She had just returned home from work and was about to enjoy the Fourth of July holiday with her fiancé and family. Ms. Palmer lived at the residence with her fiancé, Kamill Arnold, her brother, David Palmer ("Mr. Palmer"), her daughter, mother and her stepfather. Mr. Arnold was in the back yard of the residence cooking on the grill. After Ms. Palmer freshened up after returning from work, she went outside to speak with her fiancé. She was planning on boiling water on the stove to cook linguini noodles. Mr. Arnold completed grilling some meat and took a tray of grilled meat into the house. Ms. Palmer followed him inside and placed a pot of boiling water on the stove to cook the linguini noodles. As she put the pot on the stove, she turned to her left to speak with Mr. Arnold. At that point, she observed the defendant storm through the back door of the residence, wielding a firearm. The defendant faced Mr. Arnold and shot Mr. Arnold one time. After Mr. Arnold fell to the floor, the defendant stood over Mr. Arnold and shot him again. The defendant then pulled his t-shirt up and tried to cover his face. The defendant then ran through the house and fled out the front door. Ms. Palmer attended to Mr. Arnold who was bleeding very badly.

Mr. Palmer testified that he was on the front porch of the residence on July 4, 2014 enjoying the Fourth of July holiday. At one point, after Ms. Palmer had come home from work, Mr. Palmer observed a male walk along the side of the residence. Mr. Palmer went inside to ask Mr. Arnold if he had invited someone over for the holiday. Mr. Arnold replied that he had not. Mr. Palmer then observed the defendant rush through the rear door of the residence, raise a firearm and shoot Mr. Arnold. Instinctively, Mr. Palmer dropped to the floor. A few seconds later, he heard another shot. He then observed the defendant run through the house and flee.

Mr. Palmer then called the police.

On July 5, 2014, the day after the shooting, the defendant and her brother met with detectives. Ms. Palmer told detectives she had never seen the shooter before the shooting. Ms. Palmer and Mr. Palmer were each shown a photo array in an effort to identify the shooter. The defendant's photo was not in the photo array and neither Ms. Palmer nor Mr. Palmer could identify anyone in the photo array. After viewing the photo array, Ms. Palmer advised detectives that her brother had heard that a person with the nickname "Ouga" may have been responsible for the shooting.¹ Detectives accessed a Bureau of Police database and searched that nickname. The search returned a result for the defendant. The defendant's photo was placed in a second photo array. Ms. Palmer and Mr. Palmer were separately shown the second photo array and they each independently identified the defendant as the shooter.

During the investigation, detectives learned that a few days before the shooting, Ms. Palmer went to a public housing complex in the City of Pittsburgh, (which she believed was "Northview Heights"), with the victim. Ms. Palmer knew the victim was a "street" person and she was concerned about his activities. Despite her concerns, she went with the victim to Northview Heights. When they arrived at Northview Heights, the victim parked the car. Ms. Palmer sat in the rear passenger seat of their vehicle due to her concern about the reasons for the trip. She watched the victim exit the vehicle and climb a set of stairs to meet with the defendant. It was the first time she had ever seen the defendant. She testified that she was clearly able to see the defendant's face. After a brief meeting, the victim returned to the vehicle. Ms. Palmer and the victim left Northview Heights and traveled to a Wine & Spirits store. As the victim got out of the vehicle, the victim said aloud to Ms. Palmer, "Fuck that nigga, I'm keeping his money." The victim went into the store and returned with liquor and he had some money in his hand. Ms. Palmer initially did not inform the police officers about this incident due to fear of retribution. At pretrial hearings, Ms. Palmer even testified falsely under oath that she had never seen the defendant prior to the day of the shooting. At trial, she recanted her false testimony and testified about the Northview Heights incident and testified that she saw the defendant on that date with the victim. She was vigorously cross-examined at trial by the defense over the fact that she was an admitted perjurer. Despite this vigorous cross-examination, the jury still convicted the defendant.

Christina Jackson testified that the defendant had stayed with her at her residence during July of 2014. She testified that she had a conversation with the defendant during this time in which the defendant told her that someone had robbed him and he was going to get his money back on the Fourth of July.

Robert Best testified that he was with the defendant on one day in July of 2014. On that day, he and the defendant were watching television and the defendant's photograph appeared during a story on the local news. When Mr. Best asked the defendant what had happened, the defendant told him that he went to a cookout on the Fourth of July. The defendant claimed that someone tried to rob him and they "tussled." The defendant also told Mr. Best that a gun fell to the floor while the two men fought and the defendant picked up the gun and shot the other person.

Detective Judd Emery testified that he interviewed the defendant after providing him *Miranda* warnings. The defendant told Detective Emery that he went to the victim's residence to purchase drugs along with an acquaintance, "Gangster Bizz", to consummate a drug deal. He explained that when he arrived at the victim's residence, a large black male put a gun to his head and tried to rob him. At that point, Gangster Bizz wielded a gun and shot the victim. The two men then fled the residence. Obviously, based on the verdict in this case, the jury rejected this version of events.

Detective Robert Shaw testified that the defendant did not have a license to possess a concealed firearm.

The evidence at trial established that the victim was shot in the chest and abdomen. The bullet which entered the chest penetrated the victim's heart and aorta. The other bullet penetrated his veins. According to pathological evidence, both wounds proved fatal. Two spent shell casings from .40 caliber S&W ammunition were found in close proximity to the victim's body.

Defendant's first group of claims relate to this Court's rulings concerning the admission of evidence. "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.

Defendant's first claim is that this Court erred by denying the defense motion to preclude Ms. Palmer from testifying at the trial because she had given false information to police and admitted to committing perjury when she previously advised police officers and she testified prior to trial that she had never seen the shooter before July 4, 2014. This Court is aware of no rule that mandates the exclusion of the testimony of a witness who presents at trial and admits that she had previously lied under oath, pre-trial, about the substance of her trial testimony, especially when the reason for the witness' prior false testimony was that she feared for her life. The circumstances of the instant case were that Ms. Palmer had been with her fiancé, the deceased victim, three or four days prior to the shooting, when the victim met the defendant, presumably for a drug deal. Ms. Palmer, though she remained in the vehicle, had the opportunity to observe the defendant meet with her fiancé. Three or four days after that incident, the defendant burst into Ms. Palmer's apartment and shot the victim to death. Ms. Palmer testified that she feared for her personal safety and, because of that fear, she initially lied to the police about her observations and knowledge of the defendant. This Court viewed her fear as legitimate and reasonable as she was in the residence when the defendant burst into her apartment and shot her fiancé. This Court does not believe that there was any basis warranting her exclusion as a witness. Her testimony was clearly probative of the identity of the shooter and the circumstances of the homicide. The defendant was free to cross-examine Ms. Palmer, as he vigorously did, about the fact that she had admitted to committing perjury and it was within the province of the finder of fact to give this testimony whatever weight it deserved. There was no basis to exclude Ms. Palmer's testimony at trial.

Defendant's next two claims are that this Court erroneously overruled the defense motion in limine and/or permitted Mr. Palmer to testify that the victim made the statement three to four days prior to the shooting, "fuck that nigga, I'm keeping his money." The defendant claims that it was not possible to know for sure to whom the victim was referring or the substance of the comment and that the statement was inadmissible hearsay, untrustworthy and unduly prejudicial. The circumstances surrounding that statement occurred when Ms. Palmer and the victim were in a vehicle together when the victim met the defendant and they engaged in some sort of business transaction on the street. Immediately after the victim left the defendant, he returned to the vehicle and made the challenged statement to Ms. Palmer. The Commonwealth sought to admit the statement under the "state of mind" exception to the hearsay rule. The Commonwealth also argued that the statement offered motive for the shooting. Essentially, the Commonwealth intended to prove that the homicide was prompted by the fact that the Mr. Arnold took money from defendant and refused to return it to the defendant.

This Court admitted the statement pursuant to Pa.R.E. 803(3). Pursuant to Pa.R.E. 803(3), "[a] statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will" is admissible. When a declarant's statements demonstrate his state of mind, are made in a natural manner, and are material and relevant, they are admissible under the state of mind exception. *Commonwealth v. Begley*, 780 A.2d 605, 623 (Pa. 2001). This Court believes that the comment fit squarely within the hearsay exception and its admission was not improper. Mr. Arnold's statement demonstrated his current state of mind that he planned on keeping money that belonged to the defendant and he didn't really care about the defendant's thoughts on the matter. This statement was indicative of ill-will between Mr. Arnold and the defendant and it supplied a motive for the shooting. See *Commonwealth v. Puskar*, 740 A.2d 219, 225 (Pa. 1999) (statement of victim that he was not going to give money to his brother (the defendant) was admissible under the state of mind exception because the statement established ill-will between them and provided a motive for the shooting).

Defendant next claims that this Court abused its discretion in denying the defense motion seeking to bar the Commonwealth from referring to the defendant's nickname "Ouga" during trial. Trial evidence reflected that Ms. Palmer had provided that nickname to detectives immediately after she had been unable to identify a suspect in the first photo array she was shown on July 5, 2014. Ms. Palmer advised detectives that Mr. Palmer had advised her that he had heard that someone with the street name "Ouga" may have been responsible for the shooting. Detectives ran that nickname through their database and created a second photo array using the photograph of a person affiliated with that nickname. After the police prepared a second photo array with "Ouga's" photograph, Ms. Palmer and Mr. Palmer both identified the defendant as the shooter in this case.

This Court does not believe there was a basis to bar reference to "Ouga" at trial. References to that nickname were extremely probative concerning the identification of the defendant as the murderer in this case and it led to the defendant's identification in the photo array. Defendant's basis for his attack is that various explanations were provided as to how the nickname "Ouga" was obtained by detectives. Ms. Palmer claimed that she obtained the nickname from Mr. Palmer on July 5, 2014. Mr. Palmer claimed he received the information from a television news report after that date. Defense counsel was free to examine this discrepancy at trial to test the credibility of either witness, which he did. This evidence was probative, its prejudicial value did not substantially outweigh its probative value and the defendant was afforded a full opportunity to challenge the witnesses' testimony at trial. There was no error in admitting this evidence.

Defendant next claims that the evidence was insufficient to convict of first degree murder because the testimony identifying the defendant as the killer came from Ms. Palmer, an admitted perjurer. Notably, the defendant does not attack any elements of the offense. 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).

The elements of first degree murder are as follows: (1) a human being was unlawfully killed; (2) the defendant was responsible

for the killing; and (3) the defendant acted with malice and a specific intent to kill. 18 Pa.C.S. § 2502(a); *Commonwealth v. Houser*, 610 Pa. 264, 18 A.3d 1128, 1133 (Pa. 2011). First-degree murder is an intentional killing, i.e., a “willful, deliberate and premeditated killing.” 18 Pa.C.S. § 2502(a) and (d). Specific intent to kill as well as malice can be inferred from the use of a deadly weapon upon a vital part of the victim’s body. *Houser*, supra at 1133-34; *Commonwealth v. Wright*, 599 Pa. 270, 961 A.2d 119, 130-31 (Pa. 2008).

The defendant does not challenge the sufficiency of evidence of any of the elements of first degree murder, he simply argues that the testimony of an admitted perjurer should not have been considered by the jury. It is clear that Ms. Palmer identified the defendant as the shooter in this case and she described other circumstances that supported the elements of first degree murder. As set forth above, in evaluating sufficiency, a reviewing court must view the evidence in a light most favorable to the Commonwealth and the credibility determinations of the jury are given deference. For all of the reasons set forth above, this Court believes that the jury was free to consider Ms. Palmer’s credibility as an admitted perjurer. It obviously did so and accepted her trial testimony as true. Her testimony established the necessary elements that identified the defendant as the person who shot and killed her fiancé and she described the circumstances of the shooting. This claim, thus fails.

Relative to the VUFA conviction, the defendant claims that the evidence was insufficient to prove that the defendant concealed a weapon on his person or in his vehicle. The crime of carrying a firearm without a license is set forth in 18 Pa. C.S. §6106(a), which states:

Any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this Chapter commits a felony of the third degree.

In order to convict a defendant for carrying a firearm without a license, the Commonwealth must prove: “(a) that the weapon was a firearm, (b) that the firearm was unlicensed, and (c) that the firearm was concealed on or about the person outside his home or place of business or the person was carrying the firearm in a vehicle.” *Commonwealth v. Parker*, 847 A.2d 745 (Pa.Super. 2004) citing *Commonwealth v. Bavusa*, 750 A.2d 855, 857 (Pa. Super. 2000), affirmed, 574 Pa. 620, 832 A.2d 1042 (2003) (citations omitted), *Commonwealth v. Baldwin*, 985 A.2d 830, (Pa.2009).

Again, as set forth above, this Court believes the evidence was sufficient to prove this offense. The jury was free to infer that the defendant transported the firearm to the scene of the shooting in a vehicle and/or that it was concealed on his person as he approached and left the murder scene. This Court believes that evidence is sufficient to convict the defendant for a violation of the Uniform Firearms Act.

Defendant next claims that this Court abused its discretion in denying two separate motions for mistrials. As set forth in *Commonwealth v. Brooker*, 103 A.3d 325, 332 (Pa.Super. 2014) (citation omitted):

The review of a trial court’s denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will ... discretion is abused. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.

Defendant’s first basis for a mistrial is that Ms. Palmer testified at trial on direct examination that she “did not want [the defendant] to get out of jail” when testifying about the reasons why she did not tell the police that she was with the victim when he met the defendant a few days before the murder. Ms. Palmer testified

I was just scared. I’m still scared. Every day I’m scared. I didn’t want to be involved. The neighborhood I come from people kill you for testifying. I was just scared. I got tired of being scared and I just want to be honest. I didn’t want him to get out of jail. It’s not fair that he gets to play God.

Defense counsel immediately moved for a mistrial. As set forth in *Commonwealth v. Johnson*, 838 A.2d 663, 680-681 (Pa. 2003), while, generally speaking, no reference may be made at a criminal trial to a defendant’s arrest or incarceration for a previous crime, see *Commonwealth v. Williams*, 541 Pa. 85, 94, 660 A.2d 1316, 1321 (1995), there is no rule in Pennsylvania which prohibits reference to a defendant’s incarceration awaiting trial for the crimes charged. Based upon this rule, this Court does not view the statement made by Ms. Palmer as requiring a mistrial as it did not deprive the defendant of a fair trial. Furthermore, substantial evidence was elicited near the end of trial when Tony Banks, a defense witness, testified. Testimony was presented that Mr. Banks and the defendant were in the pre-trial holding cell together on the day Mr. Banks testified. The defendant did not object to this testimony.² Moreover, this Court gave a comprehensive curative instruction. This Court advised the jury as follows:

Before we do that, I want to instruct you that any reference by this last witness, Ms. Palmer, with regard to Mr. Threats being in jail you should disregard in relation to the issues in this case. Pretrial detention, whether that is occurring or not, are bail issues having nothing to do with guilt or innocence. So whether somebody is in jail for whatever reason prior to trial, anytime prior to trial or during trial is irrelevant to the issues of whether he committed the offenses. If you think about that rationally, you realize there would be no need for a trial if it had anything to do with the issues. So you are to disregard that statement by Ms. Palmer insofar as it has any affect on your judgment with regard to the issues in this case. You may regard it if you choose as motive evidence or something like that. If the lawyers want to take that position, you may regard it if it is argued that way, but what I mean by motive of this witness is whether or not she has a motive to testify in a certain manner or not. But with regard to the issues in this case concerning the guilt or innocence of Mr. Threats, it is not relevant. You must disregard it, any issue related to that, okay.

Assuming, but not conceding, that a colorable argument for a mistrial could be made, the curative instruction remedied any potential prejudice. Accordingly, this Court did not err in denying the motion for a mistrial.

Defendant also claims that this Court should have granted his motion for a mistrial based on Detective Robert Shaw’s comments that the defendant was not permitted to have a gun. The challenged exchange occurred between the Assistant District Attorney and Detective Shaw and was as follows:

Q: What is this document?

A: Commonwealth 52 is a State Police certified record. In this case it is for Zachery Threats and it basically establishes that he did not have a license to carry a firearm concealed.

Q: Is there any other areas the he cannot carry besides concealed? Is he able to have that firearm in a vehicle?

A: No, he is not allowed to have a gun.

Defense counsel moved for a mistrial arguing that the exchange indicated to the jury that the defendant must have been a convicted felon because of the testimony that he wasn't permitted to have a gun. This Court did not agree with defense counsel. In this Court's view, there was nothing about that exchange that would create the impression that the defendant was a convicted felon. On the contrary, the context of the exchange indicated that the defendant couldn't conceal a gun or possess a gun in a vehicle because he wasn't licensed to do so. The challenged exchange did not indicate that any prior conviction was the reason the defendant was disqualified from having a gun. This Court does not believe that there is any colorable basis to establish that this exchange deprived the defendant of a fair trial.

Defendant next claims that this Court erred in not denying his motion to suppress a line-up because the line-up used to identify the defendant in this case was unduly suggestive. In determining whether a photographic array is unduly suggestive, the Pennsylvania Supreme Court has instructed that a photographic identification is unduly suggestive if, under the totality of the circumstances, the identification procedure creates a substantial likelihood of misidentification. *Commonwealth v. DeJesus*, 860 A.2d 102, 112 (Pa. 2004) (citing *Commonwealth v. Johnson*, 668 A.2d 97 (Pa. 1995)). The variance between the photographs in an array does not necessarily establish grounds for suppression of a victim's identification. *Commonwealth v. Burton*, 770 A.2d 771, 782 (Pa.Super. 2001). "Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics." *Commonwealth v. Fisher*, 769 A.2d 1116, 1126 (Pa. 2001). "[E]ach person in the array does not have to be identical in appearance." *Burton*, 770 A.2d at 782. The photographs in the array should all be the same size and should be shot against similar backgrounds. *Commonwealth v. Thomas*, 75 A.2d 921 (Pa. Super. 1990).

The photo arrays presented to Ms. Palmer and Mr. Palmer were not unduly suggestive. City of Pittsburgh Homicide Detective Hal Bolin testified that after he obtained the name of the defendant, he prepared a photo array containing the defendant's photograph as well as the photograph of other persons similar in appearance. He had two separate copies of the photo array and showed separate copies to each of the Palmers when they were separated from each other. He advised Ms. Palmer and Mr. Palmer that the suspect may or may not be in the photo array. Both Palmers identified the defendant in the photo arrays, circled his photograph and placed their initials on the photo array. This Court has viewed the photo array and there is nothing about it that creates a substantial likelihood of misidentification. All of the persons depicted in the photo array have similar facial features and none of them stand out in any particular way from the other. The motion to suppress was properly denied.

Defendant finally challenges this Court's denial of his motion to suppress his statements because he claims he was unable to make a knowing, intelligent and voluntary waiver of his Miranda rights due to being under the influence of drugs. Contrary to the allegations made by the defendant, Detective Judd Emery testified prior to interviewing the defendant on August 12, 2014, he gathered the defendant's personal information and he read the defendant his *Miranda* rights directly from a *Miranda* form maintained by the City of Pittsburgh Police Department. The form was admitted as an exhibit in this case as Commonwealth's Exhibit 45. Detective Emery personally observed that the defendant was clear-headed and did not exhibit any signs that he was under the influence of narcotics. He orally advised the defendant that he could not be compelled to answer any questions and he had the right to refuse to answer any questions asked of him during this interview or while he was in custody. He was advised that if he did answer any questions, the answers given by him would be used against him in a trial in a court of law at some later date.

Detective Emery then informed the defendant that he was entitled to talk to a lawyer and have a lawyer present before he decided whether or not to answer any questions and also while he would answer any questions. He was advised that a lawyer would be appointed for him if he couldn't afford one. He was also advised that he could decide at any time before or during the questioning to exercise his rights by not answering any further questions or making any further statements, and if he exercised the right not to answer, the questioning would stop. The defendant then indicated that he was willing to waive his rights to answer questions without the presence of a lawyer. The defendant wrote his own answers on the *Miranda* form and defendant signed his name at the bottom of the *Miranda* form.

Detective Emery's testimony clearly indicates that he "Mirandized" the defendant prior his incriminating interview. In *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), the United States Supreme Court explained:

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

As set forth in *Commonwealth v. Best*, 789 A.2d 757, 762 (Pa. Super. 2002):

[T]he protective provisions of *Miranda* prohibit the continued interrogation of an interviewee in police custody once he or she has invoked the right to remain silent and/or to consult with an attorney. *Commonwealth v. Rucci*, 543 Pa. 261, 670 A.2d 1129 (Pa.Super. 1996). "Interrogation" means police questioning or conduct calculated to, expected to, or likely to evoke an admission. *Commonwealth v. Brown*, 551 Pa. 465, 711 A.2d 444 (Pa.Super. 1998). Where an interviewee elects to give an inculpatory statement without police interrogation, however, the statement is "volunteered" and not subject to

suppression, notwithstanding the prior invocation of rights under *Miranda*. *Id.*; *Commonwealth v. Bracey*, 501 Pa. 356, 461 A.2d 775 (Pa.Super. 1993); *Commonwealth v. Abdul-Salaam*, 544 Pa. 514, 678 A.2d 342 (Pa.Super. 1992). Interrogation occurs when the police should know that their words or actions are reasonably likely to elicit an incriminating response, and the circumstances must reflect a measure of compulsion above and beyond that inherent in custody itself. See *Commonwealth v. Fisher*, 564 Pa. 505, 769 A.2d 1116. (Pa.Super. 2001)(emphasis supplied).

In this case, the record reveals that, Detective Emery warned the defendant prior to any questioning that he had the right to not answer any questions, i.e., remain silent. Detective Emery advised the defendant that anything he said could be used against him in a court of law. Detective Emery informed him that he had the right to the services of an attorney, and that if he could not afford an attorney, one would be appointed to represent him prior to any questioning. The defendant indicated that he was aware of these rights and he voluntarily waived them. His claim that he was under the influence of narcotics at the time of the interview is self-serving and unsupported by any additional evidence. This Court gives no credence to the defendant's self-serving assertion.

For the foregoing reasons, the Judgment of Sentence should be affirmed.

BY THE COURT:

/s/Mariani, J.

Date: January 22, 2018

¹ Mr. Palmer testified that he believed he first heard the name "Ouga" after the defendant's photograph appeared on the news a few days after the shooting. The defense claimed that references to "Ouga" should not have been permitted at trial because Ms. Palmer said her brother told her about that nickname on July 5, 2014 but her brother testified that he only learned of that nickname after that date. As set forth more fully in this opinion, this Court does not believe that discrepancy was a basis to bar reference to that nickname at trial. The defendant thoroughly examined the witnesses on this discrepancy and the jury obviously weighed the evidence to determine the credibility of the witnesses' testimony.

² It is questionable whether the defendant could have lodged a successful objection to such testimony. The defendant is the party who called Tony Banks as a witness. Fertile cross-examination included inquiry as to whether Mr. Banks and the defendant had discussed Mr. Banks' testimony prior to trial while they were in custody together on the morning of trial.

Commonwealth of Pennsylvania v. Marsha Green

Criminal Appeal—DUI—Suppression—Sufficiency—Miranda—corpus delicti

Officer's testimony enough to establish that the defendant was intoxicated and unable to operate a vehicle safely.

No. CC 2016-05745. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Mariani, J.—January 22, 2018.

OPINION

This is a direct appeal wherein the defendant appeals the Judgment of Sentence of April 10, 2017 which became final when this Court denied the the defendant's post-sentencing motions on June 6, 2017. After a non-jury trial, this Court found the defendant guilty of one count of violating of 75 Pa.C.S.A. §3802(a)(1), (driving under the influence of alcohol), one count of driving while her driver's license was suspended and various summary/vehicle offenses including, driving an unregistered vehicle, operating a vehicle without required financial responsibility, disregarding traffic lanes, careless driving, and leaving the scene of an accident without notifying the police. At the conviction for violating 75 Pa.C.S.A. §3802(a)(1), the defendant was sentenced to a term of incarceration of 30 days to be served at an alternative housing facility. This Court imposes a concurrent term of 30 days' imprisonment at the driving under suspension conviction. No further penalty was imposed at the remaining counts. The defendant timely filed a Notice of Appeal and has raised various issues on appeal.

On February 19, 2016 at approximately 4:40 a.m., Pennsylvania State Trooper Timothy Schonbachler was dispatched to the scene of an automobile accident on Interstate 376 near the Boulevard of the Allies in the City of Pittsburgh. The vehicle had been abandoned in the left lane of the interstate. Trooper Schonbachler had received word that the occupants of the vehicle were not at the scene of the accident but had been located within a half mile of the accident scene. Both of these people had been observed walking on the Boulevard of the Allies, a busy thoroughfare in the City of Pittsburgh, not far from the accident scene. When Trooper Schonbachler arrived at the accident scene, he observed that the vehicle was positioned against the concrete barrier adjacent to the left lane of the interstate. The front left tire had been dislodged from the axle and there was heavy damage to the front of the vehicle. The driver's seat was in a forward position as though a smaller person had been driving. Trooper Schonbachler began to obtain information concerning the make, model and the registration for the vehicle. After receiving information that the defendant and another person were in the company of City of Pittsburgh police officers on the Boulevard of the Allies, Trooper Schonbachler responded to that area.

Upon arriving to that area, Trooper Schonbachler approached the defendant. The defendant is less than five feet tall. The other person with her, a male, was very large. The defendant was placed into the back of Trooper Schonbachler's vehicle and he asked her what had happened. He did not place handcuffs on her and she was not taken into custody. Trooper Schonbachler did not "Mirandize" the defendant. The defendant advised Trooper Schonbachler that she was driving her friend home and she thought she "blew a tire." She recalled hitting the concrete barrier. She told Trooper Schonbachler that she injured her leg during the accident and Trooper Schonbachler's personal observations confirmed the injury. After the defendant made these statements, Trooper Schonbachler detected an odor of alcohol emanating from the defendant's breath and person. He noticed her speech was slurred and she had bloodshot eyes. As a result, he asked her whether she had been drinking before the accident. The defendant responded that she had ended her employment that night around 11:00 p.m. She went to a bar and

had been drinking alcohol until she left the bar prior to the accident. At this point, Trooper Schonbachler took the defendant to the hospital so she could be treated for her injuries. The parties stipulated that Trooper Schonbachler continued to observe additional signs of impairment and signs of intoxication. The parties further stipulated that Trooper Schonbachler would have testified at trial that, based on his training and experience, the defendant was intoxicated to a degree that rendered her incapable of safely operating a motor vehicle on the morning of the accident. The defendant was placed under arrest at the hospital. No field sobriety tests were conducted.

Defendant first claims that this Court erred by denying her motion to suppress the statements she made to the police due to the fact that she was not read her *Miranda* rights prior to a custodial interrogation. The defendant was never read her *Miranda* rights in this case. As set forth in *Commonwealth v. Mannion*, 725 A.2d 196, 299 (Pa.Super. 1999):

A law enforcement officer must administer *Miranda* warnings prior to custodial interrogation. *Commonwealth v. Johnson*, 373 Pa.Super. 312, 541 A.2d 332, 336 (1988). The standard for determining whether an encounter with the police is deemed “custodial” or police have initiated a custodial interrogation is an objective one based on a totality of the circumstances, with due consideration given to the reasonable impression conveyed to the person interrogated.

Commonwealth v. Gwynn, 555 Pa. 86, --, 723 A.2d 143, 148 (1998). Custodial interrogation has been defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way.” *Johnson*, 541 A.2d at 336 quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706 (1966). “Interrogation” is police conduct “calculated to, expected to, or likely to evoke admission.” *Id.* quoting *Commonwealth v. Simala*, 434 Pa. 219, 226, 252 A.2d 575, 578 (1969). When a person’s inculpatory statement is not made in response to custodial interrogation, the statement is classified as gratuitous, and is not subject to suppression for lack of warnings. *Id.*

The appropriate test for determining whether a situation involves custodial interrogation is as follows:

The test for determining whether a suspect is being subjected to custodial interrogation so as to necessitate *Miranda* warnings is whether he is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation.

Commonwealth v. Busch, 713 A.2d 97, 100 (Pa.Super.1998) quoting *Commonwealth v. Rosario*, 438 Pa.Super. 241, 652 A.2d 354, 365-66 (1994) (*en banc*), *appeal denied*, 546 Pa. 668, 685 A.2d 547 (1996) (other citations omitted). Said another way, police detentions become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of arrest. *Commonwealth v. Ellis*, 379 Pa.Super. 337, 549 A.2d 1323, 1332 (1988), *appeal denied*, 522 Pa. 601, 562 A.2d 824 (1989), citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983).

The factors a court utilizes to determine, under the totality of the circumstances, whether a detention has become so coercive as to constitute the functional equivalent of arrest include: the basis for the detention; its length; its location; whether the suspect was transported against his or her will, how far, and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions. *Busch*, 713 A.2d at 101. The fact that a police investigation has focused on a particular individual does **not** automatically trigger “custody,” thus requiring *Miranda* warnings. *Commonwealth v. Fento*, 363 Pa.Super. 488, 526 A.2d 784, 787 (1987).

In this Court’s view, the interaction between Trooper Schonbachler and the defendant was not a custodial interrogation. At the time the defendant made her statements to Trooper Schonbachler, the defendant had not been arrested. She was not being detained and she was not placed in handcuffs. The defendant was suffering from a leg injury and the incident occurred in February, a month in which the average temperature is cold. Trooper Schonbachler opted to ask the defendant questions to determine the circumstances of the accident he encountered. He was simply attempting to gather information to complete his accident report. There was no show, use or threatened use of force during the interaction. There was nothing coercive about the interaction during which the defendant made statements. The record is clear that the defendant was not arrested until Trooper Schonbachler made observations about the defendant’s impairment after she had been taken to the hospital. Therefore, this Court did not believe that Trooper Schonbachler violated the requirements of *Miranda* during his exchange with the defendant.

Defendant next claims that this Court violated the *corpus delicti* rule in admitting the defendant’s statement at trial. As set forth in *Commonwealth v. Verticelli*, 706 A.2d 820, 822-823 (Pa. 1998), a case which has direct applicability to this case,:

The corpus delicti rule places the burden upon the prosecution to establish that a crime has actually occurred before a confession or admission of the accused connecting him to the crime can be admitted. *Commonwealth v. Smallwood*, 497 Pa. 476, 484, 442 A.2d 222, 225 (1982). The corpus delicti is literally the body of the crime; it consists of proof that a loss or injury has occurred as a result of the criminal conduct of someone. *Commonwealth v. McMullen*, 545 Pa. 361, 368, 681 A.2d 717, 720 (1996). The criminal responsibility of the accused for the loss or injury is not a component of the rule. *Id.* The historical purpose of the rule is to prevent a conviction based solely upon a confession or admission, where in fact no crime has been committed. *Commonwealth v. Turza*, 340 Pa. 128, 134, 16 A.2d 401, 404 (1940). The corpus delicti may be established by circumstantial evidence. *Commonwealth v. Reyes*, 545 Pa. 374, 381, 681 A.2d 724, 727 (1996). An exception to the corpus delicti rule known as the closely related crime exception was specifically approved of by this Court in *McMullen*, at 372, 681 A.2d at 723. This exception comes into play where an accused is charged with more than one crime, and the accused makes a statement related to all the crimes charged, but the prosecution is only able to establish the corpus delicti of one of the crimes charged. Under those circumstances where the relationship between the crimes is sufficiently close so that the introduction of the statement will not violate the purpose underlying the corpus delicti rule, the statement of the accused will be admissible as to all the crimes charged.

In *Verticelli*, the Court was confronted with similar factual circumstances as occurred in this case. Investigators approached a scene of a motorcycle accident that resulted in damage to the motorcycle and to the property of a landowner where the accident occurred. The operator was not at the scene. The Supreme Court explained:

The facts as accepted by the trial court reveal that, 1) someone was operating a motor vehicle when an accident occurred causing damage to property, and 2) the operator of the motor vehicle fled the scene of the accident. As the evidence shows that an injury to property did occur and that it is more consistent with a crime than an accident, the corpus delicti for the offense defined by 75 Pa.C.S. § 3745, commonly referred to as leaving the scene of an accident, was established. Thus, the appellant's statement that he was operating the vehicle at the time of the accident was properly admitted under the corpus delicti rule as to his culpability for the summary offense of leaving the scene of an accident.

Id. at 824-825. The *Verticelli* Court then explained:

As set forth in the above discussion the closely related crime exception applies where the crimes at issue share a common element and are temporally related. Obviously in this instance we have a temporal relationship between the crimes charged as the DUI arose from the same incident as did the offense of leaving the scene of the accident. The elements necessary to establish the DUI charge at issue are 1) someone was operating, or in actual physical control of a motor vehicle, and 2) the operator of the motor vehicle was under the influence of alcohol at the time, rendering him incapable of safe driving. *Commonwealth v. Wilson*, 442 Pa.Super. 521, 660 A.2d 105 (1995). The DUI charge shares the common element of operation of a motor vehicle with the charge of leaving the scene of an accident. Given the commonality of elements between the two offenses and the fact that they arose from the same incident, we find that the trial judge did not abuse his discretion in admitting appellant's statement under the closely related crime exception to the corpus delicti rule.

In this case, Defendant was also charged in this case with violating

§ 3746. Immediate notice of accident to police department.

(a) **General rule.**--The driver of a vehicle involved in an accident shall immediately by the quickest means of communication give notice to the nearest office of a duly authorized police department if the accident involves:

* * *

(2) damage to any vehicle involved to the extent that it cannot be driven under its own power in its customary manner without further damage or hazard to the vehicle, other traffic elements, or the roadway, and therefore requires towing.

Trooper Schonbachler responded to the scene of an accident that resulted in substantial damage to the defendant's motor vehicle which rendered it incapable of being driven. Defendant left the scene and was encountered less than a mile from the accident scene. The defendant did not immediately notify police of the accident. It is clear that the corpus delicti of this offense was established prior to the admission of defendant's statement. Based on the reasoning of *Verticelli*, the DUI offense was closely related to the summary offense and, therefore, there was no violation of the *corpus delicti* rule in this case.

The defendant next challenges the sufficiency of the evidence to convict. The test for sufficiency is whether viewing the evidence, and all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the fact-finder reasonably could have determined that all the elements of the crime were established beyond a reasonable doubt. *Commonwealth v. May*, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005); *Commonwealth v. Mackert*, 781 A.2d 178, 186 (Pa.Super. 2001). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff*, 911 A.2d 147, 159 (Pa.Super. 2006). Any doubts concerning a defendant's guilt were to be resolved by the fact-finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from the evidence. *Id.* A trial court's credibility determinations must be given great deference. 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. See *Commonwealth v. O'Bryon*, 820 A.2d 1287, 1290 (Pa.Super. 2003).

Defendant was charged with and convicted of driving under the influence of alcohol under 75 Pa.C.S.A. § 3802(a)(1) which provides:

§ 3802. Driving under influence of alcohol or controlled substance

(a) **General impairment.**—

(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802(a)(1). Thus, the Commonwealth must prove: (1) that defendant was operating a motor vehicle or was in actual physical control of the movement of a motor vehicle, (2) after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving. *Commonwealth v. Kerry*, 906 A.2d 1237, 1241 (Pa.Super. 2006).

The evidence was sufficient to demonstrate that the defendant was incapable of safe driving. In *Kerry*, the Superior Court looked back to the predecessor statute to § 3802(a)(1), 75 Pa.C.S.A. 3731, and explained

[t]o establish that one is incapable of safe driving ... the Commonwealth must prove that alcohol has substantially impaired the normal mental and physical faculties required to operate the vehicle safely; "substantial impairment" means a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions.

Id. citing *Commonwealth v. Gruff*, 2003 Pa. Super 126, 822 A.2d 773, 781, (Pa. Super. 2003), *appeal denied*, 581 Pa. 672, 863 A.2d 1143 (2004). "The meaning of substantial impairment is not limited to some extreme condition of disability." *Id.* citing *Commonwealth v. Griscavage*, 512 Pa. 540, 545 517 A.2d 1256, 1258 (1986). As set forth in *Kerry*, "Section 3802(a)(1), like its predecessor, "is a general provision and provides no specific restraint upon the Commonwealth in the manner in which it may prove that an accused operated a vehicle under the influence of alcohol to a degree which rendered him incapable of safe driving." *Id.* citing *Commonwealth v. Loeper*, 541 Pa. 393, 402-403, 663 A.2d 669, 673-674 (1995). Furthermore, "a police officer may utilize both his experience and personal observations to render an opinion as to whether a person is intoxicated." *Commonwealth v. Kelley*, 438 Pa. Super. 289, 652 A.2d 378, 382 (Pa.Super. 1994) (citing *Commonwealth v. Bowser*, 425 Pa. Super. 24, 624 A.2d 125 (Pa.Super. 1993)).

Various courts have determined that certain evidence was sufficient to prove that a defendant was incapable of safe driving. See *Gruff*, supra (finding conviction for DUI under former statute was supported by evidence of defendant's bloodshot eyes, smell of alcohol, inappropriate responses, refusal to take a blood test, and driving at a high rate of speed); see also, *Commonwealth v. O'Bryon*, 2003 PA Super 139, 820 A.2d 1287 (Pa. Super. 2003) (holding that evidence supported defendant's conviction under §3731(a)(1) where officer testified that defendant ran her car into a parked car and left the scene, and where defendant was confused and staggering, had alcohol on breath, and could not maintain balance); *Commonwealth v. Leighty*, 693 A.2d 1324 (Pa. Super. 1997) (holding evidence of glassy and bloodshot eyes, admission of alcohol consumption, failure of two field sobriety tests and minor accident before arrest was sufficient to support conviction for driving under the influence of alcohol under former §3731(a)(1)); *Commonwealth v. Feathers*, 442 Pa. Super. 490, 660 A.2d 90 (Pa. Super. 1995), *affirmed*, 546 Pa. 139, 683 A.2d 289 (1996) (finding evidence was sufficient to sustain conviction under § 3731(a)(1), where defendant had glassy eyes and slurred speech, staggered as she walked, smelled of alcohol and failed field sobriety tests, notwithstanding absence of evidence of erratic or unsafe driving); *Commonwealth v. Rishel*, 441 Pa. Super. 584, 658 A.2d 352 (Pa. Super. 1995) (holding evidence sufficient to sustain conviction under § 3731(a)(1), where defendant smelled of alcohol, appeared confused, was involved in an automobile accident, failed two field sobriety tests and admitted to consuming two 16-ounce beers) *vacated on other grounds*, 546 Pa. 48, 682 A.2d 1267 (1996).

In this case, this Court relied on the fact that the defendant admitted she had consumed a substantial amount of alcohol just prior to the accident. Trooper Schonbachler smelled an odor of alcohol on the defendant's breath and person, he noticed that she was slurring her speech and she had bloodshot eyes. Based on his observation and training, Trooper Schonbachler opined that the defendant was impaired to the level that she was incapable of safely driving a vehicle. This evidence, the Court believes, was sufficient to convict in this case.

Defendant next claims that this Court erred in admitting the testimony of Trooper Schonbachler relating to his opinion that the defendant was intoxicated to the extent that she was incapable of safely driving a vehicle because such testimony was admitted without the proper foundation, i.e., that the opinion was admitted despite the fact that field sobriety tests were not conducted on the defendant. There is simply no legal authority in Pennsylvania that requires the administration of field sobriety tests as a prerequisite to any finding that a defendant is impaired to such an extent that would render her incapable of safely driving.

Defendant also claims that the defendant's rights under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution were violated because she was charged and convicted of two separate DUI offenses for a single criminal act. Based upon the Pennsylvania Supreme Court's decision in *Commonwealth v. Farrow*, 168 A.3d 207 (Pa. 2017), which was decided after the defendant was convicted in this case, it appears that the defendant is correct. In *Farrow*, the Supreme Court ruled that charging and convicting defendants of separate violations of 75 Pa.C.S.A. §3802 and incorporating the penalty provisions found in 75 Pa.C.S.A. §3804 in the separate counts violated Double Jeopardy when the separate counts related to one incident of driving. *Id.* at 217. In the instant case, defendant was convicted to two counts of violating 75 Pa.C.S.A. §3802. Each count was based on the same incident of driving but the counts separately alleged facts triggering specific penalties in addition to the general impairment provision of 75 Pa.C.S.A. §3802. Because the instant case is analogous to the circumstances in *Farrow* and consistent with the holding of that case, the Superior Court should vacate the conviction at count 2 of the Information (which merged for sentencing purposes) and take any additional action it deems appropriate consistent with the holding of *Farrow*.

Defendant finally claims that the evidence was insufficient to convict of count 3, driving an unregistered vehicle. After reviewing the record, this Court agrees with Defendant. No evidence was presented at the trial that Defendant's vehicle was unregistered and the conviction for this vehicle code violation should be vacated.

BY THE COURT:
/s/Mariani, J.

Date: January 22, 2018

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Commonwealth of Pennsylvania v.
James Hawkins**

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—Failing to File Motions to Suppress—Probable Cause to Arrest—Consent To Search

Defendant's roommate gave proper consent to search residence as she had actual and apparent authority to do so.

No. CC 201507924. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—February 21, 2018.

OPINION

This is an appeal of a denial of a petition filed by Petitioner pursuant to the Post-Conviction Relief Act (hereinafter, “PCRA”). After a non-jury trial, the petitioner was convicted of one count of possession of heroin, one count of possession of cocaine and one count of possession with intent to deliver heroin. Relative to the conviction for possession with intent to deliver heroin, this Court imposed a term of imprisonment of not less than two and one-half years nor more than five years. No further penalty was assessed at the remaining counts of conviction. Petitioner filed a direct appeal but later withdrew it to pursue the instant PCRA petition. This Court denied the petition and this timely appeal followed. Petitioner claims that his trial counsel rendered ineffective assistance of counsel for failing to file a suppression motion challenging the warrantless search of his residence and his arrest.

It is well established that counsel is presumed effective and the petitioner bears the burden of proving ineffectiveness. *Commonwealth v. Cooper*, 596 Pa. 119, 941 A.2d 655, 664 (Pa. 2007). To obtain relief on a claim of ineffective assistance of counsel, a petitioner must rebut that presumption and demonstrate that counsel’s performance was deficient, and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As set forth in *Commonwealth v. Dennis*, 17 A.2d 297, 301 (Pa.Super. 2011),

[i]n our Commonwealth, we have rearticulated the *Strickland* Court’s performance and prejudice inquiry as a three-prong test. Specifically, a petitioner must show: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel’s action or inaction; and (3) counsel’s error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001).

The standard remains the same for claims under Pennsylvania and federal law. A claim of ineffectiveness will be denied if the petitioner’s evidence fails to meet any of these prongs. *Id.* at 221-222. Moreover, the credibility determinations of a trial court hearing a PCRA petition are binding on higher courts where the record supports such credibility assessments. *Commonwealth v. R. Johnson*, 600 Pa. 329, 356-57, 966 A.2d 523, 539 (2009).

The threshold inquiry in a claim of ineffective assistance of counsel is whether the issue/argument/tactic which counsel has forgone and which forms the basis for the assertion of ineffectiveness is of arguable merit. *Commonwealth v. Ingram*, 404 Pa. Super. 560, 591 A.2d 734 (Pa.Super. 1991). Counsel cannot be considered ineffective for failing to assert a meritless claim. *Commonwealth v. Tanner*, 600 A.2d 201 (Pa.Super. 1991).

The record does not establish that trial counsel rendered ineffective assistance of counsel. The evidence adduced in this case established that on June 11, 2015, officers from the City of Pittsburgh Bureau of Police received a complaint from a female that she was punched in the face by Petitioner. Officers observed that the victim had a black eye. The victim was the former intimate partner of the petitioner. Officers responded to the scene of the incident that evening but nobody appeared to be home at the residence. Officers again responded to the residence the following day. Officers knocked on the door and nobody immediately responded but the officers could hear several people moving around inside the residence. Officers observed a trash bag on the sidewalk outside the building. Inside the bag was a Verizon telephone bill addressed to Petitioner and what appeared to be plastic baggy “diapers” which were described as the remaining portion of plastic baggies after the corners are cut off to be used to package drugs. Shortly thereafter, Melissa Dono, the petitioner’s roommate opened the door to the residence. Ms. Dono confirmed that Petitioner was inside the residence and permitted the officers to enter the residence.

In the entryway of the residence, officers observed an empty stamp bag of heroin on the floor. Petitioner was placed under arrest. He was asked to consent to a search of the residence but refused consent. Molly Alexander, who identified herself as Petitioner’s girlfriend, then advised officers that she was diabetic and needed her medicine. She advised that her medicine was inside her purse which was located inside a larger bag in Petitioner’s bedroom. The purse was located in Petitioner’s bedroom next to the bag Ms. Alexander had described. Sticking out of the purse was another bag with the name, “Crown Royal” on it, and which contained bricks of heroin and baggies of crack cocaine. Marijuana was recovered from inside the purse. Ms. Alexander conceded that the marijuana was hers but she denied knowledge of the other drugs being inside the “Crown Royal” bag found in her purse. Both Ms. Alexander and Petitioner were arrested and the disposition of Petitioner’s case is set forth above.

Trial counsel did not render ineffective assistance of counsel by failing to file a motion to suppress his warrantless arrest. The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures, thereby ensuring the “right of each individual to be let alone.” *Commonwealth v. Blair*, 394 Pa. Super. 207, 575 A.2d 593, 596 (Pa.Super. 1990). To secure this right, courts in Pennsylvania require law enforcement officers to demonstrate ascending levels of suspicion to justify their interactions with citizens as those interactions become more intrusive. See *Commonwealth v. Beasley*, 2000 PA Super 315, 761 A.2d 621, 624 (Pa. Super. 2000). The first of these is a ‘mere encounter’ (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75L.Ed.2d 229 (1983); *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). The second, an investigative detention, must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Commonwealth v. Ellis*, 541 Pa. 285, 662 A.2d 1043, 1047 (1995). Finally, an arrest, or ‘custodial detention’, must be supported by probable cause. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Commonwealth v. Rodriguez*, 532 Pa. 62, 614A.2d 1378 (1992).

Our courts have explained that in determining whether probable cause to arrest exists in a given situation, a trial court shall consider the totality of the circumstances presented to the police officer. *Commonwealth v. Wright*, 867 A.2d 1265, 1268 (Pa.Super.

2005). Additionally, “it is within the province of the trial judge, who had the opportunity to observe the witnesses’ credibility, to determine the weight to be accorded their testimony.” *Commonwealth v. Gallagher*, 896 A.2d 583, 584-585 (Pa.Super. 2006). See also *Commonwealth v. Young*, 904 A.2d 947 (Pa.Super. 2006); *Commonwealth v. Semuta* 902 A.2d 1254, 1259-60 (Pa.Super. 2006). Probable cause is present when there is reasonably trustworthy information which warrants a reasonable person in the belief that the suspect has committed or is committing a crime. *Commonwealth v. Rodriguez*, 526 Pa. 268, 585 A.2d 988, 990 (1991). Probable cause has also been characterized as those facts and circumstances existing at the time of arrest which would justify a reasonably prudent person in the belief that a crime has been committed and that the defendant was the probable perpetrator. *Commonwealth v. Bailey*, 460 Pa. 498, 333 A.2d 882 (1975).

As set forth in 18 Ps.C.S.A. §2711:

(a) General rule.--A police officer shall have the same right of arrest without a warrant as in a felony whenever he has probable cause to believe the defendant has violated section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702(a)(3), (4) and (5) (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2706 (relating to terroristic threats) or 2709.1 (relating to stalking) against a family or household member although the offense did not take place in the presence of the police officer. A police officer may not arrest a person pursuant to this section without first observing recent physical injury to the victim or other corroborative evidence. For the purposes of this subsection, the term “family or household member” has the meaning given that term in 23 Pa.C.S. §6102 (relating to definitions).

The evidence in this case established that police officers received a complaint that Petitioner had assaulted his intimate female partner by punching her in the face. Officers observed that the victim sustained a black eye. The physical injuries were consistent with the victim’s statement to the officers and these facts clearly provided probable cause that Petitioner committed a simple assault on the victim. As a former intimate partner of Petitioner, the victim was within the protected class identified in 18 Pa.C.S.A. §2711. See 23 Pa.C.S.A. §6102(a). Therefore, Petitioner’s arrest was lawful and any suppression motion would have been denied. Trial counsel did not render ineffective assistance of counsel for not filing a motion to suppress when such a claim would have been meritless.

Petitioner next claims that trial counsel rendered ineffective assistance of counsel for failing to file a motion to suppress challenging the warrantless search of his residence. This claim is likewise meritless as Ms. Dono, Petitioner’s roommate, consented to the entry into the residence and Ms. Alexander, Petitioner’s girlfriend, requested the officer to retrieve her purse from a bedroom. A warrantless search or seizure is presumptively unreasonable under the Fourth Amendment, subject to a few specifically established, well-delineated exceptions. *Horton v. California*, 496 U.S. 128, 134, n.4, 110 S.Ct. 231, 110 L.Ed.2d 112 (1990). Warrantless searches are also presumptively unreasonable under Article I, Section 8 of the Pennsylvania Constitution. *Commonwealth v. McCree*, 924 A.2d 621, 627 (Pa. 2007) Under the Fourth Amendment, one such exception is a consensual search.

A description of third party consent is contained in *Commonwealth v. Blair*, 394 Pa.Super. 207, 575 A.2d 593, 597 (1990):

Third-party consent cases fall into four broad categories. Previous to this decision, cases in our Commonwealth concerned situations where: (1) the consenting party had “superior authority” to the party objecting to the search, see *Commonwealth v. Latshaw*, 481 Pa. 298, 392 A.2d 1301 (1978), *cert. denied*, 441 U.S. 931, 99 S.Ct. 2050, 60 L.Ed.2d 659 (1979) (barn’s owner had not surrendered any indicia of her absolute control over barn where defendant’s marijuana was found pursuant to warrantless search with consent of barn’s owner); (2) the consenting party had equal or common authority to the party objecting to the search, see, *Commonwealth v. Arnold*, 331 Pa.Super. 345, 480 A.2d 1066 (1984); *Commonwealth v. Lowery*, 305 Pa.Super. 66, 451 A.2d 245 (1982); *Commonwealth v. Devlin*, 302 Pa.Super. 196, 448 A.2d 594 (1982); (3) the consenting party had inferior authority to the party objecting to the search, see, *Commonwealth v. Garcia*, 478 Pa. 406, 387 A.2d 46 (1978), *Commonwealth v. Netting*, 315 Pa.Super. 236, 461 A.2d 1259 (1983) (third party who has neither interest nor control in a premises may not give the police valid consent to conduct a warrantless search of the premises); and (4) the last area of third-party consent cases concerns those situations where a police officer is reasonably mistaken as to the actual authority of the party consenting to his entry; stated another way, the police officer reasonably mistakes apparent authority for actual authority to consent to his entry.

Our Supreme Court, in *Commonwealth v. Strader*, 931 A.2d 630, 634 (Pa. 2007), described the apparent authority doctrine as follows:

Third party consent is valid when police reasonably believe a third party has authority to consent. Specifically, the apparent authority exception turns on whether the facts available to police at the moment would lead a person of reasonable caution to believe the consenting third party had authority over the premises. If the person asserting authority to consent did not have such authority, that mistake is constitutionally excusable if police reasonably believed the consenter had such authority and police acted on facts leading sensibly to their conclusions of probability.

The uncontroverted facts of record demonstrate that Ms. Dono was Petitioner’s roommate. As such, she had equal authority and apparent authority to consent to the officers’ entry into the residence and the search thereof. Moreover, Ms. Alexander specifically requested that the officers retrieve her purse from Petitioner’s bedroom so she could be provided with necessary medication. This Court believes that Ms. Alexander’s actions, as the girlfriend of Petitioner, created sufficient apparent authority to consent to the entry into the bedroom and to retrieve and search the purse and the bag. As such, any motion to suppress the search of the residence would have been denied. Therefore, trial counsel could not have rendered ineffective assistance of counsel for failing to file such a motion.

The PCRA petition was properly denied.

BY THE COURT:
/s/Mariani, J.

Date: February 21, 2018

Commonwealth of Pennsylvania v. Timothy Haluck

Criminal Appeal—POSS/PWID—Sentencing (Discretionary Aspects)—Recusal

Defendant seeks recusal of judge after he rejects negotiated plea to drug possession charges.

No. CC 2016-08030. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—January 22, 2018.

OPINION

This is a direct appeal wherein the defendant appeals the Judgment of Sentence of April 13, 2017 which became final on April 24, 2017 when his post-sentence motions were denied. Defendant was originally charged with heroin related offenses that occurred on three separate occasions, on February 22, 2016, March 2, 2016 and March 20, 2016. He was charged with identical offenses relative to each date for a total of three counts of delivery of heroin, three counts of possessing heroin with the intent to distribute it, three counts of possession of heroin, and three counts of criminal use of a communication facility (cell phone) to arrange a drug transaction. On November 27, 2016, the defendant attempted to plead guilty pursuant to a negotiated plea agreement the terms of which required him to plead guilty to all drug charges. The three counts of criminal use of a communication facility would be withdrawn. The Commonwealth agreed to withdraw those charges. The parties agreed that the defendant would serve an aggregate county sentence set by this Court.

Because this Court believed that the agreed-upon sentence did not consider the true nature of the defendant's crimes and did not serve justice, this Court rejected that plea agreement. This Court's reasoning was that the defendant was 54 years old and that he had been involved in the distribution of heroin, or as this Court frequently notes, "peddling poison" in the community on three different occasions. After this Court rejected the plea agreement, he advised the parties to proceed with jury selection. Immediately thereafter, the defendant moved for this Court to recuse itself because it had rejected the plea agreement. This Court rejected that motion.

The parties returned to this Court on January 17, 2017. The parties advised the Court that they had negotiated a plea agreement. The defendant agreed to plead guilty to the same offenses as contemplated by the previous plea agreement but the new plea agreement did not contain an agreement as to the appropriate sentence. The determination of sentence was left to the Court's discretion. A pre-sentence investigation report was ordered and the sentencing was scheduled for April 13, 2017. On that date, the Court indicated that it had read the pre-sentence investigation report and also confirmed that the Commonwealth's attorney and the defendant and his attorney had reviewed the report and offered no additions or corrections to the report. With respect to Count 1 (delivery of heroin on February 22, 2016), the Court sentenced defendant to a term of imprisonment of not less than one year nor more than two years. With respect to Count 5 (delivery of heroin on March 2, 2016), the Court sentenced defendant to a term of imprisonment of not less than one year nor more than two years. With respect to Count 9 (delivery of heroin on March 20, 2016), the Court sentenced defendant to a term of probation of 5 years. All sentences were imposed consecutively for an aggregate sentence of not less than two nor more than four years' imprisonment followed by five years' probation. The other counts of conviction merged with the offenses for which the defendant was sentenced. This direct appeal followed.

The defendant first claims that this Court abused its discretion in sentencing the by imposing an unreasonable sentence. His claims are 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 A.2d 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 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). 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 pre-sentence 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 at the individual counts were either within the standard range of the sentencing guidelines or below that range. At each of the principal counts, the standard range of sentence was nine to 16 months of imprisonment, which sentencing range was substantially influenced by the defendant’s prior record score of 2. According to the presentence report, the defendant’s drug-related criminal conduct involves possession of marijuana (2001), possession of crack cocaine (2009) and possession of heroin (2016). The defendant was also convicted of recklessly endangering another person (1987), driving under the influence (2001) and forgery (2010). Although the defendant was given a sentence of one year probation in the forgery case on May 25, 2011, the defendant was detained in that case at the time of sentencing in this case because of continued non-compliance with county supervision, including the defendant’s failure to appear for his Gagnon II hearing in May of 2012 which resulted in the issuance of a warrant for the defendant’s arrest. The defendant was arrested on that warrant on October 21, 2014.

Based on the information contained in the presentence report as well as the defendant’s conduct in the instant case, this Court considered the defendant’s long-standing recurring history of possessing drugs and illegal activity. The defendant pled guilty to three separate drug dealing offenses that occurred within a short period of time. Less than a year before his guilty plea to these three separate felony drug deliveries, the defendant was arrested while in the possession heroin as the officers were attempting to serve a bench warrant on him for failing to appear for a probation violation hearing. The defendant has a history of drug abuse and has not availed himself of the opportunities that have been afforded to him to address that long-standing problem. Instead, the defendant continues to violate the law. Based on a totality of the circumstances, the defendant continues to demonstrate that he is a danger to the community and to himself. The defendant minimizes the fact that he was sentenced for three separate instances of selling heroin, a drug that is killing thousands of Americans every year. This Court considered the defendant’s rehabilitative needs, protection of the public, deterring the defendant from engaging in future similar conduct, deterring others 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. The consecutive sentences were warranted because this Court believed that the defendant should have received an independent sentence for each separate instance of his drug dealing.

Defendant next claims that this Court should have recused itself (1) for rejecting the first plea agreement tendered to the defendant and (2) because it presented an appearance of prejudice against older drug addicts who turn to selling drugs. As set forth below, the Pennsylvania Supreme Court has discussed the standards governing recusal:

A trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can be reasonably questioned. It is presumed that the judge has the ability to determine whether he will be able to rule impartially and without prejudice, and his assessment is personal, unreviewable, and final. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion. Additionally, it is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist’s ability to preside impartially.

Commonwealth v. Tedford, 960 A.2d 1, 55–56 (Pa. 2008) (internal quotation marks, citations, and formatting omitted).

This Court held no bias or prejudice toward the defendant. This Court simply believed that the plea agreement first reached between the parties did not serve the interests of justice. For the reasons set forth above, this Court believed that a state sentence was the appropriate sentence for the defendant’s conduct. A trial court has broad discretion in approving or rejecting plea agreements. *Commonwealth v. Parsons*, 969 A.2d 1259, 1268 (Pa. Super. 2009), *Commonwealth v. Chazin*, 873 A.2d 732, 737 (Pa. Super. 2005). In the event that a court does not believe a plea agreement serves the interests of justice, the court may reject the plea agreement. *Id.* If the court does not approve of the terms of the plea agreement, it should not accept the plea agreement. Instead, the court should advise the parties of the option of proceeding to trial before a jury. *Id.* After rejecting the plea agreement, the Court did what it was supposed to do, it directed the parties to select a jury. This Court committed no error in refusing to recuse itself for rejecting the first plea agreement.

Defendant also claims that this Court should have recused itself because it demonstrated a bias toward older defendants who turned to selling drugs. It is true that the defendant’s age was a factor that the Court considered in ultimately determining what the appropriate sentence in this case should have been. However, this Court’s comments during the first attempted guilty plea hearing should not be viewed as narrowly as the defendant has interpreted them. This Court’s main concern was that the defendant was charged with three separate felonies that occurred on three separate dates. This Court was concerned that a county sentence was not sufficient to serve the interests of justice. As noted above, the sentences imposed by this Court at two counts were within the standard range. The other sentence was below the standard range. The end result of this case is clear proof that this Court did not harbor an inappropriate bias against the defendant.

Accordingly, the judgment should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: January 22, 2018

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PLJ

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OPINIONS

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**Sandra Rutkowski v.
Charles W. Stenger**

Oral Agreement (real estate and real estate partnership)

Alleged equity contribution/record title/clean hands in equity. Court entered verdict in favor of record title holder and against verbal contract claimant.

No. GD 10-007363 - Consol at FD-09-001894-017. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division. O'Reilly, S.J.—December 5, 2017.

MEMORANDUM ORDER OF COURT

This novel case grew out of a personal relationship between Plaintiff, Sandra Rutkowski and Defendant, Charles Stenger. Indeed they co-habitated for apparently 20 years until their relationship dissolved in 2009. At that point Rutkowski filed a complaint in our Family Division at Docket Number FD-09-001894 averring a common law marriage. While that case was pending Rutkowski filed another complaint at Docket Number GD-10-007363 and that is the one herein: This case was held in abeyance while the common law marriage case proceeded. It was heard in Family Division before my colleague, the Honorable Jennifer Satler. Judge Satler denied relief by her order of March 19, 2015. Rutkowski, appealed that order to the Superior Court where it was sustained. Satler then ruled that the case here was to be heard in the Civil Division.

In her other case, Rutkowski asserted that she and Stenger had a partnership in real estate investments made over the period of their co-habitation. To that end, Rutkowski on April 10, 2009, had filed a multi-count complaint against Stenger alleging 1) Claims in equity to give her an interest in certain specified real estate; 2) requested a Preliminary Injunction to prevent sale of any such real estate; 3) Breach of contract in regard to the alleged oral contract to be partner in the specified real estate. Plaintiff also filed a *lis pendens* with respect to all said real estate. One parcel of real estate had been sold and the net proceeds therefrom were placed in escrow.

The issue of the money in escrow from the sale of certain real estate came before me in Motions Court. Later, I held a conference on that issue on May 2, 2017 and Counsel for Rutkowski pointed out that the common-law marriage determination did not dispose of the case and the equity claim and the breach of contract claims were still viable. I agreed and scheduled a Trial for September 8, 2017 which was ultimately heard, non-jury, before me on September 8 and 9, 2017. The parties thereafter filed excellent and able briefs. The matter is now before me for adjudication.

FACTS:

The parties did not dispute the fact of co-habitation for many years until 2009. The issue of an oral contract or a business partnership was hotly disputed. Plaintiff, Sandra Rutkowski, testified that shortly after she met defendant Charles W. Stenger they agreed to enter into a course of business in which they would buy Real Estate and she would have an unspecified part interest in that property. Stenger vigorously disputed this assertion. Rutkowski said the first property to be bought was at 27-29 Cedricton Street, Pittsburgh, PA 15210 and to which she contended she had contributed \$4,000 which she had borrowed from her father. While a closing statement for this purchase, held on August 5, 1988, was produced, it was barely legible and it showed a hand money deposit but I can't tell if it was \$4,000 or \$1,000. Further, it makes *no* reference as to who provided that money (Exhibit 21A). Stenger averred that he contributed that \$4,000 and said Rutkowski never made any contribution at any time. Rutkowski offered a barely legible copy of a closing statement for the property.

There is no written documentation to support this claimed partnership with the exception of a brief time in 1990 when Rutkowski's name was on Stenger's checking account. See Exhibits B and 35. He said he removed her name because of her abuse of the account and her profligate spending and continued to deny any contract or partnership.

I also asked Rutkowski why her name was not on any of the properties that were purchased over a significant period of years. She offered the bizarre explanation that she did not want her name on any real estate because of her ongoing problems with the IRS. Rutkowski was a real estate agent and apparently made a significant income but she never paid taxes or enough taxes. As a result, she had significant Federal Tax Liens and as of the hearing on September 13, 2017, she had a Federal Tax Lien of \$300,000.

She offered no reasonable or even plausible reasons for this conduct and continued to accumulate tax liens for many years and apparently never sought to get her problem with the IRS corrected, or to pay taxes as they accrued.

Counsel for Stenger, argued that this non-payment of taxes by Rutkowski reflects a lack of clean hands and that equity should be denied. I'm not sure this conduct is relevant to clean hands *vis a vis* Stenger, but it certainly shows a complete lack of business acumen which militates against her argument that she is a business person capable of being a partner in the Stenger properties. Stenger also testified that their relationship, even spanning 20 years, was a stormy one and he frequently evicted her from their abode, which he owned. Obviously the Statute of Limitation has run on all the properties purchased by Stenger.

Further, I find the argument made on behalf of Stenger that the Statue of Frauds bars her claim to be persuasive. There is no question that real estate is involved here and Rutkowski's entire case is based on her oral testimony about conversation with Stenger, which he disputes.

Absent any kind of writing or writings, no contract has been established. Further, I do not find Rutkowski to be a credible witness and I credit Stenger over her on disputed matters. I therefore rule in favor of Stenger and against Rutkowski and dismiss her complaint on all counts. I further order that the *lis pendens* be struck and all funds presently in escrow be paid over to Stenger.

SO ORDERED,
BY THE COURT:
/s/O'Reilly, S.J.

Date: December 5, 2017

Sandra Rutkowski v. Charles W. Stenger

MEMORANDUM ORDER OF COURT

I heard this matter Non-Jury on September 13 and 14, 2017 and on December 5, 2017, I entered a verdict wherein I found for Defendant on all counts and against Plaintiff and dismissed the case.

Plaintiff has failed a timely Motion for Post Trial Relief. The Motion consist of 10 paragraphs with multiple sub paragraphs to

paragraph 1 and 7.

In essence, the objections are to my evidentiary rulings and implicitly to my credibility resolution. The testimony and evidence in this case are sufficiently fresh in my mind and argument on any of these points would be superfluous. Accordingly, I have not scheduled Argument on this Motion. Further, I am to be mandatorily retired on December 31, 2017 and there is insufficient time to schedule Argument in any event.

Suffice to say that I did not credit Rutkowski in any disputed area. The statute of frauds is clearly apparent here and bars Rutkowski's claim of a partnership in land with Defendant which I did not believe in any event. Further, I found no contract or any partnership and I believe that Rutkowski's life-time of IRS problems which she refuses to correct were directly relevant to her claims and her credibility.

Thus the Motion for Post-Trial Relief is DENIED.

SO ORDERED,
BY THE COURT:
/s/O'Reilly, S.J.

Date: December 22, 2017

Golan Barak v. Eyal Karolizki and Gal Zeev Schwartz

Real Estate Sale

Writ of summons with lis pendens/parties/motion to strike lis Pendens. Court ordered lis Pendens stricken—property conveyed before filing of writ.

No. GD-16-000990. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—December 21, 2017.

OPINION

This dispute arises from a property transaction between Appellant Golan Barak and Appellees Eyal Karolizki and Gal Zeev Schwartz. In 2015, Mr. Barak entered into an agreement to sell Property located at 959 South Braddock Avenue to Alon Rimoni. The closing was scheduled to occur on December 11, 2015 at the law firm of Beier, Beier & Beier ("Beier Law Firm"). Attorney Maximillian Beier requested that Mr. Barak and Mr. Rimoni come to his firm on December 10, 2015 to sign the documents relating to the Property sale. Mr. Barak appeared and signed a HUD-1 Settlement Statement and a Deed which purported to convey the Property to Mr. Rimoni. After signing the documents, Mr. Barak learned that Mr. Rimoni failed to provide the purchase funds and therefore Mr. Barak refused to go through with the closing. Attorney Beier suggested that the parties return the following day to finalize the sale. Attorney Beier drafted a handwritten note stating that the purchase funds had not been received and noted that he would hold the deeds in trust until Mr. Golan receives all closing funds. The next day Mr. Barak returned to discover that Mr. Rimoni again failed to provide the purchase funds. The parties agreed to postpone the closing and Attorney Beier agreed to hold the deed in escrow until he received the funds from Mr. Rimoni. On December 17, Mr. Rimoni advised Attorney Beier that he wanted to transfer the Property to the Appellees Mr. Karolizki and Mr. Schwartz. Attorney Beier. Mr. Barak asserts that he never authorized this transfer and never received the funds for the purchase price of the Property. Other Court records suggest that the money was paid. On January 22, 2016, Mr. Barak filed a Praecipe for Writ of Summons in Equity – Index as Lis Pendens against the Property. On October 14, 2016 and October 25, 2016, Mr. Barak filed a Complaint and an Amended Complaint seeking Quiet Title and alleging fraud and misrepresentation and conversion. Mr. Karolizki and Mr. Schwartz filed Preliminary Objections. The Preliminary Objection to Mr. Barak's Quiet Title action was sustained with leave to file a Second Amended Complaint. His conversion claim was withdrawn and the fraud and misrepresentation claims were stricken. Mr. Barak filed a Second Amended Complaint and Mr. Karolizki and Mr. Schwartz filed an Answer and New Matter as well as a Motion to Strike Lis Pendens. I granted the Motion to Strike Lis Pendens as Mr. Barak did not appear and it was unopposed. Mr. Barak filed a Motion for Reconsideration of the Motion to Strike Lis Pendens claiming that he did not timely receive notice of it. I granted the Motion for Reconsideration and restored lis pendens. I heard arguments on Mr. Barak's Motion for Reconsideration on October 26, 2017 and entered the following:

- (1) The Order of Court entered on 9/25/17 shall be stricken and the Order of Court entered on 9/5/17 striking the lis pendens has been reinstated
- (2) Parties shall perform under that governing order; Pending further Order of this Court
- (3) The proceeds of any sale shall not be released from the Department of Court Records without an Order of Court authorizing the release of the funds.

It is from that order that Mr. Barak appeals. He claims that I erred in granting Mr. Karolizki and Mr. Schwartz's Motion to Strike Lis Pendens and that I failed to recognize the fraudulent and illegal conduct by Attorney Beier.

"Lis pendens" literally means a pending suit. Lis pendens is construed to be the jurisdiction, power or control which courts acquire over property involved in a suit, pending the continuance of the action, and until its final judgment therein. The initial basis of the application of the doctrine was one of constructive notice to all the world of the pending litigation. The doctrine does not establish an actual lien on the affected property, but rather merely gives notice to third parties that any interest that may be acquired in the property pending the litigation will be subject to the result of the action. *Blumenfeld v. R. M. Shoemaker Co.*, 429 A.2d 654 (Pa. Super. 1981). The lower court must balance the equities to determine whether the application of the doctrine is harsh or arbitrary and whether the cancellation of the *lis pendens* would result in prejudice to the non-petitioning party. *Rosen v. Rittenhouse Towers*, 482 A.2d 1113 (Pa. Super. 1984).

In this case, Mr. Karolizki and Mr. Schwartz contend that the lis pendens on the Property is acting as a deterrent to their ability to sell or develop it because it is preventing clear title. They assert that Mr. Barak has not shown through pleadings that a lis pendens is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Instead, they note that Mr. Barak's argument stems from the alleged lack of consideration prior to the transfer of title. Further, they argue that Mr. Barak has not asserted that greater injury would result from lifting the lis pendens rather than letting it remain. The state Mr. Barak has not shown that he is likely to prevail on the merits of the case.

I granted the Motion to Strike Lis Pendens in this case because the title has already been exchanged and no greater injury would result from lifting it than from letting it remain. Lifting the lis pendens was in the best interest of all parties because the property will be more likely sold and developed without it. Mr. Barak would suffer no prejudice in my removal of lis pendens.

SO ORDERED,
BY THE COURT:
/s/O'Reilly, S.J.

Date: December 21, 2017

**Arthur Udler v.
Melanie Eckert**

Landlord Tenant

Breach of Lease/security deposit & rent/pre-existing conditions. Court refused award to landlord for rent and retention of security deposit for damage allegedly caused by tenant.

No. LT-17-000657. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—December 27, 2017.

MEMORANDUM ORDER

This Landlord-Tenant matter presents severe credibility disputes over a certain property at 636 College Avenue in the Shadyside area of Pittsburgh. It is compounded by the multiplicity of tenants that lived in the structure during the relevant time. In addition to Eckert, two other tenants were in the property but by May 2016, only Eckert was in residence. Udler claimed Eckert failed to pay rent for May 2016 and he gave her a notice to quit. Concurrently, Udler filed for rent and eviction before the local Magistrate. At trial he contended Eckert owed back rent in the amount of \$3,650.00 for two months which included late fees. The rent paid by Eckert was \$1,725.00 per month. Eckert denied any liability to Udler and when he filed this suit, she filed a counter-claim asserting a variety of claims.

The property is a duplex and the side leased to Defendant, Melanie Eckert, and two others consisted of 3 bedrooms, 2 baths, a kitchen, diningroom and livingroom. The landlord, Arthur Udler (UDLER), testified that on May 27, 2016, he entered the unit leased to Defendant herein, Melanie Eckert (ECKERT) to show it to prospective new tenants. He testified that the area adjacent to Eckert's bedroom was severely damaged due to a small dog that Eckert kept plus two rabbits. He provided pictures – Exhibits 3A, 3B, 3C and 3D, 3Q, 3R and 3J which showed the conditions.

It appears that Eckert in May 2016 had advised Udler that she was soon moving out as the lease would terminate in July. At the time, it appeared that Eckert was current in her rent and that her security deposit was to be used for her June 2016 rent. Eckert testified that she had not given Udler permission to enter her residence and he had *not* given her notice, under the lease, that he was going to enter the premises. She acknowledged the condition of the floor but averred that she and friends, before she vacated, worked tirelessly to clean up the area and it was in good shape when she vacated.

Eckert ultimately left the unit and this lawsuit ensued. Udler claimed Eckert owed rent of \$3,450 for June and July. He also claimed extensive damage to the property from the dog and rabbits. Udler's testimony was that the damage was so severe that the floor as shown in the pictures had to be entirely replaced, including down to the 2 X 10 floor joists underneath. He also claimed other floor damage in other parts of the building also attributable to the dog. His testimony about floor replacement on the second floor attributable to the dog and/or rabbits is not persuasive. He offered testimony from one Alex Sholkin, a contractor whom Udler had used in the past. That total claim was \$21,562.50 and was detailed and itemized in Plaintiff's Exhibit 5. Udler is also seeking Attorney fees in the amount of \$8,581.04.

After analysis and applying the standards for the burden of proof, I am not inclined to award Plaintiff the damages he is seeking.

Initially, I believe the claim that the entire floor including floor joists had to be replaced is over reaching. Eckert made a good point that the property was *not* in the pristine condition shown in Udler's photos taken in May 2013 a year *before* Eckert moved in on August 2014. Second, I do not believe the little dog and two rabbits could produce the damage attributed by Udler. Rather I believe the work by Udler to be simply a renovation of the unit, not caused by Eckert, done under circumstances where he is trying to get Eckert to pay for the periodic renovation a landlord needs to do from time to time. Indeed the repeated emphasis on some rabbit or dog *feces* suggests an effort at shocking the Court. Eckert also testified she and the other tenants repeatedly asked Udler to paint but to no avail. Now, there is a charge by Sholkin of \$1,700 just for painting. Eckert further offered testimony from her expert, Mr. Paden who has spent 20 years managing rental properties. He testified that charges by Udler were excessive and he could not countenance at all the extensive flooring work. I was impressed with his testimony much more than I was with that of Alex Sholkin.

In her contrary testimony, Eckert suggests exaggeration by Udler of any problems in the unit. In her case, she did testify that there were problems with heat, kitchen use and the like and despite repeated request, nothing was done by Udler. Ultimately, however, neither has convinced me, by a preponderance of the evidence, that the other party caused the damage claimed. Each has the burden to prove by a preponderance of the evidence that the damages caused are more probably than not the fault of the other party. Here, the damages claimed by Udler are overstated and/or not attributable to Eckert. I am satisfied that her evidence

shows Udler did not care for the property and I find she has no obligation for rent. I am not persuaded that she has any other claim for damages. Thus, I dismiss both the Plaintiff's case and the Defendant's counterclaim.

SO ORDERED,
BY THE COURT:
/s/O'Reilly, S.J.

Date: December 27, 2017

**Bayview Loan Servicing, LLC v.
Solochidi Ahiaarah; The Maerlin Company**

Mortgage Foreclosure

In rem Consent Judgment/deficiency judgment/settlement. Court entered an Order the failure to accept monetary offer and satisfy violated terms of Consent Order.

No. GD-04-006220. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—December 22, 2017.

OPINION

Plaintiff Bayview Loan Servicing, LLC, which was substituted in this matter as a party plaintiff, replacing Interbay Funding, LLC, commenced this action in mortgage foreclosure against Defendant Solochidi Ahianah on March 23, 2004 based on a November 1, 2001 default on Property located at 214 Emerson Street in the City of Pittsburgh 15206. Intervenor Maerlin Company joined in the action in 2005. Judgment was entered against Defendant on April 24, 2014.

On March 7, 2016, a Consent Order was entered which provided for an in rem judgment against Intervenor in the amount of \$170,132.53, waiving any claim against Intervenor for any deficiency judgment or personal liability and further agreeing that if Intervenor receives an offer or commitment for financing of less than \$170,132.53 that Plaintiff would receive such offer or commitment in good faith as satisfaction of the judgment.

On May 31, 2017, Plaintiff received an email from the Intervenor asking if they would accept \$150,000 in settlement of the \$170,132.53 judgment. Plaintiff rejected the settlement.

On November 13, 2017, I Ordered the following which Plaintiff has appealed: Plaintiff shall accept payment of \$150,000.00 in full and final satisfaction of the mortgage and note which are the subject of the above captioned action which payment shall be made within 60 days from the date hereof.

Plaintiff claims that I erred in enforcing the March 7, 2016 Consent Order which was signed by Judge Michael McCarthy because Intervenor failed to meet the expressed precedent conditions contained in the Order. The Consent Order states:

Case SETTLED & DISCONTINUED by the Parties. Order that: 1) In rem Consent Judgment is entered in favor of Plaintiff and against Intervenor Maerlin in the amount of \$170,132.53. 2) Plaintiff agrees to forbear execution upon said Judgment for 120 days, as specified. 3) Plaintiff agrees not to attempt to bring a deficiency Judgment against Maerlin or otherwise assert liability against it. 4) If Maerlin obtains an offer for financing that is less than Judgment amount, Plaintiff agrees to receive such offer in good faith as satisfaction of the Judgment, as specified.

Defendant claims that Plaintiff has failed to receive such offer or commitment for financing in the amount of \$150,000 in good faith as satisfaction of the judgment as it agreed to in the Consent Order.

I found that Plaintiff acted in bad faith in rejecting the \$150,000 offer to purchase the premises. Accordingly, I entered the Order here Appealed from directing Plaintiff to accept the \$150,000 in full satisfaction of its claim.

BY THE COURT:
/s/O'Reilly, S.J.

Date: December 22, 2017

**Commonwealth of Pennsylvania v.
Charles F. Nevels, III**

Criminal Appeal—Sufficiency—Sentencing (Discretionary Aspects)—Expert Testimony—Frye Hearing—Location of Suspect Via Cell Phone—Intimidation of Witnesses—Admission of Facebook Posts

Various issues relating to defendant's attempted homicide/arson trial.

No. CC 11118-2015. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Bicket, J.—January 24, 2018.

OPINION

Appellant, Charles F. Nevels, III, appeals the Judgement of Sentence imposed by this Court on August 25, 2017. For the reasons set forth below, this Court's Order should be affirmed.

BACKGROUND

The salient procedural and factual history is as follows. Tara Jones and her husband, Darwin Jones (hereinafter “Mr. and Mrs. Jones”), witnessed the commission of a homicide outside their residence. Mr. and Mrs. Jones cooperated with police and the Commonwealth in identifying the shooter, Theodore Smedley (hereinafter “Smedley”), later testifying against Smedley before a grand jury. Smedley apparently committed the murder in retribution for the prior shooting of his cousin, Dorian Smedley. Following this testimony, Smedley was charged with, *inter alia*, criminal homicide. Soon thereafter, Mr. and Mrs. Jones were victims of an arson that caused significant damage to their home and serious bodily harm to the Jones’, and their daughter, Amanda Smith.

Charles F. Nevels, III (hereinafter “Appellant”), Smedley’s cousin, was charged with three counts of criminal attempt-criminal homicide; two counts of intimidation of a witness/victim; eight counts of arson-death or bodily injury; three counts of aggravated arson; two counts of arson endangering property; two counts of reckless burning or exploding; one count of risking a catastrophe; and two counts of retaliation against a witness/victim, all in connection with the arson. Police were able to place the Defendant in the vicinity of the arson by tracking his cell phone movements at and around the time the Jones’ residence was set on fire.

On or about April 24, 2017, a *Frye* Hearing was held on Appellant’s Motion in Limine to Exclude Evidence of Cell Phone Pinging. This Court denied Appellant’s Motion and found the historical cell site analysis evidence to be generally accepted in the relevant scientific community and not novel science. The matter then proceeded to a jury trial where Appellant was found guilty on all charges. After a lengthy sentencing hearing, this Court sentenced Defendant on August 25, 2017.

On September 21, 2017, Appellant filed a timely Notice of Appeal. On October 12, 2017, this Court ordered Appellant to file a Concise Statement of Matters Complained of on Appeal. On October 30, 2017, Appellant filed a Statement of Matters Complained of on Appeal and a Motion for Extension for Time to File Supplemental Matters. This Court granted Appellant’s request for said extension. Appellant raises 16 issues on appeal which the Court will address chronologically.

Discussion

I. Historical cell site analysis is not novel science and this Court did not err in denying Appellant’s motion to exclude same.

The standard of review for the denial of a Motion in *Limine* is well-settled under Pennsylvania law: “Generally, a trial court’s decision to grant or deny a motion in limine is subject to an evidentiary abuse of discretion standard of review.” *Com. v. Reese*, 31 A.3d 708, 715 (Pa. Super 2011) (citing *Commonwealth v. Moser*, 999 A.2d 602, 605 (Pa. Super 2010)). Furthermore, “it is well-settled that a trial court’s rulings on evidentiary questions are controlled by the discretion of the trial court, and [the Superior] Court will reverse only for clear abuse of that discretion.” *Com. v. Marshall*, 824 A.2d 323, 328 (Pa. Super. 2003).

Pennsylvania courts have articulated a similar standard of review as it relates to *Frye* hearings:

As to the standard of appellate review that applies to the *Frye* issue, we have stated that the admission of expert scientific testimony is an evidentiary matter for the trial court’s discretion and should not be disturbed on appeal unless the trial court abuses its discretion. 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.

Grady v. Frito-Lay, Inc., 839 A.2d 1038, 1046 (Pa. 2003) (internal citations and quotations omitted). Pennsylvania courts continue to follow the *Frye* rule with respect to the admission of scientific expert testimony. *Id.* at 1045. Under the *Frye* rule, the party seeking to introduce the evidence must prove that the “methodology an expert used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial.” *Id.*

The evidence of historical cell site analysis is not novel science. Appellant failed in the first instance to prove that it is. As stated in *Com. v. Foley*,

The *Frye* test is a two-step process. First, the party opposing the evidence must show that the scientific evidence is novel by demonstrating that there is a legitimate dispute regarding the reliability of the expert’s conclusions. If the moving party has identified novel scientific evidence, then the proponent of the scientific evidence must show that the expert’s methodology has general acceptance in the relevant scientific community despite the legitimate dispute.

[...]

[W]here there is no dispute, *Frye* should be construed narrowly so as not to impede admissibility of evidence that will aid the trier of fact in the search for truth.

38 A.3d 882, 888 (Pa. Super 2012) (internal citations and quotations omitted). Nevertheless, by agreement of the parties, this Court granted Appellant’s request for a *Frye* hearing as the Court is unaware of any published opinions finding that the use of historical cell site analysis is generally accepted science.

At the *Frye* Hearing, the Commonwealth called FBI Special Agent John Hauger to testify as to the science of historical cell site analysis. Agent John Hauger testified that he has been employed by the FBI for approximately 14 years. *Frye* Hearing Transcript, p. 4. Since 2011, Agent Hauger has also been a member of the FBI Cellular Analyst Survey Team (“CAST”) . *Id.* at 5, 6. Agent Hauger explained the function and training of CAST members, which includes cell phone and cell phone record analysis, as well as locating cell phones and where they have been based upon those records. *Id.* Agent Hauger also explained in detail what historical cell site analysis is and how the FBI uses the records from cell phone towers to track or locate where a cell phone has been. *Id.* at 7-9. Additionally, Agent Hauger explained what happens when a cell phone is used or a call is made and the purpose or role that a cell tower plays in making that phone call. *Id.* at 9-11. Agent Hauger further explained how the particular tower a cell phone connects to when a call is placed is reflected in the historical cell site analysis records and how the FBI uses this information to identify where a cell phone is or was located at a particular time. See *Id.* generally. Agent Hauger further testified that the FBI uses historical cell site analysis to, *inter alia*, locate fugitives, kidnapping victims and/or hostage takers, as well as for exoneration purposes. *Id.* at 19-20. Agent Hauger testified that in every event the FBI has found the phone in the location where the data revealed it to be. *Id.* However, Agent Hauger conceded that the historical cell phone data can only provide a generalized geographic area and not an exact GPS location. *Id.* at 8.

Agent Hauger testified that he has been qualified as an expert in field of cell phone record analysis over 40 times in various state and federal jurisdictions. *Id.* at 21-22. Moreover, other CAST agents have testified in over 70 hearings, trials and/or litigations in *Frye* and/or *Daubert* hearings and historical cell site analysis has consistently been ruled admissible evidence. *Id.* at 23-24. Agent Hauger testified that he is familiar with articles and university studies on historical cell site analysis and it is his opinion that historical cell site analysis is a generally accepted methodology in both law enforcement and legal communities. *Id.* at 24-25. At the conclusion of the *Frye* Hearing this Court determined that there was no evidence presented by Appellant to contradict the historical cell phone data produced which reflects a cell phone connecting to a particular cell tower which thereby produces records which provide a generalized geographic area as to where a phone call was placed. Therefore, this Court determined that such data is not novel science in the cell phone record analysis community.

II. This Court properly sustained the Commonwealth's objection at the *Frye* Hearing regarding Special Agent John Hauger's opinion.

During the *Frye* Hearing, counsel for Appellant sought to question the Commonwealth's Expert Witness, Special Agent John Hauger, as to his ultimate opinion expressed in his report. See *Frye* Hearing Transcript, 4/24/2017; pp 35-37. The Commonwealth objected to this line of questioning and this Court sustained said objection as the nature and purpose of the testimony during this hearing was to ascertain whether the proposed evidence passed the *Frye* test for admissibility and not to attack Agent Hauger's ultimate expert opinion in this matter. (See *Trach v. Fellin*, 817 A.2d 1102, 1112 (Pa. Super. 2003) (stating that a *Frye* Hearing is held to "determine if the relevant scientific community has generally accepted the principles and methodology the scientist employs, not the conclusions the scientist reaches, before the court may allow the expert to testify.")

III. The evidence was sufficient as a matter of law to convict Appellant of Criminal Attempt – Homicide (18 Pa.C.S. §901(a)).

Pennsylvania Courts have established a clear standard of review with respect to appeals raising sufficiency of evidence claims.

Our well-established standard in conducting this inquiry is whether the evidence and all reasonable inferences therefrom, viewed in the light most favorable to the Commonwealth as verdict-winner, are sufficient to establish the elements of that offense beyond a reasonable doubt.

Com. v. Jermyn, 533 A.2d 74, 76-77 (Pa. 1987). The facts in this case, when viewed in the light most favorable to the Commonwealth, clearly support the guilty verdict on the charges of criminal attempt-homicide. Specifically, Appellant set fire to a residential home where it was established through circumstantial evidence that Appellant knew people resided. Specifically, the testimony revealed that the Appellant, a cousin of Smedley, wanted to prevent Mr. and Mrs. Jones from testifying at Smedley's murder trial. Furthermore, Appellant set the fire in the early morning hours when the victims were more likely to be home sleeping, rendering them helpless. Trial Transcript, Vol. I pp. 178 (Firefighter James Tarbert testifying the dispatch call for the fire occurred at approximately 4:52 a.m.). Additionally, Appellant set the fire to the residence's entry and exit in an effort to ensure that Mr. and Mrs. Jones would not be able to escape the burning building. Trial Transcript Vol I. pp. 229-235. (See also *Com. v. Dykes*, 541 A.2d 1, 3 (Pa. Super. 1988) (evidence sufficient to support conviction for involuntary manslaughter of a firefighter where appellant set fire to abandoned building where "the evidence establish[ed] that appellant set the fire and knew that people often frequented the building and sometimes slept there. [Appellant] therefore should have expected that someone might report that people could be inside the structure and that firefighters would enter the building when given such a report. In viewing the evidence in the light most favorable to the Commonwealth, it is readily apparent that the evidence was sufficient to sustain appellant's conviction for involuntary manslaughter."))

IV. The evidence was sufficient as to the charges of Intimidation of Witnesses (18 Pa.C.S. §4952(a)(3)) and Retaliation against Witness or Victim (18 Pa.C.S. § 4953 (a)).

V. The evidence was sufficient as to the charges of Retaliation against Witness or Victim (18 Pa.C.S. § 4953 (a)).

This Court will address Appellant's appeal issues IV and V together. The evidence in this case, when viewed in the light most favorable to the Commonwealth, establishes that Mr. and Mrs. Jones witnessed a homicide outside their residence during the afternoon of March 24, 2014. Trial Transcript, Vol I. pp 156-157; that Mrs. Jones cooperated with police in identifying the shooter, Theodore Smedley. *Id.* at 159; that Mr. and Mrs. Jones testified for the Commonwealth before a grand jury in the homicide case against Smedley. *Id.* at 160-161; that Theodore Smedley was the cousin of Appellant. Trial Transcript, Vol. II, p 448; that jail cell phone calls between Appellant and Smedley referred to Jones' testimony and discussed setting the fire to the their residence. Trial Transcript, Vol. II, pp. 465-475, and see Commonwealth Exhibit 112. Accordingly, the evidence was sufficient to support a guilty verdict on all counts of Intimidation of Witnesses and Retaliation against Witness or Victim.

VI. This Court properly denied Appellant's request for a mistrial.

A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to have deprived the moving party of a fair and impartial trial. *Com. v. Tharp*, 830 A.2d 519, 532-33 (Pa. 2003) (internal citation omitted). At trial, Appellant objected to the statements made by Teri Crowley concerning her son, Dorian Smedley, testifying and requested a mistrial on the basis of relevance. More specifically, Appellant argues that Mrs. Crowley's testimony that she was nervous about her son testifying were irrelevant. "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." *Smith v. Morrison*, 47 A.3d 131, 137 (Pa. Super. 2012) (internal citation omitted). A theme throughout this trial as presented by the Commonwealth was the importance of family to Appellant. (See T.T. Vol II. pp. 476 Testimony from Dorian Smedley explaining the meaning of "OTF" ("Only the Family")). Throughout the trial, the evidence established that Dorian Smedley and Appellant categorized themselves as cousins. Dorian Smedley was originally arrested in connection with this arson but later advised police that it was the Appellant that was responsible for it. Dorian Smedley subsequently testified accordingly for the Commonwealth against Appellant at the trial. Teri Crowley's testimony that she was nervous for her son to testify is relevant because this factors into the jury's findings as to the credibility of Dorian Smedley. Furthermore, Mrs. Crowley's statements relate to the Facebook photographs on Appellant's Facebook page depicting a memorial, which the Commonwealth alleges were posted by Appellant as

a threat to Dorian Smedley for speaking to the police and providing Appellants name as the perpetrator of the fire. Accordingly, this Court found that the evidence was not only legally relevant but the admission of said statements did not deprive Appellant of a fair and/or impartial trial.

VII. The Court properly admitted the screen shots of Facebook posts.

Rule 901 of the Pennsylvania Rules of Evidence provides:

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Pa.R.E.901. Furthermore, evidence may be authenticated through circumstantial evidence. See *In re F.P.*, 878 A.2d 91, 93-94 (Pa. Super 2005) (“Testimony of a witness with personal knowledge that a matter is what it is claimed to be may be sufficient to authenticate or identify the evidence. A document may be authenticated by direct proof and/or by circumstantial evidence. Proof of any circumstances which will support a finding that the writing is genuine will suffice to authenticate the writing. The courts of this Commonwealth have demonstrated the wide variety of types of circumstantial evidence that will enable a proponent to authenticate a writing.”)(internal citations, quotations and brackets omitted.)

At trial, the Commonwealth introduced Facebook screenshots which the Commonwealth purported to be posts from Appellant’s personal Facebook page. To authenticate these screenshots, the Commonwealth produced evidence showing that the Facebook page was registered to Appellant’s username “OTF Turk”, using a cell phone number linked to Appellant which was verified through the documents provided to the Commonwealth from Facebook in response to their subpoena. Additionally, included in the screenshots sought to be introduced was a photograph of Appellant with a caption relating to Appellant cutting his hair while the police were looking for him. Moreover, the screenshots logically fit into a timeline of circumstantial evidence introduced by the Commonwealth relating to Appellant discovering that Dorian Smedley had provided his name to police as the individual who set fire to the Jones’ residence. Accordingly, the Commonwealth properly authenticated the documents through circumstantial evidence.

VIII. This Court properly admitted the Facebook posts that depicted a memorial. (N.T. Vol. I pp. 39-41).

During the trial, Appellant objected to the introduction of screenshot Facebook photographs depicting a memorial at a crime scene on the basis that the prejudicial effect of said photographs outweighed the probative value. Rule 403 of the Pennsylvania Rules of Evidence provides:

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Pa.R.E.403. Here, the photographs were used by the Commonwealth in part to prove that Appellant was the person responsible for setting the fire and that he was attempting to intimidate Dorian Smedley who had recently cooperated with police and provided Appellant’s name as the actor. The photographs themselves were generic crime scene memorials with nothing inflammatory in and of themselves. Any potential inflammatory or prejudicial nature of the photographs comes from an inference derived from the photographs; the exact reason that Commonwealth alleges Appellant posted the photographs. That is to say, the Commonwealth alleges Appellant posted photographs of a crime scene memorial in attempt to threaten and/or intimidate Dorian Smedley to stop cooperating with the police. Accordingly, this Court found the probative value of the photographs outweighed any potential prejudicial value.

IX. This Court properly permitted Officer Frank Niemic’s testimony regarding Tara Jones statement.

During the trial, Officer Frank Niemic testified that, while investigating the fire, it came to his attention that a piece of material had been shoved into the gas tank of the victims vehicle parked outside their residence and that the material had attempted to be lit on fire. Trial Transcript, Vol. I pp. 127-128. Officer Niemic further testified that victim, Tara Jones, upon noticing this fact “exploded into a hysteria” and began “exclaiming, ‘They tried to kill me, they tried to kill my family. I knew I shouldn’t have testified. I knew I shouldn’t testify.’” Trial Transcript, Vol I. pp. 129-130. The testimony of Officer Niemic as to Tara Jones’ statements clearly fall within the excited utterance exception to the rule against hearsay. See Pa.R.E. 803(2). (“The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”)

X. This Court did not err by refusing to permit Appellant to ask Detective Charles Hanlon if he tried to obtain DNA from Dorian Smedley.

This Court ruled that Appellant was not permitted to question Detective Charles Hanlon as to his attempts to obtain DNA from Dorian Smedley. It reasoned that such line of questioning was beyond the scope of direct examination. (See Pa.R.E. 611(b) (“Scope of Cross-Examination. Cross-examination of a witness other than a party in a civil case should be limited to the subject matter of the direct examination and matters affecting credibility...”)) Notably, Appellant did not question Detective Hanlon with respect to this issue when he was recalled to the stand and questioned on direct examination regarding the swabbing of DNA, nor did Appellant attempt to call Detective Hanlon as a witness in Appellants case-in-chief. Trial Transcript, Vol. II pp. 815-817.

XI. Appellant’s remaining issues with respect to the sentencing of Appellant are without merit.

This Court will address Appellant’s appeal issues XI through XVI relating to the sentencing as a whole. Pennsylvania Courts have articulated the standard of review with respect to issues related to sentencing raised on appeal as follows:

If this Court grants appeal and reviews the sentence, the standard of review is clear: sentencing is vested in the discretion of the trial court, and will not be disturbed absent a manifest abuse of that discretion. An abuse of discretion involves a sentence which was manifestly unreasonable, or which resulted from partiality, prejudice, bias or ill will. It is more than just an error in judgment.

Com. v. Malovich, 903 A.2d 1247, 1252-53 (2006) (internal citations and quotations omitted). Furthermore, under 42 Pa.C.S. §9721 (b), a sentencing court is required to “make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed.” However, “a lengthy discourse on the trial court’s sentencing philosophy is not required. Rather, the record as a whole must reflect the court’s reasons and its meaningful consideration of the facts of the crime and the character of the offender.” *Com. v. Malovich*, 903 A.2d 1247, 1253 (2006).

In sentencing Appellant, this Court stated on the record that it considered the impact that the crimes had on the victims in this matter, the background and life of Appellant, the victim impact statements, the statements from Appellants family members and Appellant’s apology. Sentencing Hearing Transcript, pp. 30-32. Furthermore, Appellant was sentenced within the sentencing guidelines at all counts in this matter.

Appellant’s argument, as it relates to Smedley and his sentencing arising out of the homicide for which he was responsible, is without merit. Smedley was not a co-defendant in this matter. Any reasons for any sentence Smedley received in a separate criminal matter was of no concern to this Court when sentencing of Appellant in this matter.

BY THE COURT:

/s/Bicket, J.

PITTSBURGH LEGAL JOURNAL

OPINIONS

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In Re: Pittsburgh Citizen Police Review Board, McVay, Jr., J.Page 139
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PLJ

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OPINIONS

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In Re: Pittsburgh Citizen Police Review Board

CPRB—Home Rule Charter—Police

Police officers challenged subpoenas issued by the Pittsburgh Citizen Police Review Board (the “CPRB”). The Court held that the subpoenas were validly issued. The Court also held that (a) the CPRB was not an agent of the City of Pittsburgh, and so was not subject to a Working Agreement between the City and the Fraternal Order of Police; and (b) that the CPRB had authority to issue such subpoenas due to the City’s Home Rule Charter, as amended via referendum.

No. GD 17-005935. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
McVay, Jr., J.—August 10, 2017.

OPINION

Facts and Procedural History

On May 15, 2017, the Pittsburgh Citizen Police Review Board (the “CPRB”) presented a Petition to Enforce Compliance with Subpoenas against City of Pittsburgh Police Officers Matthew Gardner (“Officer Gardner”), Nicholas Papa (“Officer Papa”) and Christopher Rosato (“Officer Rosato”). Pet. ¶ 3-5. The subpoenas at issue stem from an event reported to the CPRB through a complaint filed by Rayden Sorock (“Sorock”) alleging improper police officer conduct on March 30, 2015. Pet. ¶ 6. Subsequently, the CPRB issued and served subpoenas on Officer Gardner, Officer Papa and Officer Rosato. Pet. ¶ 8. A hearing was scheduled for January 26, 2017. Officer Gardner failed to appear, and Officer Papa and Officer Rosato appeared but refused to testify. Pet. ¶ 8-9. The officers’ failure to appear and/or testify at the hearing resulted in the CPRB filing a petition for the enforcement of the subpoenas.

The parties argued their positions on May 15, 2017, and on May 23, 2017, an order was entered compelling Officer Gardner, Officer Papa and Officer Rosato to “appear at the public hearing . . . be sworn to tell the truth . . . assume the witness stand and respond to questions . . . [unless] a valid legal basis for . . . refusal [is asserted].”¹ Furthermore, the court indicated in its order that it rejected the argument that the CPRB is an agent of the City of Pittsburgh (the “City”) and therefore not bound by Section 21.C of the Working Agreement between the City and the Fraternal Order of Police, Fort Pitt Lodge No. 1 (the “FOP”) stating “[n]o police officer shall be compelled by the city to be interviewed by and/or testify before the CPRB.”

On June 6, 2017, Officer Gardner, Officer Papa, Officer Rosato and the FOP filed a Notice of Appeal to the Commonwealth Court of Pennsylvania from this court’s May 18, 2017 order. On June 8, 2017, this court entered an order directing counsel, pursuant to Pa. R.A.P. § 1925(b), to file a Concise Statement of Matters Complained of on Appeal within 21 days. Respondents filed a Concise Statement of Matters Complained of on Appeal on June 20, 2017, contending that no statutory authority exists conferring non-judicial subpoena power to the CPRB. Further, Respondents argue the court “ignored” the provision of the Pittsburgh Code, § 661.03(e), which protects police officers from self-incrimination afforded by the Constitutions of the Commonwealth of Pennsylvania and the United States of America. Finally, Respondents contend that the CPRB’s subpoena power could only derive from an agency relationship with the City; therefore, the CPRB would be subject to the collective bargaining agreement and Section 21.C. As stated above, the court addressed and dismissed the agency argument, based upon *stare decisis*, in its May 23, 2017 order.

On June 13, 2017, an Application for Stay Ancillary to Appeal was filed and argument was held on July 14, 2017. Counsel for Respondents argued that staying the May 23 order would be appropriate as they are likely to prevail on appeal and no interested party or the public would be adversely affected. Counsel for the CPRB contended that the appeal is interlocutory and not subject to appellate review as the May 23 order is not final and would only become final upon the officers’ failure to comply with the order. Alternatively, counsel argued that this issue was previously resolved by the Commonwealth Court, making it unlikely Respondents would succeed on appeal, and that the public interest is adversely effected by prolonging the matter.

On August 2, 2017, this court entered an order denying Respondents’ Application for Stay Ancillary to Appeal finding the appeal was interlocutory² and encouraged the parties to explore mutually acceptable resolutions that would ensure the matter was ripe for appellate review. The court believes its proposed resolution would best serve all parties and the public interest while rendering the stay issue moot. In conclusion, the court found the appeal to be interlocutory and, while a stay may not adversely affect the public nor parties’ interests, the petitioner is not likely to prevail on the merits at the present time. However, the court would be open to reconsidering the issue at a later date under the collateral order doctrine.

Discussion

It is the court’s opinion that: (1) the Commonwealth Court of Pennsylvania has already held that an agency relationship does not exist between the CPRB and the City and (2) the CPRB’s subpoena power is statutorily grounded in the referendum held on May 20, 1997.

A. The CPRB and the City Do Not Share an Agency Relationship; Therefore, the CPRB is Not Subject to the Working Agreement

First, this court was bound by controlling precedent and finds that the CPRB is not an agent of the City. In *Citizen Police Review Bd. of City of Pittsburgh v. Murphy*, the Commonwealth Court found that the CPRB should not “be considered a lawfully authorized agent of official City business and as such, be a party to negotiations with the FOP.” 819 A.2d 1216, 1222 (Pa. Commw. Ct. 2003) (quotation marks omitted). Worth noting, the CPRB, rather than the FOP, argued that the CPRB was an agent of the City and should be a party to negotiations with the FOP. *Id.* at 1220. The Commonwealth Court determined that the CPRB cited no authority that would establish an agency relationship with the City. *Id.* at 1222. In drawing this conclusion, the Commonwealth Court noted that “the amendment to Section 21 of the Agreement in no way undermines the CPRB’s present authority to obtain OMI files and other documentary material pertaining to police misconduct allegations, as well as to subpoena police officers to testify at public hearings.” *Id.* (emphasis added). This court is unaware of any change in the law while recognizing the officers’ right to have *Murphy* overruled.

The fact that opposite party is advancing the agency argument cannot alter the court’s obligation to follow established precedent. Here, the FOP has failed to proffer authority to support the position that an agency relationship exists between the CPRB and the City; therefore, the CPRB is not subject to negotiations between the FOP and the City.

2. The CPRB's Subpoena Power Originates from the City's Home Rule Charter Established Through Referendum

The issue raised is whether the referendum that formed the CPRB has the effect of express statutory authority capable of granting non-judicial subpoena power. It is this court's opinion, based on controlling case law, that it does.

The Constitution of the Commonwealth of Pennsylvania provides, "[m]unicipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by *referendum*." Pa. Const. art. IX, § 2. (emphasis added). Additionally, a "municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time." *Id.* Here, the City, through its electorate, adopted its Charter in the election held on November 5, 1974. OFFICE OF CITY CLERK: HOME RULE CHARTER, <http://pittsburghpa.gov/cityclerk/homerule> (last visited July 19, 2017).

The law is settled that non-judicial subpoena power does not exist without express statutory authority. *City of Erie v. Cappabianca*, 879 A.2d 823, 825 (Pa. Commw. Ct. 2005). However, the Supreme Court of Pennsylvania has indicated that Home Rule Charter legislation "undoubtedly" has the "force and status of an enactment of the legislature." *Citizens Comm. to Recall Rizzo v. Bd. of Elections of City & Cty. of Philadelphia*, 367 A.2d 232, 244 (1976). In reaching this conclusion in *Rizzo*, the Supreme Court of Pennsylvania relied on its earlier opinion that recognized Home Rule Charters as having the same status and effect as a statute. *In re Addison*, 122 A.2d 272, 275 (Pa. 1956). While recognizing the Home Rule Charter was not enacted by the legislature, the Supreme Court found that "[w]hether a municipal charter comes into being by direct statutory grant of the legislature or by adoption by the constituent electorate in the exercise of power constitutionally reposed, it is as much legislative in the one instance as in the other and has equal legal force and standing in both." *Id.* at 275-76. The Supreme Court emphasized this position by stating:

a constitutionally permissible adoption of a municipal charter by the electorate is not one whit less in dignity than a statute of the legislature granting a charter. Where it is adopted by a constitutionally empowered electorate, it affords an example of pure democracy—the sovereign people legislating directly and not by representatives in respect of the organization and administration of their local government.

Id. at 276.

Here, on November 5, 1974, the City's electorate approved the Charter and, on May 20, 1997, amended the Charter to establish the CPRB. Both the adoption of the Charter and the amendment to the Charter were accomplished through referendum vote. The FOP contends that non-judicial subpoena power may only be conferred through an express statutory grant. This court understands the FOP's argument to be that the referendum fails to amount to the requisite express statutory authority to grant non-judicial subpoena power. This court respectfully disagrees. In following the precedent cited above, this court finds that the referendum vote amounts to a direct statutory grant of authority capable of conferring non-judicial subpoena power.

CONCLUSION

The CPRB is not an agent of the City, and therefore, is not bound by the terms of the Working Agreement between the FOP and the City. Additionally, the referendum vote establishing the CPRB and its subpoena power was constitutionally permissible and effectively conferred non-judicial subpoena power—through direct legislation—to the CPRB.

BY THE COURT:
/s/McVay, Jr., J.

¹ In their Concise Statement of Matters Complained of on Appeal, Respondents allege that the court "ignored" Pittsburgh Code § 661.03(e) which emphasizes that the legislation was not meant to violate the officers' right against self-incrimination and other rights afforded under the Constitution of the Commonwealth of Pennsylvania and the United States of America. As indicated above, the court's order directed the officers to appear and testify unless a valid legal basis, such as a Constitutional right, is asserted.

² While the denial of a petition for enforcement of a subpoena is a final order, and therefore ripe for appellate review, the granting of a petition for enforcement of a subpoena does not place the parties "out of court." *Com., Pennsylvania Human Relations Comm'n v. Lansdowne Swim Club*, 526 A.2d 758, 761 n.2 (Pa. 1987). The Supreme Court of Pennsylvania has indicated specifically that "[a]n order granting enforcement of a subpoena would not be subject to our review, however, because it is interlocutory." *Id.* (citing *Pennsylvania Human Relations Comm'n v. Jones & Laughlin Steel Corp.*, 394 A.2d 525 (Pa. 1978)).

In Re: Estate of Sandra Holland

Standing—Will—Impossibility

After an evidentiary hearing, and in response to a motion for judgment on the pleadings, the Court held that a beneficiary under a will had standing to seek removal of the executor because she was not bound by a condition precedent in the will under the doctrine of impossibility of performance.

No. CC 7705 of 2015. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Toole, A.J.—April 12, 2018.

OPINION

This matter came before the Court on a Motion for Judgment on the Pleadings filed by James Holland, Executor of the estate, (hereinafter, "Executor") on the sole issue of whether his sister, Christine Stamper (hereinafter, "Ms. Stamper") has standing as a beneficiary under the Last Will and Testament of their mother, the Decedent.

Findings of Fact

From the pleadings and the testimony at the hearing on September 27, 2017, the Court makes the following findings of fact:

- (1) The Decedent died testate on December 21, 2015.
- (2) The Decedent's Last Will and Testament, dated October 26, 2015, was admitted to probate on December 30, 2015 and Letters Testamentary were granted to the Executor on that date.
- (3) On May 15, 2017, Ms. Stamper filed a Petition for a Rule seeking the removal of the Executor due to "the continuing neglect of his duties" to administer the estate.
- (4) The Executor filed an Answer and New Matter on May 26, 2017 alleging that Ms. Stamper lacked standing as a beneficiary under the Will because she failed to meet the conditions set forth in Paragraph 4 of the Will that state: "To my daughter, Christine M. Stamper, I give an equal share of my estate, on the condition that she enroll and successfully complete a thirty (30) day drug rehabilitation program", within ninety (90) days of the Decedent's death.
- (5) In the Answer and New Matter, the Executor also claimed that Ms. Stamper lacked standing as a beneficiary because she violated Paragraph 9 of the Will, which provides for the revocation of a beneficiary's share if he/she "contests the Will, or any of its provisions".
- (6) Ms. Stamper filed a Response to New Matter denying the allegations.
- (7) On August 10, 2017, the Executor filed a Motion for Judgment on the Pleadings, that resulted in a hearing on September 27, 2017.
- (8) Mary Lou Klemencic, Director of Health Information Management, at Gateway Rehabilitation Center, testified that Ms. Stamper was evaluated on January 20, 2016. She could not be admitted for treatment because she did not meet the criteria for either a drug or alcohol diagnosis. (N.T. 09/27/17, pp. 7-13)
- (9) Ms. Klemencic further stated that there was nothing that Ms. Stamper could have done to admit herself for treatment. (N.T. 09/27/17, p. 13)
- (10) Ms. Stamper testified that through her employment as a Certified Nursing Assistant and as a school van driver, she had to undergo drug and alcohol testing. She never failed one of the tests and she was hired by all of the employers. (N.T. 09/27/17, pp. 30-32)
- (11) Ms. Stamper denied that she had a drug or alcohol abuse problem and she denied stealing prescription medication from the Decedent. (N.T. 09/27/17, pp.36-37)
- (12) Susan Hagmaier, who is Ms. Stamper's aunt, and James Stamper, who is Ms. Stamper's husband, both testified that Ms. Stamper does not have a drug or alcohol abuse problem. (N.T. 09/27/17, pp. 77, 82)

Discussion

On appeal, the Executor raises the following single issue: whether the Court erred in finding that Ms. Stamper has standing as a beneficiary under the Will.

The PEF Code, at §3183, provides, *inter alia*, that any party in interest may petition the court for removal of the personal representative of the estate. The Executor claims that Ms. Stamper is not a beneficiary or "a party in interest" because she failed to enroll in and successfully complete a thirty (30) day drug rehabilitation program; and therefore, she is not entitled to her share of the Decedent's estate. A condition precedent is an occurrence that must take place before a legacy under a will vests. *Estate of Rozanski*, 514 A.2d 587 (Pa. Super. 1986). The doctrine of impossibility of performance, as applicable to contracts provides that if, after a contract is made, a party's performance is made impracticable through no fault of his or her own, the parties may waive the difficulties or terminate the agreement, ending all contractual obligations." *In re Busik*, 759 A.2d 417, 423 (Pa. Cmwlth. 2000) (citing West: Restatement of Contracts).

In this case, the Court finds that the Decedent's Will contains a condition precedent in Paragraph 4. Specifically, Ms. Stamper would be entitled to a share of the estate equal to the shares of her siblings if she enrolled in and completed a thirty (30) day drug rehabilitation program within ninety (90) days of the Decedent's death. But then, analogizing the doctrine of impossibility of performance to the current situation, the Court finds that, under the facts of this case, the condition precedent set forth in the Will is an impossibility. Based upon the credible testimony of Ms. Klemencic, from Gateway Rehabilitation Center, Ms. Stamper did not meet the criteria for a drug or alcohol diagnosis and, as a result, there was nothing that Ms. Stamper could do to admit herself for drug and alcohol treatment. Thus, although the Decedent may have believed that Ms. Stamper had an issue with drug or alcohol abuse, it appears that her belief was inaccurate.

Based upon the foregoing, the Court finds that Ms. Stamper took the proper actions to meet the condition precedent and her failure to meet the condition was not her fault, but rather the condition was an impossibility. Accordingly, the Court finds that the November 2, 2017 Order of Court was proper.

BY THE COURT:
/s/O'Toole, A.J.

Commonwealth of Pennsylvania v. Jerry Edge

Criminal Appeal—Sentencing (Discretionary Aspects)—Prosecutorial Misconduct—Child Sex Case—Mistrial—Expert Testimony
When District Attorney held herself out as an expert during opening statements in child sex case, curative instruction was sufficient to ameliorate any prejudice to the defendant.

No. CC 2014129979. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—February 12, 2018.

OPINION

On June 8, 2017, a jury convicted Appellant, Jerry Edge, of two counts each of Indecent Assault: Person Less than 13 years of age, Endangering the Welfare of Children, and Corruption of Minors.¹ Appellant was sentenced on August 29, 2017 in the aggregate to eight to seventeen years of incarceration with five years of consecutive probation. This Court denied Post Sentence Motions on September 18, 2017 and Appellant filed a Notice of Appeal on October 18, 2017. Appellant filed a Statement of Errors Complained of on Appeal on January 17, 2018.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises three allegations of error on appeal. First, Appellant alleges that this Court erred in failing to order a mistrial during opening statements when the prosecutor held herself out as an expert in child abuse cases. Next, Appellant alleges that this Court erred by prohibiting Appellant's counsel from arguing at closing that abused children exhibit observable indicators of abuse when Appellant had not presented an expert to testify to that effect. Lastly, Appellant alleges this Court erred in imposing a sentence contrary to the dictates of the Sentencing Code and the fundamental norms underlying the sentencing process. (Concise Statement of Errors alleged on Appeal at 2).

DISCUSSION

First, Appellant alleges that that this Court erred in failing to order a mistrial during opening statements when the Commonwealth's attorney held herself out as an expert in child abuse cases. In her opening statement, the prosecutor referenced her personal experience in child abuse cases, specifically that it was rare for a victim, especially a child victim, to report abuse immediately after it occurred. (Transcript of June 7, 2017 Jury Trial, hereinafter TT at 26-27) Counsel for Appellant objected and moved for a mistrial. (TT 28) This Court sustained the objection but denied the motion and issued a curative instruction to the jury that they may not consider the prosecutor's personal experience as evidence against Appellant.

The following standards apply to our review of a trial court's denial of a motion for a mistrial:

The trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. In making its determination, the court must discern whether misconduct or prejudicial error actually occurred, and if so, ... assess the degree of any resulting prejudice. Our review of the resulting order is constrained to determining whether the court abused its discretion. Judicial discretion requires action in conformity with [the] law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.

The remedy of a mistrial is an extreme remedy required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial tribunal.

Commonwealth v. Ragland, 991 A.2d 336, 340 (Pa. Super. 2010), *appeal denied*, 4 A.3d 1053 (Pa. 2010) (citations and quotation marks omitted). In electing to issue a curative instruction instead of declaring a mistrial, this Court relied upon the jury's ability to follow the Court's instructions. *Commonwealth v. Jones*, 668 A.2d 491, 504 (Pa.1995)

Additionally, Appellant did not suffer prejudice as it related to this Court's decision not to declare a mistrial, as the Commonwealth continued to carry the burden of testimony consistent with her opening statement. The prosecutor indicated that one of her witnesses would speak to his experience with delayed reporting, and further indicated that two of the victims would testify and explain why they failed to report the abuse promptly. Had the Commonwealth failed to produce testimony consistent with the prosecutor's opening statement, Appellant's counsel would have been free to exploit the deficiency during his closing argument. Appellant did not suffer prejudice and his first claim is without merit.

Next, Appellant alleges that the Court erred prohibiting his counsel from arguing at closing that abused children exhibit observable indicators of abuse when Appellant had not presented an expert to testify to that effect.

During closing argument, counsel may refer to all facts properly in evidence and argue all reasonable inferences therefrom. [*Commonwealth v. Abu-Jamal*, 720 A.2d 79, (Pa. 1998)] at 110 (prosecution and defense are afforded wide latitude in arguing to jury, but arguments must be based on matters in evidence and legitimate inferences drawn therefrom).

Commonwealth v. Keaton, 45 A.3d 1050, 1077 (Pa. 2012). Appellant failed to produce testimony in support of his position that abused children exhibit observable indicators of abuse. Therefore, counsel was properly precluded from arguing a position that was not based on matters in evidence. Appellant's second issue is without merit.

Lastly, Appellant allege that this Court abused its discretion by imposing an excessive minimum sentence of 35 years. In order to address an alleged sentencing error, Appellant must first establish a substantial question that his sentence is 1) inconsistent with a specific provision of the Sentencing Code; or 2) contrary to the fundamental norms which underlie the sentencing process. *Id.* at 364. 42 Pa.C.S. §9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa. Super. 1995). This determination is evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa. Super. 1988). It is appropriate to allow an appeal "where an appellant advances a colorable argument that the trial judge's actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Commonwealth v. Losch*, 535 A.2d 115, 119-120 n. 7 (Pa. Super. 1987). Generally, a bald claim of excessiveness will not raise a substantial question. *See Commonwealth v. Moury*, 992 A.2d 162, 171-172 (Pa. Super.2010). However, "[a] claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question." *Commonwealth v. Derry*, 150 A.3d 987, 995 (Pa. Super. 2016). It appears that Appellant has raised a substantial question, in that Appellant claims the sentence is contrary to the dictates of the Sentencing Code and the fundamental norms underlying the sentencing process in various aspects.

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

When imposing a sentence, this Court is required to consider, among other things, the protection of the public, the gravity of the offence in relation to the impact on the victims and community and the rehabilitative needs of the defendant. 42 Pa.C.S.

§ 9721(b). Appellant's mere unhappiness with his sentence does not constitute grounds for relief. "Since the court more than adequately considered the pertinent sentencing factors and merely weighed them in a manner inconsistent with Appellant's desires, we find his [only] issue does not entitle him to relief." *Commonwealth v. Dodge*, 77 A.3d 1263, 1276 (Pa. Super. 2013).

At the August 29, 2017 sentencing hearing, this Court considered the pre-sentence report, the 18 Pa.C.S. § 1102.1(a) (1) factors, as well as the totality of information presented to fashion an individualized sentence. (Transcript of Sentencing Hearing, Aug. 29, 2017, hereinafter "ST" at 8) This Court considered Appellant's ongoing involvement with the criminal justice system since 1987 in determining that Appellant remained a considerable threat to the public. *Id.* He has been convicted four times of assaulting women and now has four felony convictions. (ST 9) He has not taken advantage of previous probation sentences to address his mental health and addiction issues, and his supervision history is poor. *Id.* The sentence is thoroughly reflective of the gravity of the offense as it relates to the impact on two young victims by Appellant, a man who was in a position of trust with them as their stepfather, and of the need to protect the community, but also allows the possibility for Appellant to reenter society as a rehabilitated man after having served his aggregate sentence of 8 to 17 years.

CONCLUSION

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

BY THE COURT:
/s/Rangos, J.

¹ 18 Pa.C.S. §§ 3126 (a) (7), 4304 (a) (1) and (b), and 6301 (a) (1), respectively.

Commonwealth of Pennsylvania v. Darrell Andre Ward, Jr.

Criminal Appeal—Suppression—Sufficiency—VUFA—Inventory Search

Defendant, passed out in running car at drive-thru, was convicted of possession of weapon found in glovebox and possession of marijuana.

No. CC 201413863. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Manning, P.J.—February 23, 2018.

OPINION

The defendant was charged by criminal information filed on October 20, 2014 with one count of Violating the Uniform Firearms Act - Firearms Not to Be Carried W/O License (18 Pa. C.S.A. § 6106(A)(1)); two counts of Driving after Imbibing (75 Pa. C.S.A. § 3802(A)(1); one count of Possession of Marijuana (35 P.S. § 780-113(A)(31)); one count of Receiving Stolen Property (18 Pa. C.S.A. § 3925(A)); and a summary offense. At the preliminary hearing, the Receiving Stolen Property charge was withdrawn and the defendant waived the other charges to court.

The defendant was tried, without a jury, on June 28, 2017. At the same time, the Court heard testimony on the Motion to Suppress he had filed. The Court denied the Motion to Suppress and adjudged the defendant guilty at the VUFA and Marijuana charges. On August 1, 2017, the defendant was sentenced to not less than one or more than two years on the VUFA count and no further penalty on the possession charge. A Post-Sentence Motion was filed and denied. This appeal followed. In his Concise Statement of Errors, the defendant claims that he Court erred in denying his motion to suppress and that the verdict on the VUFA count was not supported by sufficient evidence.

The evidence presented at the June 28 suppression hearing/non-jury trial established that on August 24, 2014, at approximately 2:00 a.m., Munhall Police Officer Gary Cheep was approached by another vehicle and told by the driver that someone appeared to be passed out behind the wheel of a car stopped in the drive thru on the nearby Wendy's restaurant. NT¹

4. At the same time he was speaking with this witness, he received a call from dispatch reporting the same information.

He proceeded to the Wendy's where he observed a Black Hyundai parked next to the speaker. He could not see if it was occupied and called in the registration. When he approached the vehicle, he "...saw the gentleman, later identified as Mr. Ward, slouched in the front seat with his head up against the pillar of the window to the point where he was almost not noticeable." NT 4.

The vehicle was running, was in gear and the defendant's foot was on the brake. Fearing that if he tried to awaken the defendant he might press on the gas, he waited until another officer pulled his vehicle up to the defendant's front bumper before approaching the defendant again. When he did, he reached in, put the vehicle in park and removed the key. It took him four or five attempts to awaken the defendant before he finally opened his eyes. The officer immediately noticed that they were very blood-shot. NT 5. Based upon his interactions with the defendant, he suspected that he was under the influence of alcohol or a controlled substance. He said that the defendant was not uncooperative, but was very slow to respond to his questions and directions. NT 6. The defendant was arrested for driving under the influence.²

Because there was no one with the defendant to take possession of the vehicle, which the officer determined was registered to the defendant's mother, he intended to have it towed from the scene to the police impound lot. As was standard practice in his department when vehicles were being impounded, he proceeded to conduct an inventory of the vehicle. As the glove box was locked, he asked the defendant for the key to open it. After explaining to the defendant that the inventory search was to protect both him and the officers, the defendant voluntarily provided the keys. NT 7-8. Inside the glove box, Officer Cheep found a firearm. It was not registered and had been reported stolen to the Pittsburgh Police Department. NT 8. The defendant was alone in the rear of the police vehicle for several minutes before Officer Cheep opened to door to provide the defendant with the implied consent warning. Upon opening the door, he noticed a strong smell of marijuana. The defendant was removed and a bundle containing marijuana was found. The officer confirmed that he had inspected the vehicle prior to his shift and the Marijuana was not there. NT 10-11. The defendant did not have a permit to carry a concealed weapon and the substance found in the rear of the police vehicle was determined to be marijuana. NT 11.

Following Officer Cherep's testimony, the Court denied the Motion to Suppress. The parties then stipulated that the Court should consider the testimony from the suppression hearing in rendering a verdict in the non-jury trial and the defendant offered no testimony or evidence. The Court adjudged the defendant guilty of the VUFA count and the possession charge and not guilty on the remaining counts.

In this appeal, the defendant claims that the Court erred in refusing to suppress the evidence, contending that the officer did not have reasonable suspicion to detain the defendant's vehicle and or conduct the inventory search of the glove box. He argued at the hearing that when the second police car pulled up to block the defendant's vehicle, this was a seizure done without reasonable suspicion. He also claimed that the inventory search was not proper.

This Court cannot imagine a set of circumstances than those presented here that would more strongly constitute reasonable suspicion that the operator of a vehicle was intoxicated. The defendant, at a little after 2:00 a.m., the time when most bars close, was passed out in his car, the engine running, the transmission in drive and the car was stopped next to the speaker of a fast food drive-in window. These facts were sufficient, in and of themselves, to justify the detention of the defendant for further investigation. Even if the defendant were not intoxicated, that behavior was sufficient to cause the officers to do exactly what they did to assure the safety of themselves, others out at that hour and the defendant himself. Whether passed out from exhaustion, a medical condition of being drunk or high, the defendant posed a threat to others because he was unconscious behind the wheel of a car whose engine was running and which was in gear. His reaction to being awoken could very easily have sent the vehicle in motion, endangering the defendant and others. It goes without saying that being unconscious while in control of the movement of a motor vehicle presents a danger police officers must investigate and try to alleviate.

After the officer was able, after four or five attempts, to awaken the defendant, he observed blood shot eyes and noted that the defendant seemed confused and was slow to react to simple questions and commands. At this point, what had been reasonable suspicion warranting an investigation, ripened into probable cause permitting the arrest of the defendant for operating his vehicle while under the influence of alcohol or a controlled substance. The detention of the defendant was supported by reasonable suspicion and his arrest was supported by probable cause. The Court correctly denied that part of the Motion to Suppress that claimed otherwise.

The defendant also challenged the search of the glove box. The inventory search of a vehicle is permissible of the vehicle has been lawfully impounded and the police acted in accordance with standard policy or routinely securing and inventorying the contents of an impounded vehicle. *Commonwealth v. Lagenella*, 83 A. 3d 94 (Pa. 2013). The vehicle was lawfully impounded. The vehicle was blocking the drive thru lane of a commercial establishment. It could not have been secured and left there.

Moreover, this search was conducted pursuant to the standard practice of the Munhall Police Department requiring the search of vehicles to be impounded. NT 14. That policy calls for the search to be conducted at the site of the seizure and includes the search of locked areas. NT 14-15. Accordingly, the denial of the motion to suppress based on the search of the glove compartment was properly denied.

The defendant also claims that the evidence was not sufficient to support the VUFA charge. There was no dispute at trial that the defendant did not have a permit to carry a concealed weapon. Nor was there any dispute that the weapon was found in the locked glove box of the car and that the defendant was in sole possession of the car and the key that opened that glove box. The question, then, becomes whether these facts were sufficient to establish, beyond a reasonable doubt, that the defendant constructively possessed the firearm. This Court is satisfied that these facts did so.

Illegal possession of a firearm may be shown by constructive possession. *Commonwealth v. Parker*, 847 A.2d 745, 750 (Pa.Super.2004). Constructive possession is present when a defendant has conscious dominion over the contraband. Conscious dominion is present when the defendant has the power to control the item of contraband and the intent to exercise that control. Constructive possession may be established by circumstantial evidence and must be evaluated by examining the totality of the circumstances. *Commonwealth v. Thompson*, 779 A.2d 1195, 1199 (Pa.Super.2001), *appeal denied*, 567 Pa. 760, 790 A.2d 1016 (2001).

The defendant was the only person in the vehicle. He had sole possession of that vehicle. He had possession of the key to the glove compartment where the gun was located. These facts were certainly sufficient to establish his ability to control the firearm. When first asked for the key to open the glove box, he hesitated, asking to know why the officer wanted to look in the glove box. As the only person with a key, the defendant was the only person with the ability to lock the glove box. His hesitation in turning over the key, which he knew would lead to the discovery of the weapon, was circumstantial evidence that was aware of the gun's presence in the glove box. Together with all of the other circumstances described above, this fact was sufficient to support the conclusion this Court reached that the defendant had control over the weapon and the intent to exercise that control.

For these reasons, the judgement of sentence should be affirmed.

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

Date: February 23, 2018

¹ NT refers to the Notes of Testimony from the June 28, 2017 Hearing/Non-Jury Trial.

² Officer Cheep said that he did not have the defendant perform field sobriety test because he did not think he capable of doing so. NT

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Lailha Maben, a Minor, by Leigha Maben, her parent and natural guardian, and Leigha Maben, individually v. Magee Women's Hospital of UPMC, a Pennsylvania corporation; University of Pittsburgh Physicians, a Pennsylvania corporation; and Christina M. Scifres, M.D., Wettick, Jr., J.Page 145
Deposition—Credibility—Medical Professionals

Case based on allegations that delayed c-section caused newborn baby to suffer quadriplegia and cerebral palsy. Motion to Reconvene Deposition of Obstetrical Nurse who was in charge of monitoring fetal heart rate strip granted even though deponent nurse testified she could not remember the incident in question. Court found nurse's testimony that if she reviewed the strip at the time of the deposition it would not assist her in describing the treatment she provided at the time prior to the birth was not credible. Also, evidence showed nurse changed mother's chart after delivery and nurse has no credible basis why she cannot review the chart and explain what caused her to make the changes.

William J. Skelly, Margaret Skelly, and Leonard Mandichak v. Franjo Construction Corporation, Loyalhanna Health Care Associates d/b/a Loyalhanna Care Center and Quest Healthcare Development, Inc., O'Reilly, J.Page 147
Preliminary Objections—Licensed Professionals—Statute of Limitations

Preliminary Objection to professional negligence claim based on lack of allegation that defendants hold a professional license overruled as Pa.R.Civ.P. 1042.2 only recommends (but does not require) that a complaint contain a reference to licensed professionals. Preliminary Objection based on failure to file within the 30-day period as set forth in Pa.R.Civ.P. 401(a) also overruled where Plaintiff made a good faith attempt to serve Defendants within the statutory time period by using addresses registered with the PA Department of State within the 30-day period.

Leonard Rosenberg and Adam Rosenberg v. Pittsburgh Water and Sewer Authority, Friedman, J.Page 147
Recusal—Transcript

Transcript of hearing on statutory appeal of Water Exoneration Hearing Board necessary to rule on Motion for Post-Trial Relief and Motion to Vacate. Owner of real estate subject to water bills must pay for transcript. Appellants' demand for recusal based on allegation that presiding judge's husband and sons had a water bill dispute in 2010 denied where presiding judge does not recall dispute, had no interest in the dispute and where the alleged dispute, if anything, would appear to bias the judge in favor of appellants.

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Wages—Liquidated Damages—Employment

In case alleging nonpayment of wages in violation of the Pennsylvania Wage Payment and Collection Law (43 P.S. §260.1 et seq.), the Court held that plaintiff was entitled to liquidated damages under 43 P.S. §260.10 based upon the (greater) total amount owed at the time plaintiff filed suit, not the (lesser) amount owed at the time of trial. The Court also held that defendant did not have a good faith basis to withhold the wages in question.

PLJ

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OPINIONS

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No. GD-15-003793. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Wettick, Jr., J.—December 12, 2016.

OPINION AND ORDER OF COURT

Plaintiffs' Motion to Reconvene Depositions of Emily Getty, RN and Motion for Sanctions is the subject of this Opinion and Order of Court.

This case is based on allegations that defendants delayed performing a C-section for close to seven hours, which caused the newly-born baby to suffer spastic quadriplegia and cerebral palsy.

On May 23, 2013, the mother—38 weeks into her pregnancy—arrived at Magee Women's Hospital Emergency Department at 6:00 pm.

At 6:55 pm, the mother was placed on an electric Fetal Heart Rate ("FHR") monitor. Per Magee Hospital Policy CM801 H: "The goal of FHR monitoring is to detect signs that may indicate abnormal fetal oxygenation, therefore providing a potential opportunity for timely intervention."

Magee Hospital Policy CM801H also states:

Any *Category II* FHR tracing with *no reassuring characteristics* must be reported to a healthcare provider immediately (emphasis in original).¹

Hospital Policy CM802H describes "reassuring characteristics" as:

Reassuring signs of fetal well-being include, but are not limited to, the *presence of FHR accelerations* and/or *moderate FHR baseline variability* (emphasis in original).

At 7:30 pm, the deponent, Emily Getty, RN, became the obstetrical nurse responsible for monitoring the strip. As part of her job, Nurse Getty was required to continuously review the strip, document her findings every half hour, and notify a physician if the strip became concerning.

From 7:30 pm through 9:30 pm, Nurse Getty documented every half hour that the strip was Category II, had no accelerations, and only minimal variability.

At 10:00 pm, Nurse Getty documented that the strip had "moderate" variability with "accelerations present." At 10:35 pm, Nurse Getty documented that the strip again had "moderate" variability.

From 10:35 pm through the delivery, Nurse Getty again documented that the strip was Category II, had no accelerations, and only minimal variability.

In her deposition, Nurse Getty testified that the accelerations and moderate variability at 10:00 pm and the moderate variability found at 10:35 pm (i.e., the reassuring characteristics) were what nullified her obligation to notify a physician.

At 12:13 am, the mother was taken to the operating room, and the baby was delivered via C-section at 12:42 am. Upon delivery, the baby was in respiratory distress and had no color, as documented by Nurse Getty. The baby was immediately transferred to the Neonatal Intensive Care Unit. Close to 3:30 am, because the baby's condition continued to deteriorate, arrangements began being made to transfer the baby to Children's Hospital.

An audit trail obtained in discovery revealed that at 3:48 am—more than three hours after the delivery and after it was clear that the baby's condition was serious—Nurse Getty went back into the mother's electronic chart and made the following changes to her 10:00 pm note:

She deleted:

Accelerations **absent**
Periodic decelerations
Minimal variability

She changed to:

Accelerations **present**
No decelerations
Moderate variability

The audit trail also revealed that Nurse Getty went back into the chart at 3:49 am and added the 10:35 pm note that the strip had "moderate variability." In other words, the two positive or reassuring portions of the strip documented at 10:00 pm and 10:35 pm were made hours after she knew of the bad outcome.

At her deposition, Nurse Getty was asked about the care plaintiffs received based on her review of the continuous strip. Nurse Getty initially testified that she had no recollection of the incident and that even if she reviewed the continuous strip (which did not happen because her counsel instructed her not to do so), she would have no recollection of the day in question because of the passage of time and because this is one of hundreds of deliveries in which Nurse Getty provided care.

Through the Motion that is the subject of this Opinion and Order of Court, plaintiffs seek a court order requiring Nurse Getty to appear for a reconvened deposition at which she will answer questions about what occurred following her review of the FHR strip.

Defendants contend that this discovery dispute is governed by *McLane v. Valley Medical Facilities, Inc.*, 157 PLJ 252 (C.P. Allegheny Cnty., 2009). According to defendants, I ruled in *McLane* that a person providing medical care (a cytotechnologist in that case) cannot be compelled to offer testimony of the care that was provided if he or she cannot recall the incident. According to

defendants, in *McLane*, I established an absolute rule. If the medical witness says that “I cannot remember the incident and a review of PAP smear slides/strips and the like will not cause me to remember the day in question,” the witness cannot be asked to review the PAP smear slides/strips and the like.

This is a complete misreading of the *McLane* case. *McLane* dealt with a fact situation in which it was not possible to place the witness in the same setting that the witness occupied at the time the treatment was provided. The rulings in *McLane* were limited to a witness who, if shown the PAP smears, can only testify as to what she sees at this time under very different circumstances, namely that the witness now knows that the patient was diagnosed with cancer.

As I stated in *McLane*, the purpose of discovery is to obtain evidence that has a bearing on what occurred in the past. The controlling issue is not whether the witness can remember the incident; it is whether the witness can describe the treatment that was provided by looking at the strip.

In *Lattaker v. Magee Women's Hospital UPMC*, No. GD-13-021120 (Document 30, Allegheny Cnty., 2016), the treating physician never testified that he remembered the incident. He testified that if he looked at the fetal monitoring strip, he would be able to testify minute-by-minute as to what he did, when he did it, and why he did it strictly by reviewing the fetal monitor strip. Counsel for the defendant, citing *McLane*, objected and instructed the witness not to answer. I ruled that the objection was frivolous. Nothing in my Opinion in *McLane*, in any way, suggests that *McLane*, bars questions directed to the treating physician regarding the care that he or she was providing when the treating physician has testified that he can answer these questions if shown the fetal monitor strip. *McLane* is limited to the situation in which the cytotechnologist can testify only as to what she currently observes, now knowing that the patient had developed cancer.

The present case is governed by *Lattaker* because I do not find to be credible Nurse Getty's testimony that if she reviewed the strip at the time of her deposition, this review will not assist her in describing the treatment she provided at the time prior to the child's birth. Getty Dep. 5:6-19, Aug. 26, 2016. But Nurse Getty also testified that:

Q. It would be unreasonable for you to remember what the strips showed back in May 2013, right?

A. Yes.

Q. But in order to do your job as an obstetrical nurse, you need to have a repeatable method of determining what the characteristics of a fetal heart monitor strip are, correct.

A. Yes.

Q. For example, you know what a deceleration is, what an acceleration is, we talked about. There are definitions that give you a hard, objective, black-and-white idea of what's an acceleration, what's a deceleration, right?

A. Yes.

Q. And in May [2013], you told me you were using the same definitions or criteria that you've just talked about on reviewing a fetal heart monitor strip, right?

A. Yes.

Q. And is your method for reviewing strips the same today as it was in May of 2013?

A. Yes.

Q. I mean, has it changed at all?

A. I mean, no, not to my knowledge.

Q. Do you feel you were less qualified in May 2013 to review strips than you are today?

A. No.

Q. In comparing your methods, technology, training and abilities to characterize a fetal heart monitor strip from May 2013 to today, has anything really changed?

A. No.

Getty Dep. 224:11-225:18, Aug. 26, 2016.

Furthermore, in the present case, several hours after delivery, Nurse Getty made material changes to the mother's chart. During her deposition, she was asked why she changed the entries. She stated: "...obviously, I went back and looked at the tracing and didn't agree with what was charted." Getty Dep. 289: 10-11. She has not offered any credible testimony as to why today she cannot review the chart and explain what information in the records caused her to make the changes.

In summary, the question to be answered is whether Nurse Getty, if shown the FHR strip, should be able to answer questions regarding the treatment that was provided to plaintiffs prior to delivery. For the reasons set forth above, I find that she should be able to do so.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 12th day of December, 2016, it is hereby ORDERED that Plaintiffs' Motion to Reconvene Deposition of Emily Getty, RN, and Motion for Sanctions is granted. Counsel for defendants shall produce Emily Getty, RN for her reconvened deposition within twenty (20) days. During the deposition, plaintiffs are permitted to show Nurse Getty the FHR strip and ask questions accordingly to which Nurse Getty must respond. Costs of the reconvened deposition shall be paid by counsel for defendants.

BY THE COURT:
/s/Wettick, Jr., J.

¹ That is because a strip showing only "minimal" variability with no accelerations is reflective of a fetus that is not getting sufficient oxygen. A healthy strip has "moderate" or "marked" variability along with accelerations (you want to see variability and accelerations). Those are "reassuring" characteristics reflecting a fetus getting sufficient oxygen.

**William J. Skelly, Margaret Skelly, and Leonard Mandichak v.
Franjo Construction Corporation, Loyalhanna Health Care Associates
d/b/a Loyalhanna Care Center and Quest Healthcare Development, Inc.**

Preliminary Objections—Licensed Professionals—Statute of Limitations

Preliminary Objection to professional negligence claim based on lack of allegation that defendants hold a professional license overruled as Pa.R.Civ.P. 1042.2 only recommends (but does not require) that a complaint contain a reference to licensed professionals. Preliminary Objection based on failure to file within the 30-day period as set forth in Pa.R.Civ.P. 401(a) also overruled where Plaintiff made a good faith attempt to serve Defendants within the statutory time period by using addresses registered with the PA Department of State within the 30-day period.

No. GD-16-005988. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, J.—April 11, 2017.

MEMORANDUM ORDER

This case involves a civil action claim filed by Plaintiffs William J. Skelly, Margaret Skelly and Leonard Mandichak against Defendants Franjo Construction Corporation, Loyalhanna Health Care Associates d/b/a Loyalhanna Care Center and Quest Healthcare Development, Inc. over an alleged construction accident that occurred on April 22, 2014. On that date, contractors were constructing the Loyalhanna Continuing Care Campus at 535 McFarland Road, Latrobe, Westmoreland County, Pennsylvania. Plaintiffs Skelly and Mandichak were installing concrete planks when the steel beam upon which they were standing swayed causing both men to fall off the structure and sustain injuries.

In their Complaint, Plaintiffs allege that Defendants were jointly responsible for inspection, maintenance, supervision, upkeep, repairs, work site safety, and overall safety of the job site. They further allege that Defendants knew or should have known of the dangerous condition that existed at the premises. As a result, the Plaintiffs allege that they have sustained damages.

Plaintiffs alleged five counts in their Complaint including negligence, professional negligence and loss of consortium. Defendants Loyalhanna and Quest (hereinafter “Defendants”) filed Preliminary Objections to Plaintiffs’ Complaint seeking dismissal of Counts two, four and five on the grounds that they are legally insufficient. Specifically, they claim that the Plaintiffs failed to establish that either Defendant holds a professional license in engineering or architecture. Defendants also claim that Plaintiffs did not file within the statutory limitation period. Finally, they allege that Plaintiffs’ claims fail to conform with Pa.R.C.P. No. 1029(a) and (b).

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Haun v. Community Health Systems, Inc.*, 14 A.3d 120, 123 (Pa. Super. 2011).

Count four of Plaintiffs’ Complaint states a claim for professional negligence. Defendants claim that because there is no allegation that either Defendant holds a professional license in engineering or architecture, that claim is insufficient. However, Pa. Rule of Procedure 1042.2 states that “[i]t is recommended” (but not required) “that the complaint” contains a reference that they are “licensed professionals”. There was clearly a professional relationship between the parties and therefore the Defendants’ preliminary objection is overruled.

Defendants also allege that Plaintiffs’ claims are legally insufficient because they failed to file within the statutory limitation period. Specifically, they contend that they were not provided notice of the suit within 30 days of the filing of Plaintiffs’ Complaint as required by Pa.R.C.P. No. 401(a). However, the evidence shows that Plaintiffs made a good faith attempt to serve Defendants within the statute of limitations. They used the addresses registered with the Pennsylvania Department of State on or about April 21 and April 29, 2016, well within the 30 day period provided by Rule 401 (a). Therefore, Defendants’ preliminary objection is overruled. Further, much of these preliminary objections raise issues without the benefit of discovery. At this stage, Plaintiffs’ averments are treated as true. After discovery, Defendants may deem it appropriate to seek summary judgment on some of these same issues.

Therefore, Defendants’ preliminary objections are overruled. Defendants to answer in 30 days.

It is also ordered that my August 30th, 2016 Order of Court is amended to strike Count IV instead of Count III as Count III pertains to another Defendant.

BY THE COURT:
/s/O'Reilly, J.

Date: April 11, 2017

**Leonard Rosenberg and Adam Rosenberg v.
Pittsburgh Water and Sewer Authority**

Recusal—Transcript

Transcript of hearing on statutory appeal of Water Exoneration Hearing Board necessary to rule on Motion for Post-Trial Relief and Motion to Vacate. Owner of real estate subject to water bills must pay for transcript. Appellants’ demand for recusal based on allegation that presiding judge’s husband and sons had a water bill dispute in 2010 denied where presiding judge does not recall dispute, had no interest in the dispute and where the alleged dispute, if anything, would appear to bias the judge in favor of appellants.

No. SA-16-000758. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—March 30, 2017.

OPINION

Appellant Adam Rosenberg has filed two separate appeals of two different orders on his own behalf and on behalf of his father, Leonard Rosenberg. Both appeals were filed on the same date, March 6, 2017, and we were unable to ascertain which appellate docket number refers to which order. One notice of appeal relates to our order entered on February 8, 2017, after completion of a non-jury trial that was in the nature of a *de novo* hearing (implicitly ordered by the Hon. R. Stanton Wettick, formerly of this court, who scheduled the non-jury trial) on the Appellants' statutory appeal of a decision by the Water Exoneration Hearing Board. The other notice relates to our later order of February 22, 2017, which ordered that Appellants (1) order a transcript of the proceedings for which Leonard Rosenberg was to pay the cost, and (2) file a copy of the power of attorney pursuant to which Adam Rosenberg claimed to be acting for Leonard Rosenberg in this matter. We also declined to recuse.

Appellants have filed a direct appeal from our February 8, 2017 order even though their post-trial motion was pending. We are unsure which is appropriate here. In either case, however, the transcript is essential and must be paid for by Leonard Rosenberg who is the owner of the real estate that is subject to the water bills. Leonard Rosenberg has never asked for nor been granted *in forma pauperis* status. The presumption is that he has sufficient assets to pay for the transcripts and, frankly, for the other costs of the matter which were not charged because of the misleading IFP petition filed by his son, Adam.¹ Adam Rosenberg, who was granted IFP status, is not an owner and has only acted for his father, allegedly pursuant to a power of attorney.

We need the transcript called for by our order of February 22, 2016, so that we can give a meaningful review of two motions, a Motion for Post-Trial Relief and a Motion to Vacate, both filed on February 16, 2017, by Appellant Adam Rosenberg, again on his own behalf and on behalf of his father. Superior Court will also need the transcript for their review. As a practical matter, this is the most important issue, assuming that Adam Rosenberg does actually have the power of attorney he claimed to have; it has not yet been filed as far as we can tell.

The demand for our recusal was made only after the order of February 8, 2017 was entered; it was untimely and is without any valid basis.

The only basis for the demand that I recuse is the contention that I should have been aware of a dispute regarding an excessive water bill disputed in 2010 by my husband and my sons on rental real estate they own jointly and in which I have no interest and no involvement. That dispute with the PWSA allegedly created a conflict of interest and required me to recuse from the instant matter or, at a minimum, required me to let Appellants know of the dispute.

I now have a dim recollection of hearing about a ridiculously high water bill for some rental property, but it occurred so long ago, in 2010, that I was certainly not aware of it more than six years later, when the instant trial began nor at any time prior to reading Appellants' motions. I still fail to see how this matter can give the appearance that I was prejudiced *against* Appellants. If anything, it might be seen to have biased me *in favor* of them. Since I had no recall of something that I ever barely knew about and had long since forgotten totally, the supposed conflict did not in fact exist at all. In other words, there was neither the appearance of an impropriety nor an actual impropriety.

I am sure that the transcript of the proceedings, once ordered, paid for and filed, will show that Appellants, and the PWSA, received fair and impartial treatment from me, that my rulings were proper and that my decision was well-supported by the evidence. My order of February 22, 2017 should be affirmed. If the order of February 8, 2017 is also considered at this time, that order should be affirmed as well, if only because of the Appellants' failure to timely order and pay for the transcript.

BY THE COURT:
/s/Friedman, J.

Date: March 30, 2017

¹ The name on the caption of the IFP Petition is Adam Leonard Rosenberg; later captions on other documents used two separate names, leading eventually to the undersigned entering an order directing the correct caption to be used thereafter.

Michael Yablonski v. Keevican Weiss Bauerle & Hirsch LLC

Wages—Liquidated Damages—Employment

In case alleging nonpayment of wages in violation of the Pennsylvania Wage Payment and Collection Law (43 P.S. §260.1 et seq.), the Court held that plaintiff was entitled to liquidated damages under 43 P.S. §260.10 based upon the (greater) total amount owed at the time plaintiff filed suit, not the (lesser) amount owed at the time of trial. The Court also held that defendant did not have a good faith basis to withhold the wages in question.

No. GD 16-19374. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—April 2, 2018.

OPINION

Plaintiff Michael Yablonski, an attorney with approximately twenty-six years of experience as a civil litigator, began working for Defendant Keevican Weiss Bauerle & Hirsch, LLC (“KWBH”) in June of 2013. A letter agreement between the parties states that Mr. Yablonski’s “compensation will be \$125,000.00 per year, which will be paid to you at the rate of \$10,416.66 per month, subject to normal withholding.” Trial Exhibit 1. In 2014 KWBH became late with Mr. Yablonski’s paychecks, did not pay employer withheld taxes until the end of the year and failed to provide him with an entire month of compensation. *See* transcript from Nonjury Trial, November 8, 2017 (“T.” hereafter), pp. 13-15 and Trial Exhibits 2 and 3. In 2015 KWBH also did not pay Mr. Yablonski’s withheld payroll taxes until the end of the year and failed to provide him the month’s pay of \$10,416.66 still owed from 2014. *See* T., pp. 16-17 and Trial Exhibits 4 and 5.

From January through May of 2016, KWBH paid Mr. Yablonski a total of \$31,000 without making payroll tax payments. *See* Trial Exhibit 6. KWBH paid no compensation to Mr. Yablonski during June, July and August of 2016, and on August 31, 2016 presented a letter agreement to Mr. Yablonski that proposed the elimination of his \$125,000 yearly salary. Effective September 1, 2016, Mr. Yablonski's compensation instead would consist of 50% of fees collected from work he performed for clients originating from him and 25% of the value of fees from work he performed for clients not originating from him. *See* Trial Exhibit 7¹. Sometime during the following week Mr. Yablonski met with partners Leo Keevican and James Bauerle to discuss the terms of any future employment with KWBH. When Mr. Yablonski asked what they were going to do about his back salary, Mr. Keevican said:

Oh, we owe you the money, and we're going to pay it. We just don't know when we'll be able to.

T, pp. 25-26. On September 13, 2016 Mr. Yablonski informed Mr. Keevican and Mr. Bauerle that he was ending his employment with KWBH. *See* Trial Exhibit 9.

On October 13, 2016 Mr. Yablonski commenced this proceeding by filing a complaint requesting \$65,249.91 of unpaid salary, interest, liquidated damages plus reasonable attorneys fees under the Pennsylvania Wage Payment and Collection Law (43 P.S. §260.1 *et seq.*). On December 6, 2017, in return for Mr. Yablonski's agreement to a thirty day extension for filing a response to the complaint, KWBH paid him additional compensation such that only four of the nine months of his salary he claimed was owed in the complaint remained due. *See* Trial Exhibit 10. The dispute was later submitted to me for resolution by way of a non-jury trial. My verdict was in favor of Mr. Yablonski for his unpaid salary from the four months of May, June, July and August of 2016, which amounts to \$41,666.64, plus liquidated damages of \$15,987.48 for a total of \$57,654.12.²

Both parties filed motions for post-trial relief. I denied KWBH's motion for post-trial relief, but I granted Mr. Yablonski's by adding \$4,637.62 in prejudgment interest to the verdict, increasing the total to \$62,291.74. I entered judgment on the verdict, and KWBH appealed to the Superior Court of Pennsylvania. KWBH filed a concise statement of errors complained of on appeal that specifies my alleged errors warranting correction by the Superior Court. This opinion will address each of my alleged errors identified in KWBH's concise statement of errors complained of on appeal. *See* Pennsylvania Rule of Appellate Procedure no. 1925(a).

KWBH first contends that I incorrectly determined the amount of liquidated damages. KWBH argues the liquidated damages should be twenty-five percent of the wages owed at the time of trial, not twenty-five percent of the wages owed when Mr. Yablonski filed suit. Pennsylvania's Wage Payment and Collection Law contains this provision, at 43 P.S. §260.10, entitled "Liquidated damages":

When wages remain unpaid for thirty days beyond the regularly scheduled payday, or, in the case where no regularly scheduled payday is applicable, for sixty days beyond the filing by the employee of a proper claim or for sixty days beyond the date of the agreement, award or other act making wages payable, or where shortages in the wage payments made exceed five percent (5%) of the gross wages payable on any two regularly scheduled paydays in the same calendar quarter, and no good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment, the employee shall be entitled to claim, in addition, as liquidated damages an amount equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars (\$500), whichever is greater.

Since it is undisputed Mr. Yablonski's wages remained unpaid "for thirty days beyond the regularly scheduled payday," the provision imposes liquidated damages of twenty-five percent "of the total amount of wages due...." I believe the plain meaning of the language of this legislation is to calculate liquidated damages utilizing the total wages due thirty days beyond the payday and not at the time of trial. In addition, the Superior Court of Pennsylvania interprets this provision as a penalty aimed at deterring an employer from withholding pay that is legitimately owed an employee. *See Andrews v. Cross Atlantic Capital Partners, Inc.*, 2017 PA Super 72, 158 A.3d 123 at 135-136. The deterrent effect will be weakened or eliminated if an employer is able to withhold legitimately owed pay and then reduce or avoid liquidated damages by paying the employee between the time suit is filed and the trial begins. Hence, calculating the liquidated damages owed Mr. Yablonski as twenty-five percent of the \$41,666.64 he was owed at trial, rather than the \$63,949.91 I determined he was owed thirty days after payday and when suit was filed, is inconsistent with this interpretation of the liquidated damages provision. Therefore, I correctly determined that the liquidated damages owed Mr. Yablonski are twenty-five percent of \$63,949.91³, or \$15,987.48.

KWBH next contends I made an error by awarding liquidated damages because it had a good faith dispute over Mr. Yablonski's wages. While Mr. Bauerle testified to withholding Mr. Yablonski's wages due to his poor performance and failure to report for work, this testimony was not credible. Mr. Yablonski's testimony that, during the September, 2016 meeting, Mr. Keevican acknowledged "we owe you the money" was credible. T., p. 25. KWBH did not cross examine Mr. Yablonski and produced no testimony rebutting this admission. The testimony about Mr. Yablonski's poor performance and failure to report for work were excuses provided after suit was filed in an effort to mask the real reason KWBH did not pay Mr. Yablonski. It did not have the money available to pay him. In any event, Mr. Yablonski provided credible testimony and documentary evidence that rebutted the poor performance claim, established he did all work KWBH assigned him and was not prohibited from doing some work from home. *See* T., pp. 24, 59-68 and 83-89 and Trial Exhibits C and 12. Since my determination that KWBH had no good faith dispute over Mr. Yablonski's wages was based on credible evidence, my decision to award liquidated damages was correct.

KWBH's final contention is that my award of salary to Mr. Yablonski is erroneous because he failed to report for work. Mr. Yablonski, however, credibly testified that KWBH did not have enough work for him to do to keep him busy. *See* T., p. 24. In addition, Mr. Yablonski billed for similar time on the days KWBH says he failed to report for work as he did on some of the days KWBH says he reported to work. *See* Trial Exhibits C and 12.⁴ Hence, there is no proof that any failure to report to work by Mr. Yablonski impacted KWBH's revenue. KWBH also produced no written policy prohibiting work from home and no testimony that it informed Mr. Yablonski he could not do so. Mr. Yablonski was an "at will" employee (*See* Trial Exhibit 1), hence KWBH could have terminated his employment at any time. However, it did not do so until August 31, 2016, and efforts at trial to show Mr. Yablonski constructively terminated his employment earlier were not credible. Since it is clear that Mr. Yablonski's employment with KWBH was unaffected by any work he performed from home and did not end until September 1, 2016, my award to him of salary to that date was correct.

BY THE COURT:
/s/Hertzberg, J.

¹ For clients originating from Mr. Yablonski with fees collected from work performed by individuals other than Mr. Yablonski, he also would receive 25%.

² My non-jury verdict explanation permitted Mr. Yablonski to file a petition for counsel fees within 30 days that included “authority and/or argument on the propriety of the award when the plaintiff is a self-represented litigant.” Mr. Yablonski did not file any petition for counsel fees thereafter.

³ In his complaint Mr. Yablonski claimed wages of \$65,249.91, but, because he failed to explain a \$1,300 medical plan reimbursement claim at the trial, I reduced his claim to \$63,949.91 thirty days after payday.

⁴ KWBH incorrectly recorded 6/7/16 as paid time off on Exhibit C, because Exhibit 12 demonstrates Mr. Yablonski was flying back from a bankruptcy court appearance in Denver on that day. On July 27 and 29 and August 9, 10, 16, 19, 22, 23, 24, 25, 26 and 30 when Exhibit C indicates he did not report for work, his billings under Exhibit 12 are similar to February 11, May 17, 18, June 14, 17, 22, 29 and 30, July 7, 18, 19, 20 and 21 and August 31 when Exhibit C indicates he did report to work.

PITTSBURGH LEGAL JOURNAL

OPINIONS

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PLJ

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OPINIONS

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**Jeffrey Anderson; Cynthia Anderson, Ind.
and on behalf of Abaigeal Anderson, a minor v.
Port Authority of Allegheny County**

Car Accident—Personal Injury—Property Damage

Court determined at trial that Port Authority's bus driver was negligent and caused accident where point of impact was the plaintiff's front passenger door. Also ruled that Plaintiff husband could recover on a property damage claim as owner of the car even though he was not at trial due to work conflicts.

No. AR-15-002393. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, J.—June 13, 2017.

MEMORANDUM ORDER

The matter involves a collision between a Port Authority Bus and a motorist near the intersection of Fifth Avenue and Bellefield Avenue in the Oakland section of Pittsburgh.

Plaintiff, Cynthia Anderson was operating her automobile on December 16, 2014 with her daughter Abaigeal Anderson, a minor, as her passenger. As she turned left at the intersection and onto Fifth Avenue, with a green light in her direction of travel, there was a collision with Port Authority bus, turning right at the same intersection but opposite to Cynthia. The collision occurred between the two vehicles and the point of impact was at the Front passenger door where Abaigeal was sitting, with the left front bumper of the bus. The bus was a 60 foot long articulated bus being driven by Port Authority employee Maurice Barrow.

The vehicle driven by Cynthia was registered to her husband, Jeffrey Anderson who was unable to attend the trial due to work requirements in Ohio. Cynthia testified that she suffered personal injuries as a result of the collision and was first treated at Med Express for neck and shoulder strain and sprain. She went to Med Express 4 times and then sought chiropractic treatment for her neck and shoulder injuries. She had 7 such treatments. She also testified as to pain and physical limitations during the relevant period.

The Port Authority did not contest her injury but asserted the collision was her fault and that she ran into the bus. It also mounted a Counterclaim but no evidence in support therefore was offered.

On review and analysis of the Facts I find the driver of the 60 foot Port Authority bus was negligent in operating the bus because of the point of impact on the Plaintiff's vehicle. The driver asserts that Cynthia Anderson, Plaintiff ran into the bus. The point of impact was on the passenger side door where the left front bumper of the bus hit the car. At the time the driver was pulling into the intersection making a right turn. Due to the size of the bus, he was focusing on the right side of the bus so that he did not turn this 60 foot bus too sharply and collide with utility poles and the traffic light at the corner. Thus I believe he went a little too wide and hit Plaintiff's vehicle in the side with the front of the bus. Further his diagram of the accident on his report belies the actual fact of the point of impact.

As to the property damage claim, I am not persuaded that the registered owner of the damaged vehicle cannot recover because he was not in Court and was working out of state. His wife, the injured Plaintiff, Cynthia Anderson was the driver of the vehicle and she was in Court and testified to the damage and the repair. She offered 2 estimates to repair the vehicle of \$2,400 each but her husband affected the repair himself with a right front door purchased from a salvage yard which he installed himself. I find the value of that door to be \$500 and his installation to be worth \$280. Thus I enter a verdict of \$780 for Jeffrey Anderson. Counsel for Plaintiff's referral to *Tonucci v. Beegal*, 145 A.2d 885 (Pa Super 1958) and *Shappell v. Kubert*, 858 A.2d 1244 (Pa Super 2004) is well taken and that is the basis on which I render that verdict.

As to Cynthia, I find for her and enter a verdict in her favor and against the Port Authority in the amount of \$7,000. A completed verdict form is attached.

I make no finding as to Abaigeal who survived the collision unscathed even though the collision was next to her.
The Counterclaim of Port Authority is DISMISSED.

BY THE COURT:
/s/O'Reilly, J.

June 13, 2017

NON-JURY VERDICT

AND NOW, to-wit, this 13th day of June, 2017, I find for Plaintiffs and against Defendants as follows:

For Jeffrey Anderson the sum of \$780.
For Cynthia Anderson the sum of \$7,000.
Memorandum Order attached.

BY THE COURT:
/s/O'Reilly, J.

NON-JURY VERDICT ON COUNTERCLAIM

AND NOW, to-wit, this 13th day of June, 2017, I find for Plaintiff/counter Defendant and against Defendant, counter Plaintiff, counterclaim DISMISSED.

Memorandum Order attached.

BY THE COURT:
/s/O'Reilly, J.

**County of Allegheny Office of Treasurer v.
Erma S. Dodd, Fort Pitt Motel**

Tax—Exemption

Sufficient evidence that a contract to rent motel rooms for at least one year existed and therefore the permanent resident exemption applies.

No. SA-15-000645. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, J.—September 21, 2017.

OPINION

This matter involves a claim by the Appellee Allegheny County Treasurer's Office against Appellant Erma Dodd, owner of the Fort Pitt Motel. By way of history, this matter was initially heard in April 2015 in front of Hearing Officer Philip J. Murray, III, Esquire. Hearing Officer Murray upheld the decision of the Allegheny County Treasurer's Office which imposed tax, penalty and interest upon the Fort Pitt Motel, finding that Ms. Dodd owed \$336,786.33. Ms. Dodd appealed and the matter came before me. I reversed Hearing Office Murray's decision and remanded the matter to the Controller's Office and/or the Treasurer's office. I ordered the parties to conduct an engagement to determine the correct amount owed. Pursuant to my Order, Lauren Myers, a representative of the Controller's Office, spent approximately one month reviewing Ms. Dodd's records. Although difficult, due to Ms. Dodd's inconsistent reporting, the Controller's Office performed a 100% review of the provided records. The Controller's Office determined that as of May 17, 2017, Ms. Dodd owed a total of \$48,270.14 with penalty and interest in hotel tax for the period of April 1, 2011 to September 30, 2014. Ms. Dodd appealed that determination claiming that she is entitled to more exemptions than the County has recognized.

I heard this case non-jury on May 17th and May 25th 2017. A Transcript was made and is numbered consecutively covering both days. During trial, Ms. Dodd argued that she is entitled to the Permanent Resident Exemption. Specifically, she claims that a Texas company, Equipment Transport, agreed to rent 12 rooms for a year and to pay even if the rooms sat empty. Ms. Dodd testified that Equipment Transport "agreed that they would need the rooms for a year, and it could have been longer." Transcript p. 178. They also paid her \$270,000 for the rooms.

The Treasurer claims that after its audit, it determined that Ms. Dodd owed the amount of \$31,725.78 and after adding penalty of \$1,586.30 and interest of \$14,958.06 the gross claim against Ms. Dodd is \$48,270.14. This claim is for the period April 1, 2011 through September 30, 2014. Transcript page 38, 39 and Exhibits 1, 2 and 3.

Michael Mohring, Special Tax Division Manager for the Treasurer's office gave his view and of how the exemption worked. He testified that a hotel guest would be subject to a 7% County tax through 29 days, but become exempt on the 30th day as a resident of the hotel, as long as all 30 days were consecutive. He further explained that the 30 days are considered consecutive as long as there were no breaks in payment. Transcript p. 49. Ms. Myers from the Controller's Office also testified that payment of rent was required for the exemption to apply. Transcript p. 105. Bethany Neal, also from the Controller's Office, explained that the regulations permitted an oral contract to rent rooms although her office has never been given an *oral contract*. She also testified that the guest did not need to physically be present in the room as long as they had the right to occupy it. Transcript 162-164. Ms. Dodd testified that she committed to hold rooms for Equipment Transport and they paid for them. She stated that they paid \$270,000 over 15 months. Transcript p. 190. She also explained that the rooms were Equipment Transport's and they agreed that they'd need them for at least a year. Theresa Harrington, who helps run the Fort Pitt Motel, testified that there were times when they had to ask guests to leave a room if Equipment Transport needed it. Transcript p. 272. Finally, Jeffrey Kendall, a former supervisor for Equipment Transport, testified in a deposition that he used the Fort Pitt Motel when he needed rooms for out of town employees. He explained that he told the Fort Pitt Hotel that he would need the rooms for at least a year. Mr. Kendall added that he "committed to purchasing all those rooms for a whole year so I didn't have to move drivers from – you know-, from one motel to another." Deposition p. 9. He stated that he felt that he had control of the rooms in case he needed them.

The Allegheny County Code, Article 1, Section 475-8 provides for certain exemptions for governmental employees or non-transient guests. A permanent resident is defined as: "A person who has occupied or has the right of occupancy of any room or rooms in a hotel as a patron or otherwise for a period exceeding 30 days". It also provides that "a 'rental period' for the purposes of these regulations is 'a period of time during which, under and subject to the terms of the *legally enforceable contract*, an occupant has a continuous right to occupy a room or rooms in a hotel and is legally bound to pay rent therefore." It further states that "the occupancy or right of occupancy must be for thirty consecutive days..." Ms. Dodd alleges that Equipment Transport had a contractual right to the rooms and a contractual obligation to pay for them. There were no breaks in occupancy and therefore the exemption should have applied from day one. The Treasurer's Office, however, argues that there was no legally enforceable contract between the Fort Pitt Motel and Equipment Transport. They assert that Equipment Transport was not legally bound to pay rent, except on a weekly basis and therefore the exemption does not apply as broadly as Dodd contends. However, the audit that the Treasurer conducted included, *inter alia*, the amount paid by Equipment Transport which is included in the figure on Treasurer's Exhibit 6. The Treasurer, applying its interpretation of the regulation, granted only an exemption of \$55,948.68, leaving a balance of \$214,082.90 upon which the tax was levied. **See Transcript at 326.**

As noted above, I disagree with the interpretation advanced by the Treasurer and believe that all of the money paid by Equipment Transport should be exempt. I find that the agreement between the Fort Pitt Motel and Equipment Transport was a legally enforceable contract. Although, the agreement was for an open-ended period of time there was money paid between the parties. Ms. Dodd presented sufficient evidence that a contract to rent the rooms for a period of at least one year existed and therefore the permanent resident exemption should be applied to all money paid by Equipment Transport. Consequently the full sum of \$270,031.58 should be deducted from the gross amount shown on Exhibit 6. That leaves a balance of zero and thus no tax, penalty or interest should be imposed for the period involved.

Therefore, I find that Ms. Dodd does not owe the County of Allegheny, Treasurer's Office any money for the period involved.

BY THE COURT:
/s/O'Reilly, J.

September 21, 2017

**Stephen Walker and Lori Walker, his wife v.
Alumisource Corporation and William W. Meyer & Sons, Inc.**

Products Liability—Assumption of the Risk—Industrial Accident

Plaintiff severely injured hand while servicing industrial machine. Court rejected assumption of the risk defense where a simple warning light on the machine would have avoided the accident.

No. GD-14-003159. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, J.—September 21, 2017.

MEMORANDUM ORDER

I heard the Motion for Summary Judgment filed by William W. Meyer & Sons, Inc. (MEYER) in this case on September 7, 2017. The case involves an industrial accident which happened on the premise of Alumisource Corporation which in its business used a certain rotary air lock manufactured by Meyers. The Plaintiff, while servicing the rotary air lock made by Meyer, suffered a severe injury to his hand when, believing the air lock to have been de-energized attempted to diagnose the problem and put his hand in the machine. It then started and mangled his hand.

At Argument, counsel for Meyer asserted an assumption of the risk in this products liability case. Counsel for Plaintiff argued effectively that the circumstance of use of the air lock, the noise in the work area, the dispute as to whether the power to the lock was on *and* the absence of any warning light on the tool to advise whether it was receiving power.

I find this last argument persuasive and indeed controlling. Given the circumstance of use and the noisy environment, a simple on/off glow light would have avoided this tragedy.

I will also observe that the arguments presented herein were from two veteran lawyers whose knowledge and proficiency were a pleasure to behold. Would that more other and younger lawyer had been in my Courtroom to observe two Masters at work.

The Motion for Summary Judgment is DENIED.

BY THE COURT:

/s/O'Reilly, J.

September 21, 2017

**Richard Seech v.
Gateway School District**

Same Sex Benefits—Due Process—Equal Protection

Court ruled defendant school district violated retired teacher's equal protection and due process rights by refusing to pay for spousal health insurance benefits for same sex partner even though plaintiff retired before Pennsylvania recognized a constitutional right for same sex couples to marry and the applicable CBA did not recognize benefit rights for same sex couples. Court ruled that classification based on sexual orientation in the CBA did not survive intermediate scrutiny and awarded economic and non-economic damages and well as equitable relief and attorney's fees awarded to Plaintiff.

No. GD 16-005672. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—November 30, 2017.

OPINION

I write this Opinion in support of my September 19, 2017 Orders of Court, which denied Defendant's Motion for Post-Trial Relief thus upholding my award of economic and non-economic losses to Plaintiff, and awarded Plaintiff equitable relief and attorney fees and costs. Defendant has appealed these decisions the Commonwealth Court of Pennsylvania. Plaintiff was employed as an Art Teacher for Defendant from September of 1979 until his retirement in June of 2013. From 1996 until his retirement, Plaintiff has been in a long-term, committed domestic partnership with another man. Plaintiff and his partner own a home together, share a bank account, are the beneficiaries on each other's life insurance policies and will, and even exchanged wedding vows and rings on a 2001 trip to Italy, each taking the other as husband. Defendant offers employees and their spouses health benefits, paid by Defendant, that continue into retirement. At the time of Plaintiff's retirement, he and his partner were legally unmarried as same sex partners were not able to wed in the state of Pennsylvania. Therefore, during Plaintiff's employment, his partner was not enrolled in the health insurance plan offered by Defendant. Approximately one year after Plaintiff's retirement on May 20, 2014, Pennsylvania recognized the constitutional right of same sex couples to marry in *Whitewood v. Wolf*, 992 F.Supp. 2d 410 (M.D.Pa. 2014). On June 4, 2014, Plaintiff married his long-term domestic partner. After their marriage, on two occasions, Plaintiff asked Defendant to pay for the health benefits of Plaintiff's spouse. Defendant refused and Plaintiff's union filed a grievance on his behalf and at Arbitration Plaintiff was awarded the right to spousal health insurance benefits for his partner. Plaintiff also initiated this action. After a non-jury trial, and a hearing on post-trial motions and a motion for attorney fees and costs I awarded Plaintiff \$50,000 for economic and non-economic losses, \$81,718.14 for attorney fees and costs, and \$3,365.65 for attorney fees and costs to litigate the fee petition. On October 3, 2017 Defendant appealed these awards to the Commonwealth Court of Pennsylvania. I ordered Defendant to file a Concise Statement of Errors Complained of on Appeal ("Concise Statement") and on October 17, 2017 Defendant timely filed a Concise Statement alleging 10 points of error. I will address these allegations in this Opinion.

Defendant contends I erred by ruling that Defendant discriminated against Plaintiff on the basis of sexual orientation in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Under Article XXXI of the 2008-2013 Professional Negotiation Agreement ("CBA") between the Gateway Board of School Directors and the Gateway Education Association, if an employee elected spousal health insurance benefits prior to retirement, Defendant would pay for both the employee's and the spouse's premiums after the employee's retirement. However, if spousal health insurance benefits were elected after retirement, then Defendant would not pay the spouse's premiums. The CBA did not recognize benefit rights for same sex spouses, domestic partnerships, or same sex spouses from marriages performed in states where same sex marriages were already

legally recognized. At the time the CBA was negotiated, Defendant's health insurance provider allowed school districts to offer health insurance benefits to same sex domestic partners. Although as evidenced by their 2001 commitment ceremony, Plaintiff wished to marry his partner prior to his retirement, which would have entitled him to spousal health insurance benefits, he was unable to do because of the state of Pennsylvania law prior to May 2014. The CBA effectively created two categories of employees: heterosexual employees who could enjoy spousal benefits simply by choosing to marry, and homosexual employees who had no way to enjoy spousal benefits because marriage between same sex parties was not yet legal in Pennsylvania. Classifications based on sexual orientation, such as in the CBA, are "quasi-suspect" and policies based on that classification are subject to intermediate scrutiny. *Whitewood v. Wolf*, 992 F.Supp. 2d 410, 430 (M.D. Pa. 2014). To survive intermediate scrutiny, a classification must be "substantially related to an important governmental objective..." and the justification for the classification must be "exceedingly persuasive." *Id.* At 430, *internal citations omitted*. It is also imperative that a link between the classification and the governmental objective be clearly established. *Id.* At 431. In its trial brief, Defendant offers no objective to be achieved by failing to provide for domestic partnership benefits or allowing for Plaintiff to secure spousal health benefits nunc pro tunc beyond arguing that even a heterosexual employee who is unmarried at the time of retirement would not be able to obtain spousal health benefits paid for by Defendant if the marriage occurs after retirement. Defendant fails to acknowledge the discriminatory classification inherent between heterosexual employees who had the legal ability to marry during their employment thus securing spousal benefits versus homosexual employees who did not have the legal ability to marry and thus had no way of obtaining spousal benefits at all. In fact, Robert Reger, assistant to the Superintendent testified that he could not say why spousal benefits were not provided to same-sex domestic partnerships. (transcript of May 15, 2017, non-jury trial, hereinafter "T.," pp. 17-18). The bald assertion that a policy is not discriminatory, coupled with testimony unable to support the basis for the policy does not survive intermediate scrutiny. Therefore, Defendant violated Plaintiff's Equal Protection and Due Process rights and I committed no error.

Defendant next contends I erred by ruling that Defendants infringed upon Plaintiff's fundamental rights of marriage in violation of the Pennsylvania Constitution Article I Section 26 and Article I Section 1. "The equal protection provisions of the Pennsylvania Constitution are analyzed under the same standards used by the United States Supreme Court when reviewing equal protections claims under the Fourteenth Amendment to the United States Constitution." *Muscarella v. Commonwealth*, 87 A.3d 966, 972 (Pa.Cmwlth. 2014). Therefore, as explained above, I committed no error in finding Defendant's treatment of Plaintiff to be discriminatory.

Next Defendant contends I erred by "considering issues beyond those submitted on stipulated facts." In deciding this case, I considered only the stipulated facts, testimony offered, and the argument presented in each party's trial brief. Unfortunately for Defendant, the stipulated facts when applied to the laws of the Commonwealth of Pennsylvania were sufficient to support a finding for Plaintiff. Defendant offers no specific facts or argument to support its allegation and I committed no error.

Defendant next contends that I erred by "considering issues beyond the scope and application of the 2008-2013 Collective Bargaining Agreement, where such issues were inflammatory and not relevant to the proceedings." Again, Defendant fails to make any specific allegations regarding what "issues" I considered that were beyond the scope of the CBA or how they "inflamed" myself. I limited my fact-finding on the basis of the facts and arguments made by the parties and committed no error.

Next Defendant argues that I erred in awarding \$38,654.52 in economic damages and that such damages were "excessive, beyond any actual losses claimed, and not supported by the credible evidence or testimony of record." I awarded economic damages based on Plaintiff's proposed formula of awarding "the cost of the health insurance premiums that Defendant would have paid had it been willing to pay for Seech's spousal health insurance benefits following his June 4, 2014 marriage to his same-sex spouse." (Plaintiff's trial brief, p. 28). I found this proposed formula to be fair and reasonable given that it is the exact amount to which Plaintiff would have been entitled to but for Defendant's discriminatory behavior. Further, Defendant neither offered objection to this formula nor proposed its own formula for calculating economic losses in the event that Plaintiff prevailed. When determining the value of lost benefits, an award must have a "basis in evidence." *Kelly v. Matlack, Inc.*, 903 F.2d 978, 985 (3rd Cir. 1990). At trial, Plaintiff presented uncontradicted evidence of the economic losses suffered as a result of Defendant's discriminatory behavior. (T. pp. 25-26, and Ex. 1). Therefore, my award of economic damages was supported by the evidence and I committed no error.

Defendant next contends that I erred by awarding Plaintiff \$11,345.48 in non-economic losses. Parties who have suffered a Constitutional violation may be awarded damages for non-economic losses in addition to monetary damages. *See Memphis Community v. School District v. Stachura*, 477 U.S. 299, 306-7 (1986). In discrimination cases, a Plaintiff's testimony of his embarrassment and humiliation is sufficient to support an award of non-economic damages. *Girard Finance Company v. The Pennsylvania Human Relations Commission*, 52 A.3d 523 (Pa.Cmwlth. 2012) *citing Bogle v. McClure*, 332 F.3d 1347, 1359 (11th Cir. 2003). Indeed, Plaintiff testified that he felt "devastated," and that Defendant's refusal to treat him equally felt "like a slap in the face." (T. p. 30). Therefore, my award of non-economic losses was supported by credible testimony and I committed no error.

Next, Defendant contends that I erred by granting Plaintiff's Motion for Equitable Relief and "ordering Defendant to provide spousal retiree health care benefits to Plaintiff, at Defendant's expense, as Defendant had already reinstated spousal retiree health benefits to Plaintiff." In Defendant's Response to Plaintiff's Motion, it argued that Plaintiff's Motion should be denied as moot, as Defendant reinstated Plaintiff's spousal health benefits as required by Court Order in a separate proceeding (docketed at GD 17-1109). Plaintiff notes, however, that Defendant appealed the Order requiring the reinstatement of spousal health benefits, thus leaving Plaintiff vulnerable in the event that Defendant is successful on appeal. "The key inquiry in determining whether a case is moot is whether the court or agency will be able to grant effective relief and whether the litigant has been deprived of the necessary stake in the outcome of the litigation." *Consol Pennsylvania Coal Co., LLC v. Dep't of Env'tl. Prot.*, 129 A.3d 28, 39 (Pa. Commw. Ct. 2015). By granting Plaintiff's Motion I was able to grant effective relief. The pendency of Defendant's appeal in the other proceeding deprived Plaintiff the certainty of the outcome of that litigation, therefore, the Motion was not moot and I committed no error by granting it.

Defendant next contends that I erred by awarding Plaintiff Attorney's Fees and Costs in the underlying case in the amount of \$74,013 in fees and \$7,705.14 in costs. A court has the authority to award attorney's fees to the prevailing party in a civil rights case. 42 U.S.C. §2000e-5(k). Absent special circumstances "reasonable" attorney's fees should be included in an award based on a violation of a Plaintiff's civil rights. *Newman v. Piggie Park Enterprises, Inc.* 390 U.S. 400, 400 (1968). When computing an award for attorney's fees, the "lodestar" method is presumed to produce a reasonable fee award. The "lodestar" method multiplies the number of hours reasonably spent on the litigation by a reasonable hourly fee. *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1035 (3rd Cir. 1996). A party requesting attorney's fees must present specific enough evidence of the

hours spent on litigation to allow the court to determine if the time spent is reasonable. Reasonable billing rates are determined by the “prevailing market rates in the community.” *Id.* At 1036-7. In this case, Plaintiff offered the affidavits of several attorneys in the local legal community to establish that they billed at a “reasonable rate.” Plaintiff also offered extensive detailed records of the legal work done on Plaintiff’s behalf. When determining an award for attorney’s fees, a court has the duty to “review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are ‘excessive, redundant, or otherwise unnecessary.’” *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). I closely reviewed the documents offered by Plaintiff, and indeed reduced Plaintiff’s request by \$1,650. When the requested attorney’s fees have been deemed reasonable by the Court, it is permissible for the attorney’s fees to exceed the award of damages. *See City of Riverside v. Rivera*, 477 U.S. 561 (1986). Finally, expenses associated with the prosecution of the case, such as travel time, telephone expenses, postage, etc, are recoverable. *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225-6 (3rd Cir. 1995). Plaintiff’s request for attorney’s fees and expenses was reasonable and I committed no error by awarding them.

Finally, Defendant contends that I erred by awarding Plaintiff attorney’s fees and expenses for the litigation of the fee petition and post-verdict motions in the amount of \$2,860 in fees and \$505.64 in expenses. In civil rights cases, attorney’s fees for time spent litigating a request for attorney’s fees, or “fees on fees,” is recoverable. *Hernandez v. Kalinowski*, 146 F.3d 196, 198-99 (3rd Cir. 1998). I evaluated Plaintiff’s request for “fees on fees” by the same standard as his request for attorney’s fees and found them to be reasonable. Therefore, I committed no error by awarding them.

BY THE COURT:
/s/Hertzberg, J.

**Christopher J. Parker, Jr. and Ali J. Parker v.
Anthony E. Surman, d/b/a A.J. Surman Construction, Inc.**

HICPA—UTPCPL—Individual Liability

Bathroom contractor held individually liable even though he was not a party to the remodeling contract under “participation theory” of liability. Contractor liable under HICPA for failing to include a registration number of the proposal. Contractor liable under the UTPCPL because his deceptive conduct created a likelihood of confusion.

No. AR 17-826. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—April 30, 2018.

OPINION

Plaintiffs Christopher Parker and Ali Parker purchased a home in Mt. Lebanon in July of 2016. Mr. and Mrs. Parker decided to have the only full bathroom in the home remodeled, and on October 4, 2016 Mr. Parker signed a two page proposal from AJ Surman Construction “together with” American Patriot Construction, Inc. to do the work for \$7,456. However, the proposal Mr. Parker signed is not valid because it lacks a contractor registration number and multiple other features specified by Pennsylvania’s Home Improvement Consumer Protection Act¹. 73 P.S. §§517.1 *et seq.* (“HICPA” hereafter).

Anthony Surman, who prepared the proposal, accepted a \$1,860 check from the Parkers after Mr. Parker signed the proposal and Anthony Surman also accepted their \$3,728 check when he began the work on Tuesday, October 11, 2016. The scope of work described in the proposal called for removal and replacement of the wall tile, floor tile, toilet, tub, towel bar, sink, faucets and vanity cabinet as well as two coats of paint. After only the first day of work on the bathroom, Mr. and Mrs. Parker arrived home from their jobs to find holes had been made in the wall of the hallway outside the bathroom. Mr. and Mrs. Parker next encountered a problem with the work not being completed within the three days promised by Mr. Surman. Each day, from October 13 until October 22, Mr. Surman would say that he just needed another hour or two to finish. Since the Parkers were not able to use the primary bathroom in their home, this was a major inconvenience.

On Saturday, October 22, after Mr. Surman and a helper finished working, Mrs. Parker went in the bathroom to investigate it for herself. She noticed something seriously wrong with the tile floor because it cracked when she walked on it and it clearly was not level. The Parkers were losing their patience. However, on October 24, Mr. Surman refused to do more work unless the Parkers paid him additional money. Mr. Surman also asserted that the price total had increased by \$389. With the proposal showing no additional money due until completion, Mr. and Mrs. Parker at first refused to pay any more money. But they could find no other contractor that could come quickly, hence on October 27 they paid an additional \$1,126.50 for Mr. Surman to come back and finish.²

Mr. Surman promised, both verbally and by electronic mail, that all of the bathroom work would be finished no later than Saturday, October 29. However, after finishing work on Saturday, October 29, once again, Mr. Surman said an hour or two more would be needed to finish. At this point, the Parkers asked Mr. Surman to return the key to their home and told him he was not permitted to do any more work in their home. The holes in the wall of the hallway had not been repaired, a marble windowsill in the bathroom that Mr. Surman broke had not been replaced, there were large holes in the bathroom wall from his unsuccessful effort to replace the towel bar, the top of the toilet tank was broken, the toilet was leaking, the tub was unstable, grout was missing from the floor tile and the previously functional light switch was no longer operable.

On October 31, 2016 Mr. Surman sent the Parkers an invoice with another additional charge of \$2,484. The Parkers paid nothing additional and filed a civil lawsuit for money damages against Anthony E. Surman d/b/a AS Surman Construction with their local magisterial district judge. Mr. Surman did not appear for the hearing with the magisterial judge, but timely appealed the decision to the compulsory arbitration section of this court. On March 2, 2017 the Parkers filed their complaint in this court against Anthony E. Surman d/b/a A. J. Surman Construction, Inc.³. The one hundred forty-eight paragraph detailed complaint includes counts alleging Mr. Surman violated HICPA and Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (see 73 P.S. §§201-1 *et seq.*, “UTPCPL” hereafter). After the arbitration panel awarded money damages to the Parkers, Mr. Surman appealed to obtain a new non-jury trial, and I conducted the trial on January 12, 2018. My verdict was in favor of the Parkers and against Mr. Surman in the amount of \$2,970.

Mr. Surman then filed a post-trial motion, which I denied. Mr. Surman then appealed to the Superior Court of Pennsylvania and filed a concise statement of matters complained of on appeal. This opinion addresses the errors Mr. Surman alleges I made in his concise statement of matters complained of on appeal. *See* Pennsylvania Rule of Appellate Procedure no. 1925(a). Mr. Surman alleges a single error in my verdict. Mr. Surman contends there was no basis for me to find him individually liable because there was no contract between him and the Parkers.

Mr. Surman is incorrect as the “participation theory” is the basis for his individual liability. *See Village at Camelback Property Owners Assn. Inc. v. Carr*, 371 Pa. Super. 452 at 460-463, 538 A.2d 528 at 532-533 (1988) *citing Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 470 A.2d 86 (1983). Assuming a valid contract between the Parkers and AJ Surman Construction together with American Patriot Construction, Inc., these entities do not shield Mr. Surman from liability for his personal participation in wrongful acts. Mrs. Parker credibly testified that Mr. Surman misrepresented the work would be completed in three days and falsely stated on multiple occasions over the course of two weeks, “I need one or two hours to finish, just give me another day....” Transcript of Non-Jury Trial, January 12, 2018 (“T.” hereafter), pp. 15 and 17. Mrs. Parker also testified credibly that Mr. Surman “individually did the work.” T., p. 36. She also testified credibly that Mr. Surman “held himself out as an experienced contractor, and that turned out not to be the case.” T., p. 45. Hence, this substantial evidence of Mr. Surman’s individual participation in the wrongful acts makes my decision to hold him individually liable correct.

There also is a basis for Mr. Surman’s liability under the HICPA and UTPCPL statutes. Any HICPA violation is deemed a violation of the UTPCPL. *See* 73 P.S. §517.10. Mr. Surman, as an individual, is a “contractor” under HICPA because he was undertaking a home improvement. *See* 73 P.S. §517.2. Hence, he violated HICPA by not including a registration number on the proposal (*see* 73 P.S. 517.6), subjecting him to the private action for damages under the UTPCPL brought by Mr. and Mrs. Parker. *See* 73 P.S. §201-9.2.

Mr. Surman’s deceptive conduct, described above, creates a likelihood of confusion or of misunderstanding in violation of the UTPCPL, independent of the HICPA violation. *See* 73 P.S. §201-2(4)(xxi) and *Com. Ex rel. Corbett v. Manson*, 903 A.2d 69 (Cmwlth. Ct. 2006) (holding “participation theory” is a basis for personal liability for deceptive conduct under the UTPCPL). While there were multiple instances of deceptive conduct by Mr. Surman, the most egregious involved the completion date of the work. Knowing the Parkers wanted access to their bathroom, he deliberately misled them, over and over again, about the completion date. Other deceptive conduct by Mr. Surman includes hiding the identity of the owner or owners of “AJ Surman Construction.” Since the Parkers communicated almost exclusively with Mr. Anthony Surman, he was in charge of the project and his first name begins with the letter A, it was reasonable for them to conclude that he was AJ Surman. However, according to Mr. Surman, who was not credible, he was only an employee with no ownership interest in AJ Surman Construction or American Patriot Construction, Inc. He testified that one of his brothers, who coincidentally both also have first names that begin with the letter A (Aaron and Albert), is the real AJ Surman who is the “principal” of the business. His testimony that he was not paid anything for the work he did at the Parkers’ home as he was just helping his brothers out (T., p. 94), even though he collected \$6,714.50 from the Parkers, stood out as even less credible than any of his other testimony. Needless to say, Mr. Parker’s testimony about being “honestly confused” and Mr. Surman’s “false affiliation” (T., p. 63) was very credible.

Thus, the violations of HICPA and the UTPCPL by Mr. Surman also provide a basis for my determination that he was individually liable. Hence, my decision to find Mr. Surman individually liable was correct.

BY THE COURT:
/s/Hertzberg, J.

¹ 73 P.S. §517.6, entitled “Proof of registration,” states that “A contractor shall include its registration number...on all contracts, estimates and proposals with owners in this Commonwealth.” 73 P.S. §517.7(a)(1), entitled “Home improvement contracts,” states that “No home improvement contract shall be valid or enforceable against an owner unless it...contains the home improvement contractor registration number of the performing contractor.” Other features for a valid contract under 73 P.S. 517.7 that were missing from the proposal Mr. Parker signed include the signature of the contractor or a sales person, an address that is not a post office box number and approximate start and completion dates.

² All three checks from the Parkers were payable to “AJ Surman Construction.”

³ The Parkers did not sue the corporate entity, “A.J. Surman Construction, Inc” because it is a Virginia Corporation that was terminated by the State of Virginia on August 31, 2016. The Parkers did not sue “American Patriot Construction, Inc.” because they never dealt with anyone affiliated with that entity and it did not have a contractor registration number required by HICPA.

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Mine Safety Appliances Company v. The North River Insurance Company, Hertzberg, J.Page 157
Asbestos—Silica—Coal Dust—Excess Insurance Coverage—Insurer Bad Faith

Breach of insurance action alleging insurer wrongfully failed to pay for defense costs and settlements related to asbestos, silica and coal dust exposure lawsuits. Jury verdict was that insurer breached applicable insurance contracts by not reimbursing settlement payments made by the insured in the amount of \$10,909,057.86 and that insurer failed to act in good faith and deal fairly with insured. Non-jury verdict was that insurer violated the statutory bad faith prohibition of 42 Pa.C.S. 8371 and issued bad faith damages in the amount of \$59,812,800.68.

UPMC, a Pennsylvania Nonprofit, Non-Stock Corporation, UPMC Presbyterian Shadyside, and UPMC Community Medicine, Inc. v. Michael P. O'Day, d/b/a The Law Offices of Michael O'Day, McVay Jr., J.Page 165
Tortious Interference—Civil Conspiracy—Professional Conduct

Court grants preliminary objections to hospital's tortious interference and civil conspiracy claims against attorney alleged to have contacted patients to recruit them as plaintiffs for future lawsuits. Complaint failed to sufficiently plead facts or cite authority for a common law claim against an attorney in impending litigation. Complaint also failed to plead sufficient facts to support the other elements of a tortious interference with contractual relations claim and without an underlying tort, the civil conspiracy claim would fail. Court also struck references of Conduct because the Supreme Court has exclusive authority to supervise attorney conduct.

Eric Robert Neff v. National Collegiate Athletic Association, O'Reilly, J.Page 166
Preliminary Objections

Preliminary objections to complaint by former college football player asserting negligence against the National Collegiate Athletic Association (NCAA) for failure to protect him from the long-term effects of concussions and sub-concussive blows to the head while playing collegiate football overruled. Court overruled preliminary objections based on lack of duty and proximate cause where NCAA has plenary power of its members and dictates standards education and protocols to its members.

Commonwealth of Pennsylvania v. Kenneth M. Reeves, Cashman, A.J.Page 167
Criminal Appeal—Homicide—Sufficiency—Weight of the Evidence—Expert Testimony—Jury Instruction—Prior Bad Acts—mens rea

Defendant challenges the evidence following his conviction of third-degree homicide in the death of a 5 ½ month old infant.

PLJ

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OPINIONS

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Mine Safety Appliances Company v. The North River Insurance Company

Asbestos—Silica—Coal Dust—Excess Insurance Coverage—Insurer Bad Faith

Breach of insurance action alleging insurer wrongfully failed to pay for defense costs and settlements related to asbestos, silica and coal dust exposure lawsuits. Jury verdict was that insurer breached applicable insurance contracts by not reimbursing settlement payments made by the insured in the amount of \$10,909,057.86 and that insurer failed to act in good faith and deal fairly with insured. Non-jury verdict was that insurer violated the statutory bad faith prohibition of 42 Pa.C.S. 8371 and issued bad faith damages in the amount of \$59,812,800.68.

No. GD 10-7432. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—November 28, 2017.

OPINION

I. Background

Plaintiff Mine Safety Appliances Company (“MSA”) is a business corporation that was founded in 1914. From its inception to the present, MSA’s business has been the manufacture and sale of safety equipment for laborers in dangerous conditions. Respirators for use by laborers in factories, coal mines and other dangerous environments have been manufactured and sold by MSA for more than sixty years.

Beginning in approximately 1970, laborers began filing products liability lawsuits against MSA. The lawsuits alleged MSA’s respirators were defectively dangerous for failing to protect laborers from the lung diseases that result from working with silica and asbestos. MSA applied to Defendant North River Insurance Company (“North River”) in 1980, 1981 and 1982 for “excess” insurance coverage against bodily injury claims and fully disclosed all of the silica and asbestos claims against it in the applications. MSA paid North River’s premiums and received three policies that provided this “excess” coverage, which means the coverage only applies after exhaustion of MSA’s underlying primary and umbrella insurance policy limits. Each North River policy provided MSA with \$10 million of insurance coverage for claims of bodily injury, sickness or disease from exposure to injurious conditions.

In 2001, coal miners began to sue MSA on grounds similar to the silica and asbestos lawsuits. The coal miners alleged MSA’s respirators were defectively dangerous for failing to protect them from coal workers pneumoconiosis, also known as “black lung.” Unlike typical silica and asbestos lawsuits naming approximately one hundred defendants, coal miners lawsuits against MSA often involve only two or three defendants.

MSA’s primary insurance coverage from 1952 to 1971 was with INA Insurance Company and from 1971 to 1986 MSA’s primary insurance coverage was with Travelers Insurance Company. In 1981 INA and Travelers entered into a cost sharing agreement that determined the percentage of defense costs, settlements and verdicts each paid, with the percentage changing based upon the date of first exposure to an MSA product. The primary policies began to exhaust late in the 1980’s, and all of them had exhausted by 2002. However, whenever a primary policy exhausted, the umbrella policy carrier provided MSA with continuing coverage under the cost sharing agreement, with six different insurers participating in the agreement at one point in time. The cost sharing agreement between insurers ended in approximately 2005.

Relative to Defendant North River’s excess policies effective April 1, 1980, 1981 and 1982, each had a \$5 million umbrella policy beneath it, with Puritan the carrier covering 1980-81, and Harbor the carrier covering 1981-82 and 1982-83. Harbor began paying MSA defense costs and settlements in August of 2002 and Puritan began doing so in December of 2002. In 2004, MSA had its first discussions with North River and advised it that the umbrella policies would be exhausting in the not too distant future. In May of 2006, MSA notified North River that the umbrella policies were nearly exhausted, and in July of 2006 the Harbor policies exhausted while the Puritan policy exhausted in August of 2006.

In September of 2007 MSA began to tender to Defendant North River the lawsuits against it from exposure to asbestos, silica and coal dust. North River’s initial response was to ask for additional information, which MSA provided. North River, however, did not accept coverage of the claims, but instead asked for additional information. Even though North River asked for more information than any other insurer, MSA continued to provide whatever additional information North River requested. In addition, MSA officials met with North River officials in Chicago, London and in March of 2009 at the Duquesne Club in Pittsburgh. By this point, with North River still not accepting coverage of any of the claims tendered by MSA, it was clear to MSA that the intent of North River’s unending requests for information was to indefinitely delay paying to defend and settle the lawsuits against MSA.

On April 9, 2010, North River commenced this proceeding by filing a Complaint for Declaratory Relief that named as Defendants MSA, several of its other insurers and the Plaintiffs in the lawsuits tendered to North River by MSA. North River averred in the Complaint that its 1980, 1981 and 1982 excess policies did not cover the asbestos, silica and coal dust related claims that MSA had tendered and requested this Court to declare as much. In June of 2010, MSA filed a Counterclaim that averred North River breached the three insurance contracts by not paying for defense costs and settlements and by failing to act in good faith and deal fairly with MSA. The Counterclaim also averred that North River violated Pennsylvania’s statutory prohibition against insurer bad faith set forth in 42 Pa. C.S. §8371.

The Honorable Judge R. Stanton Wettick Jr. handled this proceeding as “Commerce and Complex Litigation” (see Allegheny County Local Court Rule No. 249(1)) from 2010 until it was assigned to me in July of 2016. Judge Wettick made numerous pre-trial rulings. He promptly dismissed the Plaintiffs in the lawsuits MSA had tendered to North River and he stayed North River’s Declaratory Judgment Complaint. Thereafter, the litigation moved forward only on MSA’s breach of contract and bad faith complaint. He disposed of multiple summary judgment motions made by MSA and North River, which reduced the number of disputed issues. On September 13, 2016, I heard argument on motions in limine, and from September 16 to October 6, 2016 I presided over the jury trial of the dispute. The Jury’s Verdict was that North River breached all three insurance contracts by not reimbursing MSA’s settlement payments and defense costs in the amount of \$10,909,057.86, and that North River also breached all three insurance contracts by failing to act in good faith and deal fairly with MSA. My non-jury verdict was that North River violated the statutory bad faith prohibition set forth in 42 Pa.C.S. §8371.

Over the course of five days during December of 2016 and January of 2017 I heard testimony on the issue of damages relative to North River's statutory bad faith. In February of 2017 I issued a verdict on bad faith damages against North River in the amount of \$46,912,213.11 (\$30 million in punitive damages, \$11,831,991.76 in attorney fees and costs and \$5,080,221.35 interest at the prime rate plus three percent) and in June of 2017 I supplemented the attorney fees by \$1,969,594.96 and the costs by \$21,934.75. The grand total of these jury and non-jury verdicts against North River is \$59,812,800.68.

After denying North River's and MSA's Motions for Post-Trial Relief, in August of 2017 I directed the entry of judgment on the verdicts. North River then appealed to the Superior Court of Pennsylvania and filed a concise statement of errors complained of on appeal ("Concise Statement" hereafter). Pursuant to Pennsylvania Rule of Appellate Procedure no. 1925(a), the balance of this Opinion addresses the alleged errors identified by North River in the Concise Statement.¹ This Opinion addresses each alleged error in the identical sequence in which each appears in the Concise Statement, with the roman numbers and letters of each title below matching the roman numbers and letters of the paragraphs in the Concise Statement.

II. Proof of Underlying Claims and Exhaustion

In paragraph II. of the Concise Statement North River contends I made an error by accepting only inadmissible hearsay evidence "that injuries alleged by the underlying claimants resulted from exposure to a toxicant while using an MSA product..." However, MSA did not have to establish its own liability to the underlying claimants "so long as ... a potential liability on the facts known to the [insured is] shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimants success against the [insured]." *Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091 (2d Cir. 1986) citing *Damanti v. A/S Inger*, 314 F.2d 395, 397 (2d cir.) cert. denied, 375 U.S. 834, 84 S. Ct. 46, 11 L. Ed. 64 (1963); also see Windt, *Insurance Claims and Disputes* §6.31 at 6-244-249. To show "the facts known to the insured ... culminating in a settlement," MSA offered into evidence a summary of the claims files and defense costs for the thirty eight underlying claimants. Since this evidence was offered to show MSA's knowledge of a potential liability and not "the truth of the matter asserted," it does not fall within the definition of hearsay. See Pennsylvania Rule of Evidence 801(c)(2). Therefore, I was correct in admitting this evidence.

North River makes this same argument, that there was only hearsay evidence, relative to MSA's proof of exhaustion of the Puritan and Harbor umbrella policies. However, there was extensive testimony received on the topic of exhaustion that did not involve hearsay, including testimony from representatives of Puritan and Harbor and MSA's Director of Litigation and Risk Management, William Berner. North River objected on the basis of hearsay to the admission of "loss runs" from the umbrella carriers. The "loss runs" from MSA's insurers typically set forth, during a policy period, for each payment made under the policy, the date of payment, the name of the claimant and the date of first exposure. It was clear to me that, in the insurance industry, a "loss run" will be provided to an insurer as evidence that the policy beneath it has been exhausted. The testimony from the Puritan and Harbor representatives established that the loss runs fall under the hearsay exception for business records, now known as "records of regularly conducted activity." See Pennsylvania Rule of Evidence no. 803(6). Because the loss runs fall within this exception to the hearsay rule and because there was much additional testimony to evidence exhaustion, there was sufficient proof of exhaustion of the umbrella policies.

III. A. Jury Charge on Proof of Underlying Claims and Exhaustion

In paragraph III.A. of the Concise Statement North River contends I made an error by not instructing the Jury that MSA had the burden to prove "the underlying claims involved exposure to a toxicant as a result of the use of an MSA product during the period of the North River policies." But, as I mentioned above, MSA only had to show the settlement amounts were "reasonable in view of the size of possible recovery and degree of probability of claimants success against [MSA]." *Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091. My instruction to the Jury did set forth that burden of proof. See Jury Trial transcript ("J.T." hereafter), pp. 2398-2399. Therefore, my instruction to the Jury on MSA's burden of proof was correct.

III. B. (1) Jury Charge on Known Loss by MSA Risk Manager

In paragraph III.B. (1) of the Concise Statement North River contends I made an error in the "known loss" defense instruction to the Jury because I said North River had to prove MSA's risk manager (or other employee involved in purchasing the North River policies) knew of a likely exposure to losses. North River, however, is mistaken as the instruction is consistent with the law on the known loss defense set forth by the Pennsylvania Supreme Court. See *Rohm & Haas Co. v. Continental Casualty Co.*, 781 A. 1172 at 1177-1178 (Pa. 2001). Therefore, this instruction to the Jury was appropriate.

III. B. (2) Jury Charge on Known Loss and Exhaustion

In paragraph III.B.(2) of the Concise Statement North River contends I made another error in the known loss defense instruction to the Jury because I said North River had to prove MSA knew all of its primary and umbrella policies would be exhausted. North River again is mistaken as the instruction also is consistent with Pennsylvania law. *Id.* at p. 1177. Thus, this instruction to the Jury also was appropriate.

III. C. Pollution Exclusion

In paragraph III. C. of the Concise Statement North River contends I erred by granting MSA's motion in limine to preclude North River from offering evidence regarding its pollution exclusion. The "pollution exclusion," which appears in each of the insurance policies at issue in this case, provides that:

...this policy shall not apply to personal injury...arising out of the discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants, or pollutants into or upon land, the atmosphere or any watercourse, or any body of water..."

In its Motion in Limine, MSA argued that collateral estoppel barred North River from entering any argument or evidence of this exclusion at trial. MSA and North River are also engaged in litigation in Delaware state court regarding the same insurance policies at issue in this case. In that case North River sought Summary Judgment precluding MSA from coverage on the basis of the pollution exclusion in each policy. The issue was briefed and argued by each party, and the Delaware court issued a detailed Memorandum Opinion denying North River's Motion and finding the pollution exclusion inapplicable to MSA's claims. Based on this result in the Delaware action, MSA filed a motion in limine to preclude North River from entering evidence of the pollution exclusion as a defense in this case. Collateral estoppel applies when:

(1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

Heldring v. Lundy Beldecos & Milby, P.C., 2016 PA Super 263, 151 A.3d 634, 644 (2016) citing *Selective Way Ins. Co. v. Hospitality Grp. Servs., Inc.*, 119 A.3d 1035, 1042 (Pa. Super. 2015).

In the Delaware case, the issue was whether the pollution exclusion applied to MSA's claims, MSA and North River were both parties to the action, and both had a fair opportunity to argue their position on its applicability. Therefore, it is clear the first, third, and fourth factors for the application of collateral estoppel have been met. Collateral estoppel is intended to preclude the re-litigation of issues of law or fact in a subsequent action. *Yonkers v. Donora Borough*, 702 A.2d 618, 620 (Pa. Commw. Ct. 1997), citing *PMA Insurance Group v. Workmen's Compensation Appeal Board (Kelley)*, 665 A.2d 538 (Pa.Cmwlt.1995). In the Delaware action, the court specifically ruled that the pollution exclusion was not applicable to MSA's claims for coverage and thus not a defense available to North River. In its Memorandum, the Delaware court writes, "there is no reasonable interpretation that injury resulted from..." the types of contaminants contemplated in the pollution exclusion. The Delaware court further explains that a finding that coal dust is a pollutant would render the insurance coverage "illusory." The court succinctly explains why it denied North River's motion, by explaining that the coal dust itself did not cause the injury, but "Rather, this is a case about coverage for injuries caused by an allegedly defective product designed to counter the effects of exposure to dangerous materials." North River argued in opposition to the motion that the ruling in the Delaware case is not "final" for the purposes of collateral estoppel. In Pennsylvania, "a final judgment includes any prior adjudication of an issue in another action that is sufficiently firm to be accorded conclusive effect." *Commonwealth v. Holder*, 805 A.2d 499, 502 (Pa. 2002) citing *Restatement (Second of Judgments) §13*, cmt g). Delaware's ruling is very firm regarding why the pollution exclusion is inapplicable and is sufficient to be considered a final judgment on the issue. One of the purposes of collateral estoppel is to prevent inconsistent decisions. *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 51 (Pa. 2005). The parties and the issues in the Delaware case are identical to this case and failing to hold that collateral estoppel applies to Delaware's ruling on the pollution exclusion would result in inconsistent decisions and violate one of the purposes of the doctrine. Therefore, I did not commit an error by granting MSA's motion in limine to preclude North River from offering evidence of the pollution exclusion.

III. D. Couch Trial

In paragraph III. D. of the Concise Statement North River contends I erred by granting MSA's motion in limine to exclude evidence of the *Couch* trial and denying North River's motion in limine to preclude MSA from denying that it acted with reckless disregard and that such conduct was a substantial factor in causing injuries and damages. The *Couch* trial was a personal injury case brought in Kentucky by Plaintiff Couch against MSA and other defendants. The jury in the *Couch* case found MSA 80% liable for Plaintiff Couch's injuries, awarded him \$4,000,000 in damages, found that "MSA acted with reckless disregard for the lives, safety, or property of others, including Mr. Couch," and awarded Plaintiff Couch \$4,000,000 in punitive damages. MSA presented motions in limine to preclude North River from entering evidence presented during the *Couch* trial, or evidence of the jury's finding that served as the basis for its award of punitive damages. MSA argued that this type of evidence has a low probative value, would confuse the jury, and is highly prejudicial to MSA. North River argued that it should be able to admit this evidence based on collateral estoppel and that barring this evidence would afford MSA the opportunity to relitigate the issues of the *Couch* case. North River further argues that the jury's findings in the *Couch* trial are necessary to support their defense that the injuries for which MSA seeks coverage were "expected and intended" by MSA, as well as necessary to their defense against MSA's bad faith claims. Relevant evidence may be excluded if it is unfairly prejudicial. Unfair prejudice includes evidence that would divert the jury's attention, or induce the jury to make a determination on an improper basis. It is the job of the trial court to balance the probative value of evidence against the potential for prejudice when determining whether to admit evidence. See *Parr v. Ford Motor Company*, 109 A.3d 682, 696 (Pa.Super. 2014). Relevant evidence can also be excluded if it would confuse the jury. *Commonwealth of Pennsylvania v. Baez*, 720 A.2d 711, 724 (Pa. 1988). I determined that evidence from the *Couch* trial, which involved MSA's duty to its customers and breach, to be irrelevant to the different issues in this case, which involve questions of North River's duty to MSA and whether North River acted with bad faith. Further, I felt that the jury's findings and verdict in the *Couch* trial, particularly given the large size of the verdict, would distract the jury in this trial from the main insurance inquiries in this case and therefore be irrelevant. North River argues that evidence of the *Couch* trial is necessary to support its defense to MSA's bad faith claims; however the present litigation was initiated in 2010, and the *Couch* verdict was reached in 2016, so North River's argument that evidence of the jury verdict supports its denial of coverage is illogical. Although the jury in the *Couch* trial found that MSA acted with recklessness, recklessness is not sufficient to support an exclusion based on "expected or intended" injuries. *Erie Insurance Exchange v. Fidler*, 808 A.2d 587, 589-90 (Pa.Super. 2002) citing *USAA v. Elitzky*, 517 A.2d 982, 987 (Pa.Super. 1986). Therefore, admitting evidence that another jury found that MSA acted in a manner that does not necessarily bar them from coverage under their policy with North River would only confuse the jury while also painting MSA in a bad light and is unfairly prejudicial to MSA. Therefore, it was appropriate to grant MSA's motion in *limine* and I committed no error.

III. E. Expected or Intended Defense

In Paragraph III.E. of the Concise Statement North River contends that I erred by granting MSA's motion in *limine* to preclude North River from offering any evidence or argument respecting its "expected or intended" defense. In the Delaware action, MSA filed a Motion for Partial Summary Judgment on the Expected or Intended Exclusion, both parties briefed and argued the issues. The Delaware court determined that North River had not met its substantial burden of proof that the "expected or intended" exclusion applied to MSA's claims, and granted MSA's Motion for Partial Summary Judgment. Collateral estoppel will apply when: (i) the issue decided in the first action is identical to the one presented in the other action, (ii) the issue was actually litigated in the first action, and (iii) a final judgment on the specific issue in question was issued in the first action. *Commonwealth v. Holder*, 805 A.2d 499, 502 (Pa. 2002). These factors have been clearly met. First, the issue is identical. In both the Delaware case, and this case North River attempts to raise the "expected and intended" exclusion of the insurance policies as the reason for its denial of MSA's claims. An issue is "actually litigated" when it is properly raised, submitted, and determined. *Id.* Citing *Restatement (Second of Judgments) §13*, cmt d. MSA properly raised the issue by filing a Motion for Summary Judgment in the Delaware case, submitted it for determination by offering a brief and argument on the issue, and ultimately it was determined by the thorough

Opinion and Order entered by the Delaware court. Therefore, the second factor is met. Finally, the Order entered by the Delaware court is “final” because a judgment in a prior case is considered final for the purposes of collateral estoppel “unless or until it is reversed on appeal,” which the Delaware ruling has not been. *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996). Therefore, North River’s attempt to raise the “expected or intended” defense is barred by collateral estoppel and I did not err by granting MSA’s motion in *limine* to preclude North River from entering any evidence of that defense.

IV. A. Proof of Bad Faith

North River also contends I made an error by not dismissing MSA’s claim for breach of the duty to act in good faith and MSA’s claim for statutory bad faith under 42 Pa. C.S. §8371. In paragraph IV. A. of the Concise Statement North River contends MSA did not prove by clear and convincing evidence that North River lacked a reasonable basis for denying benefits under the insurance policies and knew or recklessly disregarded this lack of a reasonable basis. See *Rancosky v. Washington National Insurance Company*, 170 A.3d 364 (Pa. 9/28/2017). North River’s argument is meritless as there is strong evidence North River had no basis to deny coverage and knew or recklessly disregarded it. To determine if North River had a reasonable basis for denying benefits to MSA involves “an objective inquiry into whether a reasonable insurer would have denied payment of the claim under the facts and circumstances presented.” *Rancosky v. Washington National Insurance Company*, 170 A.3d at 374, citing *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W. 2d 368 at 377. MSA’s proof that a reasonable insurer would have paid it benefits includes umbrella insurers Puritan and Harbor having paid benefits to MSA based upon much less information than was provided to North River. See J.T., pp. 303-304, 326-327 and 543-544. Also, industry practice would be to communicate directly with these carriers with any questions about exhaustion of their policies, but North River failed to do so. See J.T., pp. 302 and 606-607. Additionally, North River avoided paying MSA’s underlying claims by requesting far more medical, employment and product usage information than any of MSA’s other insurers. See J.T. pp. 326-327 and 543-544. This is clear and convincing evidence North River lacked a reasonable basis for denying benefits under the insurance policies.

“Smoking gun” evidence of personal animus towards MSA, self-interest or ill will is not required to prove North River knew or recklessly disregarded its absence of a reasonable basis to deny benefits. See *Rancosky v. Washington National Insurance Company* 170 A.3d at 376. However, there is this type of “smoking gun” evidence against North River. Communications between claims adjusters in 2006 described reviewing voluminous court documents from a personal injury case against MSA as “a big pain in the ass.” Plaintiff’s trial exhibit 952. Information requested in North River’s claims investigation focused on North River’s internal business reasons instead of the merits of the underlying claims against MSA. See J.T., p. 325. At a meeting in March of 2009, a North River officer threatened to “rat out” MSA (by disclosing to the public the alleged defects in its respirators) and to hire experts being used by plaintiffs in the underlying litigation to testify against MSA. See J.T., p. 635. The evidence most indicative of North River’s personal animus towards MSA comes from West Virginia litigation against MSA filed by a coal miner named Norman Moore. Similar to many of the claims for which MSA sought coverage in this proceeding, Mr. Moore sued MSA because he allegedly developed black lung after using an MSA respirator. MSA reached an out-of-court settlement with Mr. Moore that included assignment of MSA’s insurance benefits from North River. The assignment put Mr. Moore “in the shoes” of MSA, but North River handled coverage for Mr. Moore in the manner it refused to do for MSA. North River paid Mr. Moore his settlement without erecting any of the multiple defenses faced by MSA.

There also was substantial circumstantial evidence that North River knew or recklessly disregarded its absence of a reasonable basis for denying benefits. From 1994 until the 2016 Jury Verdict North River took the position that MSA had not proven exhaustion of the umbrella policies, but it provided no evidence during the trial to contradict MSA’s evidence proving exhaustion. Even though North River called a witness to testify in support of its known loss defense, this defense was very weak because MSA would have needed a “crystal ball” to see that a coal miner lawsuit would be filed twenty years in the future. Until I signed an order directing North River’s counsel to use their best efforts to produce its corporate designee, Bryce Larrabee, as a trial witness for MSA, North River refused to make this resident of New Hampshire available as an MSA witness. See Motions in Limine Argument transcript (“M.L.A.” hereafter), pp. 314-325 and 9/14/2016 Order of Court (Department of Court Records document no. 537). North River also attempted to delay the Jury Trial by means of a meritless eve-of-trial interlocutory appeal from my decisions on two motions in limine. See Pennsylvania Superior Court docket no. 1366 WDA 2016. Thus, MSA proved by clear and convincing evidence that North River lacked a reasonable basis for denying insurance benefits and knew or recklessly disregarded this lack of a reasonable basis. Hence, I acted correctly in refusing to dismiss MSA’s claim for breach of the duty to act in good faith and MSA’s claim for statutory bad faith under 42 Pa. C.S. §8371.

IV. B. Underlying Claims Dismissed by MSA

In paragraph IV.B. of the Concise Statement North River contends I made an error by not dismissing the breach of duty to act in good faith and statutory bad faith claims “where the court held that North River has no liability on 655 of the 730 underlying claims....” North River not being liable on 655 of the 730 underlying claims results from a ruling made on June 30, 2015 by Judge Wettick on one of North River’s motions for summary judgment. He ruled that North River’s policies contained no duty to defend and could cover defense costs for only those underlying cases that MSA settled. Hence, MSA dismissed, without prejudice, its claims against North River arising in 655 of the underlying claims because they were not yet settled and therefore comprised exclusively of defense costs. As a result, the approximately \$800,000 value of all 655 of the dismissed claims is minor when compared to the approximately \$11 million in settlements and defense costs submitted to the Jury. Because the comparative value of the 655 dismissed claims is minimal, this was not a proper reason for dismissal of MSA’s breach of duty to act in good faith and statutory bad faith claims.

V. A. Threat to “Rat Out” MSA

In paragraph V.A. of the Concise Statement North River contends I made an error by permitting the previously referenced “rat out” statement (See J.T., p. 635) to be admitted into evidence because it was made during confidential compromise negotiations. Pennsylvania Rule of Evidence no. 408(a) prohibits the admission of evidence of compromise negotiations offered to prove the validity or amount of a disputed claim. However, Rule no. 408(b) authorizes admission of this evidence for purposes other than proving the validity or amount of a disputed claim. The “rat out” statement was an insurer’s threat to harm the revenues of its insured. It was offered into evidence to show North River’s bad faith, which is a purpose other than proving the validity or amount of the claim, which therefore is admissible under Rule no. 408(b). The parties actually entered into a written agreement before the March, 2009 meeting that contained a confidentiality provision. See Exhibit 1 to Mine Safety Appliance Company’s Motion

Respecting Use of Evidence of North River's Threats (Department of Court Records Document no. 639). Under the written agreement, communications made in connection with compromise negotiations are confidential. Since North River's threat to harm MSA's revenues is outside the boundaries of what is acceptable in compromise negotiations, the threat is not subject to the written agreement's confidentiality provision. Therefore, I correctly permitted admission of the "rat out" statement into evidence.

V. B. Evidence of Good Faith Settlement Negotiations

In paragraph V.B. of the Concise Statement North River also contends I made an error by precluding it from introducing evidence of its good faith compromise negotiations during the meeting when it threatened to "rat out" MSA. The threat made during the March, 2009 meeting was the subject of Motions in *Limine* by both parties, with extensive oral argument. See Motions in *Limine* Argument transcript, pp. 137-151. Also, during the Jury Trial, before the testimony on the meeting began, there was argument from counsel and I made it crystal clear that the testimony would be limited to the threatening statements by MSA, with Rule 408(a) prohibiting any testimony in the Jury's presence about compromise negotiations. See J.T., pp. 576-586. However, North River could have provided the Jury with testimony disputing the "rat out" threat, from the North River official who made it or from two other North River officials and two other MSA officials who were present for the threat. Instead, North River did not produce any evidence to dispute the threat and argues it should have been permitted to provide evidence of its good faith compromise negotiations during the meeting. If North River could testify about its good faith compromise negotiations, MSA would respond with its view that a good faith compromise should be a much larger amount, with the Jury exposed to evidence that is totally irrelevant to the true value of MSA's claims. In any event, North River ended up playing a videotaped deposition of Mr. Berner to the Jury with his testimony of the amount of the compromise offer made by North River during the March, 2009 meeting.² See transcript of videotaped deposition of William Berner taken May 9, 2012, pp. 106-107. Hence, although I was correct to prohibit testimony of North River's good faith compromise negotiations, North River still ended up getting evidence on the topic to the Jury.

V. C. Evidence of *Moore* Litigation and Settlement

In Paragraph V. C. of the Concise Statement North River contends I erred by denying its motion in *limine* to preclude MSA from submitting or relying on evidence of the *Moore* litigation and settlement. The "*Moore* litigation and settlement" references a West Virginia case that is factually very similar to the underlying litigation cases for which MSA is seeking coverage from North River in this proceeding. Norman Moore was a coal miner who used the "Dustfoe" respirator and developed coal-workers' pneumoconiosis ("CWP"). Mr. Moore sued MSA, who ultimately settled the case without admitting liability. As part of MSA's settlement with Mr. Moore, MSA assigned him the right to a certain amount of the proceeds of an insurance policy that is materially similar to the policies in this case that was issued to MSA by North River. Following the settlement with MSA, Mr. Moore sought declaratory relief that his claims were recoverable under the policy. North River settled the claim and paid Mr. Moore the amount assigned from the policy. MSA sought discovery regarding the *Moore* litigation and settlement, and Judge Wettick ordered that discovery regarding the case should be limited to the effect that the settlement had on the limits of any of the policies at issue in this case. In its motion in *limine* to preclude MSA from submitting evidence of the *Moore* litigation and settlement North River argued that this amounts to a determination that the *Moore* litigation and settlement are irrelevant as a whole and should be barred by the "law of the case" doctrine. North River further argues that Pa.R.E. 408(a) prohibits the admission of any evidence of the *Moore* litigation and settlement. It is true that the law-of-the-case doctrine prohibits a judge of coordinate jurisdiction from altering "the resolution of a legal question previously decided." *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995). Judge Wettick ruled that MSA must limit its discovery regarding the *Moore* litigation and settlement. The legal issue was what information MSA could seek in discovery; the legal issue that I ruled on was the admissibility of evidence that MSA obtained without a discovery order. Therefore, the admissibility of evidence of the *Moore* litigation and settlement was not previously decided and I did not disrupt Judge Wettick's discovery Order by admitting it. Further, Pa.R.E. 408(a) provides that evidence of a settlement may be offered for "another purpose" than demonstrating the validity or amount of a disputed claim, or impeachment. Evidence of the *Moore* litigation and settlement was not offered to prove that MSA was entitled to coverage or how much coverage to which it was entitled. It was offered to show how differently North River handled Mr. Moore's claim versus how it handled MSA's claims and therefore, that evidence was directly relevant to MSA's claim of bad faith. Therefore, I did not violate the law of the case or any rule of evidence and committed no error by denying North River's motion in *limine* to preclude MSA from submitting or relying on evidence of the *Moore* litigation and settlement.

V. D. Evidence of North River's State of Mind

In paragraph V. D. of the Concise Statement North River contends I erred by excluding evidence of North River's state of mind, "in particular, evidence of (a) the WV AG lawsuit; (b) "white paper" and testimony to NIOSH; and (c) North River's understanding of the etiology of CWP." The West Virginia Attorney General lawsuit ("the West Virginia action") is a case that was brought in 2003 by the state of West Virginia against MSA and two other defendants for the purpose of recovering reimbursement for the Workers Compensation payments the state has made to coal miners who developed lung illness despite wearing the defendants' respirators. In the lawsuit, the "WV AG" avers MSA is liable for the Workers Compensation payments for intentionally or knowingly causing the coal miners' injuries. Thirteen years after its filing, the case is still pending but has not gone to trial and no findings of fact have been made. Evidence is unfairly prejudicial if it would induce the jury to make a determination on an improper basis. *Parr v. Ford Motor Company*, 109 A.3d 682, 696 (Pa.Super. 2014). Here, it is likely that a lawsuit initiated by the state government would influence the jury to accept the validity of the claims in the West Virginia action, even though no facts have been determined in the case. During argument on MSA's motion in *limine* to preclude evidence of the West Virginia action, counsel for North River offers that evidence it will offer at this trial supports some of the allegations in the West Virginia action, effectively litigating the West Virginia action within the context of this case. (J.T., p. 565). It would confuse the jury to be burdened with determining the facts of the West Virginia action while also separately determining the facts of the case for which it was empaneled. Further, the allegations on their own have little probative value into the facts of this case. Therefore, the potential for prejudice and confusion outweigh any probative value into North River's state of mind and I did not err by precluding evidence of the West Virginia action.

The "white paper" is a document that was created by MSA employees and submitted to NIOSH³ (the regulatory body that issues the government standards and approval of the type of respirators manufactured by MSA), during the comment period for rule making. An employee of MSA also testified before NIOSH in support of the contents of the "white paper." The paper and testimony were offered in 1994. Notably, the "white paper" and testimony included that testing with diethylphthalate ("DOP") shows

electrostatic filters to be particularly dangerous because a user is unable to tell when the filter is working or not. (Motion in *Limine* Argument transcript, “M.L.A.” hereinafter Sept. 13, 2016, pp. 55-56). North River argues that the conclusion reached in the 1994 “white paper” was based on testing that had occurred at MSA since 1955, when MSA began testing with DOP and therefore, although the “white paper” and relevant testimony post-dates the issuance of the insurance policies, it is evidence of what MSA knew prior to obtaining insurance coverage. (M.L.A., pp. 56-57). First, North River intended to offer the testimony of Mr. Bevis, who possessed knowledge of the testing and information that allegedly served as the basis for the “white paper,” so North River would still be able to offer that evidence without relying on a tenuous connection to a paper that was written 12 years after insurance coverage was obtained. (M.L.A., p. 57). North River’s attempt to create a chain of connection between testing that commenced in the 1950s to a paper written in the 1990s would be speculative and confusing to the jury. Second, I specifically made an exception to my ruling for instances where references are made to information predating the insurance application, so that North River would not be precluded from offering evidence relevant to MSA’s knowledge at the time of its application for insurance. Therefore, I committed no error by granting MSA’s Motion in *limine* to Exclude Certain Evidence Re: North River’s “Known Loss” and “Material Misrepresentation” Defenses.

North River intended to offer the testimony of multiple physicians on their understanding of the etiology of CWP to prove that there was a reasonable basis for the denial and their denial of MSA’s claims were not in bad faith. MSA argued that the testimony of multiple physicians on in depth medical issues would distract the jury from the true nature of its bad faith claims. MSA argues that its claim for bad faith was not based on the denial of the claims, but rather the behavior of North River beyond the denial of the claims. Counsel for North River even agreed that, if MSA’s bad faith claims were limited to the allegation that North River decided to take a position on what triggered coverage and only hired doctors to investigate the etiology of CWP to find support for their position, then the testimony of the doctors was unnecessary. (M.L.A., pp. 89-90). Further, in 2015 Judge Wettick denied North River’s Motion for Partial Summary Judgment seeking a determination that the continuous-trigger approach does not apply to coal-mine dust claims. Judge Wettick held that “J.H. France’s continuous-trigger approach applies to coal dust claims because...the injuries do not manifest themselves until a considerable time after initial exposure.” Therefore, the law of the case already established which approach to triggering coverage was applicable in this case and testimony from multiple physicians on how the disease manifests was unnecessary. So from a logical standpoint, North River was able to refute the bad faith claims by offering testimony from its own employees regarding how the claims were handled, even without the detailed scientific testimony. What confuses me about this allegation of error, is that I *denied* MSA’s Motion to exclude this medical and scientific testimony (M.L.A., p. 107). Therefore, it was the decision of North River’s counsel not to offer evidence of its understanding of the etiology of CWP and therefore, I committed no error.

V. E. Lack of Jury Charge Defining “Recklessness”

In paragraph V.E. of the Concise Statement North River contends I made an error by not defining “recklessness” in the instruction to the Jury on breach of the duty of good faith and fair dealing. North River, however, did not request an instruction defining recklessness in its written Proposed Points for Charge or during the Charging Conference. *See* J.T. pp. 2231-2235. My charge to the Jury was consistent with North River’s request that it contain Pennsylvania Suggested Standard Jury Instruction (Civil) no. 17.300, which repeats the word “recklessly” three times. By requesting an instruction that uses “recklessly” three times without either a written or oral request for a definition of recklessness in the instruction, North River waived its ability to raise lack of a recklessness definition after the trial. *See* Pennsylvania Rule of Civil Procedure no. 227.1(b)(1). Therefore, the lack of a recklessness definition in the Jury instructions was not an error.

Assuming North River has not waived the issue of recklessness not being defined and this was an error by me, it would be a harmless error. Because I prohibited MSA from offering evidence of damages from any breach of the duty of good faith and fair dealing, the Jury determined only that North River breached the duty. The Jury was not asked to determine damages resulting from this breach of duty and did not do so. Hence, any error in the Jury instruction on the duty of good faith and fair dealing did not harm North River.

In paragraph V.E. of the Concise Statement North River contends I also made an error by not defining recklessness in the jury charge because it “also indicates that the Court failed to properly guide its verdict on statutory bad faith with the required construction of ‘recklessness.’” Put another way, because I did not give the Jury a definition of recklessness, I must have applied the incorrect definition of recklessness in reaching the non-jury verdict on statutory bad faith. North River is mistaken as I applied the correct definition of recklessness in reaching the non-jury verdict. Hence, no error was made as to the definition of recklessness in connection with the non-jury verdict on statutory bad faith.

VI. A. Non-Jury Verdict Without Findings

In paragraph VI.A. of the Concise Statement North River contends I unfairly prejudiced its defense in the trial on damages for statutory bad faith because my non-jury verdict contained only the conclusion that North River acted in bad faith in violation of 42 Pa. C.S. §8371. North River argues I was required to set forth findings and conclusions underlying my verdict for it to be able to fairly defend itself in the trial on damages that began two months later. North River is unable to support this unusual argument with reference to caselaw or a rule of court. The reason for this lack of supportive authority is that the caselaw and applicable rule of court make it clear findings and conclusions are not required to support my verdict. *See Bensinger v. University of Pittsburgh Medical Center*, 2014 PA Super 174, 98 A.3d 672 at 684 (holding that Pennsylvania Rule of Civil Procedure no. 1038(b) does not require findings of fact and conclusions of law with a non-jury verdict). In any event, North River was in no way prejudiced as it was able to conduct discovery, including depositions of all of MSA’s fact witnesses, in advance of the non-jury trial on damages. Therefore, North River was not unfairly prejudiced by the absence of findings of fact and conclusions of law.

VI. B. Punitive Damages Relation to Punishment and Deterrence

In paragraph VI.B. of the Concise Statement North River contends the \$30 million punitive damages award is erroneous because it “is not reasonably related to the Commonwealth’s interest in punishing and deterring bad behavior.” Three factors are analyzed to determine if the size of a punitive damages award is unrelated to punishment and deterrence: “(1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.” *Hollock v. Erie Ins. Exchange*, 2004 PA Super 13, 842 A.2d 409, 419. The character of North River’s acts, which are described above, is reprehensible. Instead of honoring its promise to cover MSA against bodily injury claims, some valued at over seven figures, North River refused to pay the claims based on unwarranted defenses, threatened MSA, but was willing to pay a single claim when MSA assigned its rights to another. MSA was

extensively harmed because it had to borrow the money to pay for the underlying claims settlement and defense, with there being both a borrowing cost in the form of interest owed and the lost opportunity for use of the funds to grow the business. When North River made good on one of its threats and hired underlying Plaintiffs' expert Darrell Bevis, Mr. Bevis obtained information that is harming MSA's ability to defend itself against thousands of claims that MSA's respirators failed to protect the Plaintiffs from lung disease. The wealth of North River, which was not disputed, was evident. As of December 31, 2015, it had over \$1 billion in assets, \$306 million in surplus, earned \$57 million on investment income that year and could pay a \$250 million judgment without its payment of ongoing claims being impacted. See Non-Jury Trial Transcript ("N.J.T." hereafter), pp. 81-83, 94 and 101. Therefore, the \$30 million punitive damages award is reasonably related to punishment and deterrence and not erroneous.

VI. C. Evidence of Consequential Damages

In paragraph VI.C. of the Concise Statement North River contends the punitive damages award is erroneous because it "is based on improper evidence of consequential damages." However, before the Jury Trial began I ruled in favor of North River on a motion in limine that prohibited MSA from offering evidence of consequential damages under the breach of duty to act in good faith and deal fairly claim. What MSA describes as "improper evidence of consequential damages" was instead evidence of the nature and extent of the harm during the Non-Jury trial on statutory damages. Therefore, the punitive damages award was not erroneously based on evidence of consequential damages.

VI. D. Punitive Damages Proportionality

In paragraph VI.D. of the Concise Statement North River contends the punitive damages award is erroneous because it is disproportionate. This contention is premised on the opinion of North River's expert that the Pennsylvania Department of Insurance fine would not have exceeded \$75,000. While the United States Supreme Court includes proportionality between a punitive damages award and civil penalties imposed in comparable cases as a guidepost, this is only part of the analysis. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 at 418 (2003). First, it is the proportionality between a punitive damages award "and the civil penalties **authorized** or imposed in comparable cases...." that must be reviewed. *Id.* [emphasis added]. The Pennsylvania Unfair Insurance Practices Act authorizes the Department of Insurance to revoke an insurer's license (see 40 P.S. §1171.9), and this "authorized" penalty is much harsher than a \$75,000 fine. See *Hollock v. Erie Ins. Exchange*, 842 A.2d at 422. The United States Supreme Court also set forth two other guideposts for punitive damages awards: the reprehensibility of the defendant's conduct (addressed above) and the disparity between the harm to the plaintiff and the punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 at 418. In *Hollock* above, the Pennsylvania Superior Court found that the disparity from a 10 to 1 ratio of punitive damages to compensatory damages (which consisted of attorney fees, costs and interest) did not violate due process. The \$30 million punitive damages award against North River approximates a 1 to 1 ratio with the compensatory damages (\$29,812,801 for breach of contract, attorney fees, costs and interest). Hence, when the proportionality guidepost and the other two guideposts are examined, it is evident that no error was committed in assessing \$30 million in punitive damages against North River.

VI. E. Consideration of Non-Parties

In paragraph VI.E. of the Concise Statement North River also contends I made an error by "considering the financial condition of non-parties in awarding punitive damages...." First, consideration of the financial condition of the other entities would be appropriate because they are related to North River and pool their premiums and losses with North River. See *Bombar v. West American Ins. Co.*, 2007 PA Super 222, 932 A.2d 78 at 94-95. Second, in determining the punitive damages award, I did not consider the financial condition of an entity other than North River. Given the financial wherewithal of North River described above, it will be able to absorb the \$30 million expense without disruption of its operations. Because I did not consider the finances of non-parties, and, in any event, doing so would have been appropriate, I did not commit an error.

VII. A. Attorney Fee Award and Actual Charges

In paragraph VII.A. of the Concise Statement North River contends the attorney fee award is erroneous because "MSA never entered any evidence as to what Reed Smith actually charged until after close of evidence...." This argument is premised on the fact that I conducted a conference telephone call with counsel for both parties after the non-jury trial because I was uncertain of how MSA's "volume discount" applied to some of the Reed Smith invoices. This information was contained in the invoices admitted into evidence during the non-jury trial (see N.J.T., p. 239 and exhibits P-21A - P-21-J, P-22A -P-22L, P-23A - P-23L, P-24A - P-24L, P-25A - P-25K, P-26A - P-26L and P-27A - P-27I). I just wanted to be certain that I was interpreting all of the invoices correctly to avoid awarding Reed Smith its "standard budget rate," which often was higher than the amount billed to MSA. A subsequent letter from Reed Smith to me and North River's counsel provided a full explanation that allowed me to be certain as to the amount of the volume discount (it ranged between 10 and 32 percent) and how it was applied. 42 Pa.C.S. §8371 sets forth no procedure for assessing "attorney fees against the insurer." The Superior Court of Pennsylvania, in upholding an attorney fee award under 73 P.S. §201-9.2 in the Unfair Trade Practices and Consumer Protection Law, found a document with counsel's hours and hourly rate submitted at the end of trial with counsel's assertion that the hourly rate was fair and reasonable constituted sufficient information for determining the attorney fee award. See *Wallace v. Pastore*, 1999 PA Super 297, 742 A.2d 1090 at 1094. North River participated in a much more elaborate process, with Reed Smith providing its invoices far in advance of trial and North River calling multiple experts for opinions on their propriety. With no statutory procedure for assessing attorney fees and caselaw allowing minimal information, the fact that I needed a letter explaining the discounts allowed in the invoices admitted into evidence establishes no error. Even if I made an error by obtaining the explanation in the letter after the trial, there was credible expert testimony that the higher "standard budget rate" was reasonable. See N.J.T., pp. 334-335 and 374. Therefore, I correctly determined the amount of Reed Smith's attorney fees assessed against North River.

North River also contends the attorney fee award is erroneous because MSA never proved that it paid Reed Smith's invoices. However, the invoices themselves evidenced payment by MSA (see exhibits P-22D and P-26G) and MSA testimony was un rebutted that Reed Smith's invoices were paid. N.J.T., p. 369. Hence, MSA proved it paid Reed Smith's invoices.

VII. B. Level of Intent for Attorney Fee Award

In paragraph VII.B. of the Concise Statement North River contends the attorney fee award is erroneous because MSA "has not established that North River acted with the requisite level of intent to support penal remedies under 42 Pa.C.S. §8371...." The requisite level of intent for an attorney fee award under 42 Pa.C.S. §8371 is bad faith, and I previously described some of

the clear and convincing evidence of North River's bad faith. With bad faith proven it was within my discretion to award MSA attorney fees to compensate for expenses it incurred in litigation in which it prevailed. The attorney fee award was not an abuse of this discretion. Hence, the requisite level of intent for the attorney fee award was present, and I properly exercised my discretion in making the award.

VII. C. Attorney Fees After Settlement Offer

In paragraph VII.C. of the Concise Statement North River contends I made an error by awarding attorney fees after North River made a reasonable offer of settlement. In *Lohman v. Duryea Borough* (574 F.3d 163 (3d Cir. 2009)) the Court held that a \$12,205 jury verdict following rejection of a \$75,000 settlement offer was a valid basis for a reduction in the attorney fee award. Attorney fees are awarded based on the degree of a party's success, hence a rejected settlement offer that is approximately six times larger than the jury verdict indicates a low degree of success. *Id.* North River argues its September 6, 2016 \$120 million settlement offer that was rejected by MSA indicates a low degree of success by MSA. I disagree because the \$120 million was a "global" settlement offer for all North River policies issued to MSA that total \$250 million in coverage. Therefore, this settlement offer is not relevant to MSA's degree of success. Since MSA obtained one hundred percent of the amount submitted to the jury and a \$30 million punitive damages award, it achieved a very high degree of success. Hence, my award of attorney fees following North River's September 6, 2016 settlement offer was appropriate.

VII. D. Items Included in Attorneys Fee Award

In paragraph VII.D. of the Concise Statement North River contends I made an error by awarding "fees and costs not authorized by section 8371...." While North River includes fees to attorneys not of record in this proceeding, deposition transcription costs, mock jury costs, MSA's portion of the special discovery master's fees and jury consulting fees as unauthorized by 42 Pa. C.S. §8371, this legislation is silent as to what comprises "attorney fees." The U.S. Court of Appeals for the Third Circuit determined that "the object of an attorney fee award is to make the successful plaintiff completely whole" and the "obvious design" of 42 Pa. C.S. §8371 is to place the insured "in the same economic position [it] would have been in had the insurer performed as promised, by awarding attorney's fees as additional damages...." *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 236 (3d Cir. 1997). Hence, expenses ordinarily billed by attorneys to their clients are properly part of an attorney fee award. *See W. Va. Univ. Hosps. Inc. v. Casey*, 499 U.S. 83 at 87 n. 3 (1991) and *InvesSys, Inc. v. McGraw-Hill Co.s., Ltd.*, 369 F.3d 16 at 22 (1st Cir. 2004). All the expenses North River alleges are unauthorized by section 8371 are ordinarily billed by attorneys to their clients. It also is noteworthy that the expenses for contract attorneys, local defense counsel and national coordinating counsel are less than Reed Smith would have charged for the same work, and North River hired a jury consultant, mock juries as well as a "shadow jury" present throughout the jury trial. Hence, it was appropriate to include the expenses described above in the attorney fees award.

VIII. A. Interest Pre-Dating Ruling on Coal Dust Trigger

In paragraph VIII.A. of the Concise Statement North River contends my award of interest is erroneous because the interest began accruing before Judge Wettick's June 10, 2015 ruling that coal dust injuries begin upon exposure. *See* footnote no. 1 above. 42 Pa. C.S. §8371(1) authorizes an award of interest "from the date the claim was made by the insured...." I used the dates when MSA paid the settlements of the underlying claims as the start dates, which actually is a later point in time than the dates the claims were made by MSA. Therefore, North River's contention that interest on the coal dust claims should start after June 10, 2015 is meritless.

VIII. B. Interest Pre-Dating Ruling on Exhaustion

In paragraph VIII.B. of the Concise Statement North River contends my award of interest is erroneous because the interest began accruing before Judge Wettick's May 7, 2012 ruling on MSA's motion for partial summary judgment on the subject of exhaustion of the umbrella policies. This contention is meritless for the reasons set forth in the preceding paragraph.

VIII. C. Compound Interest

In paragraph VIII.C. of the Concise Statement North River contends I made an error in my award of interest by utilization of compound interest. 42 Pa.C.S. §8371 is silent as to whether the award is limited to "simple" interest or allows for compound interest. Awarding only simple interest, however, would not put MSA financially in the position it would have been in if the settlement payments were made by North River. In that case, MSA would have been able to place the funds in an investment that earns compound interest. Since 42 Pa. C.S. §8371 is silent and compound interest furthers the purpose of 42 Pa.C.S. §8371, I was correct in awarding compound interest.

IX and X. Reed Smith's Supplemental Attorney Fees

In paragraphs IX and X of the Concise Statement, North River raises issues I have already addressed above, except in paragraph X. A. North River contends I made an error in the award of supplemental attorneys' fees because Reed Smith's fees "are insufficiently documented, include fees sought for excessive and unnecessary time" and "are based on rates that are excessive for the Pittsburgh market." I reviewed MSA's supplemental fee petition and Reed Smith fees are documented properly with the time spent necessary for representation of its client. Reed Smith's rates, based on credible testimony from its expert witness, are not excessive for the Pittsburgh market. Hence, there was no error in the award of supplemental attorneys' fees to Reed Smith.

XI. Cost of Transcripts of Trials

In paragraph XI of the Concise Statement, North River contends I made an error by awarding MSA supplemental court costs of \$21,934.75 in reimbursement of the official court reporter's fees for producing transcripts of the trials. While an award of attorney fees is not made to the prevailing party without a statutory authorization, court costs ordinarily are imposed on the unsuccessful litigant. *See Smith v. Rohrbaugh*, 2012 PA Super 208, 54 A.3d 892. These costs, referred to as "taxable costs," include the Prothonotary's charges for filing a lawsuit and the Sheriff's charges for serving it. *Id.* The official court reporter's fees are similar as they originate from another "arm of the court" and customarily appear on the docket. Hence, I was correct in awarding them as court costs to MSA. Even if it was an error, the error would be harmless as the official court reporter's fees for transcribing a trial are ordinarily billed by attorneys to their clients and therefore could be awarded to MSA as part of its attorney fees.

BY THE COURT:
/s/Hertzberg, J.

¹ I will not be addressing paragraph I in the Concise Statement because the alleged error identified by North River involves rulings by Judge Wettick. North River alleges Judge Wettick erroneously determined that insurance coverage under the “continuous trigger” approach (see *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993)) applies to the coal dust claims. Although Judge Wettick is retired and therefore unable to write an opinion, he explained his ruling in the Memorandum and Order of Court Dated June 10, 2015 (Document no. 501 in the docket of the Allegheny County Department of Court Records). MSA also appealed to the Superior Court of Pennsylvania and filed a Statement of Errors Complained of on Appeal. I will not be addressing any alleged errors raised by MSA because all involve Judge Wettick’s rulings and are adequately explained by Judge Wettick’s filings or his on the record statements.

² North River was permitted to show Mr. Berner’s videotaped testimony of the amount of the compromise offer made by North River during the March, 2009 meeting because both parties agreed to allow it. See J.T., pp. 2104-2110.

³ NIOSH stands for The National Institute for Occupational Safety and Health, a department of the Center for Disease Control

**UPMC, a Pennsylvania Nonprofit, Non-Stock Corporation,
UPMC Presbyterian Shadyside, and UPMC Community Medicine, Inc. v.
Michael P. O’Day, d/b/a The Law Offices of Michael O’Day**

Tortious Interference—Civil Conspiracy—Professional Conduct

Court grants preliminary objections to hospital’s tortious interference and civil conspiracy claims against attorney alleged to have contacted patients to recruit them as plaintiffs for future lawsuits. Complaint failed to sufficiently plead facts or cite authority for a common law claim against an attorney in impending litigation. Complaint also failed to plead sufficient facts to support the other elements of a tortious interference with contractual relations claim and without an underlying tort, the civil conspiracy claim would fail. Court also struck references in Complaint to alleged violations of Professional Rules of Conduct because the Supreme Court has exclusive authority to supervise attorney conduct.

No. GD 17-3857. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
McVay Jr., J.—June 9, 2017.

MEMORANDUM and ORDER OF COURT

Facts and Procedural History

On March 14, 2017, UPMC, UPMC Presbyterian Shadyside, and UPMC Community Medicine (collectively referred to as “Plaintiffs”) filed a civil complaint against attorney Michael O’Day (“Defendant”) alleging: (1) tortious interference with contractual relations and prospective contractual relations and (2) civil conspiracy. The instant matter before this Court are preliminary objections filed on behalf of the Defendant.

Plaintiffs allege that Defendant recruited a former patient (“Jane Doe”) of UPMC and Dr. Ghassan Bejjani (“Dr. Bejjani”) and instructed Jane Doe to solicit other patients that had undergone a specialized operation performed by Dr. Bejjani. Complaint ¶ 26. According to Plaintiffs, Jane Doe reached out to at least one patient (“Patient A”) via Facebook messenger and created an “unwarranted” fear about their health and operation. Complaint ¶¶ 33-35, 31. Patient A and Patient A’s daughter were both operated on by Dr. Bejjani to correct Chiari Malformations. Eventually, Jane Doe and Patient A spoke on the phone, and Jane Doe stated that she was on “a mission to find” other patients at Defendant’s direction. Complaint ¶ 43. Jane Doe allegedly made numerous false and/or misleading statements to Patient A surrounding Patient A’s decision to have both she and her daughter undergo the procedure. Complaint ¶ 46. Patient A and Defendant spoke on the phone on January 24, 2017, Complaint ¶ 48-49, and Defendant later forwarded an email to Patient A that contained a news article involving UPMC. Complaint ¶ 56. Plaintiffs contend that these actions were intended to “driv[e] a wedge” between UPMC and its patients. Complaint ¶ 25.

Eventually, Patient A unequivocally stated to Defendant she was not interested in joining Defendant’s law suit against UPMC and Dr. Bejjani. Nevertheless, Plaintiffs maintain that Defendant continued to contact Patient A through phone and email. Complaint ¶¶ 64-65, 67. According to Plaintiff, patients that have received the decompression operation to address Chiari Malformations are particularly vulnerable and that the continuing contact with the physicians are a key component in treatment. Complaint ¶ 73-79. Plaintiffs indicate that they believe Defendant’s conduct is on-going and that other patients may have been similarly contacted. Complaint ¶ 81.

Throughout the Complaint, Plaintiffs allege Defendant violated multiple aspects of the Pennsylvania Rules of Professional Conduct (the “Rules”) through the abovementioned conduct. Complaint ¶¶ 27, 28, 32, 44, 64, 66, 90.

On April 11, 2017, Defendant filed Preliminary Objections and contend that the “lawsuit is without basis in existing law or ethics opinions, is subject to multiple deficiencies including legal insufficiency, privilege, immunity and public policy” and should be dismissed with prejudice. Preliminary Objection ¶¶ 3, 46. Defendant argues Plaintiffs’ allegations of violations of professional conduct are an attempt to use the Rules as a “procedural weapon to impose civil liability for an attorney preparing a lawsuit against them.” Prelim. Obj. ¶ 11. It is the Defendant’s position that Plaintiffs’ motive in filing the law suit was to hinder the filing of a lawsuit against Plaintiffs. Prelim. Obj. ¶ 6.

Relating to the tortious interference of contractual and prospective contractual relations, Defendant argues that Plaintiffs are unable to satisfy any of the four elements of the claim. Prelim. Obj. ¶ 37. Defendant’s position is heavily based on the assertion that the Plaintiffs have failed to demonstrate a contract exists at all. Prelim. Obj. ¶¶ 38-42. Additionally, Defendant argues that the use of the Rules to buttress a civil lawsuit is an improper infringement on the jurisdiction of the Pennsylvania Supreme Court. Prelim. Obj. 77-98. While Defendant continues to explain why his conduct was proper under the Rules, this Court and all parties agree with the position that such a determination lies solely with the Pennsylvania Supreme Court and Disciplinary Board. Finally, Defendant argues that the claim for civil conspiracy is legally insufficient and should be dismissed because: (1) an attorney cannot be held

liable for conspiracy with their own clients and (2) if the underlying tort of tortious interference with contractual relations were dismissed, no cognizable underlying tort would exist to support a claim for conspiracy.

In summary, Plaintiffs filed a two-count complaint alleging tortious interference with contractual and prospective contractual relations and conspiracy. Defendant filed preliminary objection seeking dismissal with prejudice arguing both counts are legally insufficient and that the conspiracy count fails for want of a valid, underlying tort claim. Additionally, Defendant raises public policy concerns and questions the motives of Plaintiffs in initiating this lawsuit.

Analysis

Initially, it is well settled law that preliminary objections in the nature of a demurrer calling for dismissal of a cause of action should be sustained only in cases that are clear and free from doubt. *Jones v. City of Philadelphia*, 893 A.2d 837, 843 (Pa. Commw. Ct. 2006). Moreover, even where the trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend. *See Harley Davidson Motor Co. v. Hartman*, 442 A.2d 284, 286 (Pa. Super. 1982).

Similarly, in *Foster v. UPMC S. Side Hosp.*, the Superior Court of Pennsylvania likewise held that a trial court's dismissal of a suit on preliminary objections will only be sustained where the case is free and clear of doubt. 2 A.3d 655, 662 (Pa. Super. 2010) (citing *Lugo v. Farmers Pride, Inc.*, 967 A.2d 963, 966 (Pa. Super. 2009)). This Court is not "free and clear of doubt" to dismiss with prejudice but has present doubt concerning both of Plaintiffs' causes of action because, as it stands, the complaint fails to sufficiently plead facts or cite authority for a common law claim against an attorney in impending litigation. Further, assuming *arguendo*, Plaintiffs have sufficiently plead that a contractual relationship or protected business interest existed to support a tortious interference claim, this Court is unconvinced that Plaintiffs have plead sufficient facts to support the other elements of a tortious interference with contractual relations claim. It follows, without a sufficiently plead underlying tort, the Plaintiffs' civil conspiracy claim would fail.

Finally, this Court acknowledges that, generally, legal causes of action for tortious interference with a contract and injunctive relief may be appropriate when alleged attorney misconduct is the substantive issue. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1183–85 (1978). On the other hand, this Court also recognizes that "exclusive authority to regulate and supervise the conduct of attorneys" lies with the Supreme Court of Pennsylvania. *In re Adoption of M.M.H.*, 981 A.2d 261, 272 (Pa. Super. 2009). As a result, "the Rules of Professional Conduct do not have the effect of substantive law but, instead, are to be employed in disciplinary proceedings." *Id.* This principle is well outlined in the Preamble to the Rules of Professional Conduct:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, it does not imply that an antagonist in a collateral proceeding or transaction has standing to enforce the Rule. *Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.*

Id. at 273 (2009) (citing Pa.R.P.C., Preamble).

Conclusion

Accordingly, the Court will sustain the Defendant's preliminary objections as to both counts of Plaintiffs' complaint with leave to amend. Further, the Court will strike all references to attorney conduct and alleged violations of the Rules

BY THE COURT:
/s/McVay Jr., J.

Eric Robert Neff v. National Collegiate Athletic Association

Preliminary Objections

Preliminary objections to complaint by former college football player asserting negligence against the National Collegiate Athletic Association (NCAA) for failure to protect him from the long-term effects of concussions and sub-concussive blows to the head while playing collegiate football overruled. Court overruled preliminary objections based on lack of duty and proximate cause where NCAA has plenary power of its members and dictates standards education and protocols to its members.

No. GD-16-020465. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, J.—April 11, 2017.

MEMORANDUM ORDER

This case involves a Complaint in Civil Action filed by Plaintiff, Eric Robert Neff against Defendant National Collegiate Athletic Association ("NCAA") for injuries allegedly sustained by Plaintiff as a direct and proximate result of the tortious conduct of the Defendant in connection with its failure to take effective action to protect Plaintiff from the long-term effects of concussions and sub-concussive blows to the head suffered while he played collegiate football in the NCAA.

Plaintiff was a student at Indiana University of Pennsylvania ("IUP") and played intercollegiate football there as outside line-backer during the 1997, 1998 and 1999 seasons. During this time period, Plaintiff suffered numerous repeated blows to the head during practices and games. He lost consciousness or had altered consciousness many times playing football. He was never informed that he had suffered an injury.

Plaintiff was evaluated for the first time on May 24, 2016. He reported ongoing symptoms including but not limited to forgetfulness, headaches, irritability, depression, impulsivity, anxiety, disorientation to space, social isolation, obsessive compulsive disorder, sleep disorder, reduced independence for activities of daily living, poor hygiene, financial irresponsibility, and loss of focus. He was informed that the neurobehavioral changes he was experiencing were related to the repetitive concussive and sub-concussive blows to his head.

Plaintiff's Complaint states a cause of action for negligence against the NCAA. The NCAA filed Preliminary Objections to Plaintiff's Complaint seeking dismissal of all claims against NCAA.

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Haun v. Community Health Systems, Inc.*, 14 A.3d 120, 123 (Pa. Super. 2011).

The NCAA claims that Plaintiff has not alleged facts showing that the NCAA owed him a duty or that the NCAA's actions or inactions proximately caused his alleged injuries. The NCAA further argues that Plaintiff's Complaint should be dismissed based upon the statute of limitations.

Plaintiff argues that the NCAA was negligent in failing to educate, warn or disclose to Neff the risks inherent in football, failing to promulgate or adopt rules and regulations to address the dangers of football, misrepresenting or concealing facts about safe return to play or risks of football, and increasing the risk of harm. They cite *Palsgraf v. The Long Island Railroad Company*, 248 N.Y. 339, 162 N.E. 99, 101 (1928) for the concept that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Plaintiff alleges that the NCAA assumed a duty to Plaintiff by undertaking to act as a leader in providing a "healthy and safe" environment for student-athletes in their athletic programs through "research, education, collaboration and policy development." The Plaintiff also cites the fact that the NCAA assumed the duty owed to individual colleges to formulate guidelines for student-athlete safety. The Plaintiff has pled facts sufficient to establish the proximate cause of the Plaintiff's injuries. Specifically, the Plaintiff cites the NCAA's omission of appropriate safety standards regarding head injuries.

I was not persuaded by the NCAA's analogy to the American Bar Association and its assertion that it is no different than the ABA to which lawyers may or may not choose to belong and which organization has no power over any such lawyer. In contrast, the NCAA has plenary power over its constituent members and can, and does, dictate standards, education and protocols to the members in great detail. Thus, their analogy to the ABA is not persuasive.

Similarly, the suggestion that the Statute of Limitation has run is likewise inapposite. The injuries sustained can only be known when expert medical opinion says so. Here, the Plaintiff's injuries were diagnosed well within the Statute.

Therefore, the NCAA's Preliminary Objections are overruled; Answer in 30 days of this order.

BY THE COURT:

/s/O'Reilly, J.

April 11, 2017

Commonwealth of Pennsylvania v. Kenneth M. Reeves

Criminal Appeal—Homicide—Sufficiency—Weight of the Evidence—Expert Testimony—Jury Instruction—Prior Bad Acts—mens rea
Defendant challenges the evidence following his conviction of third-degree homicide in the death of a 5 ½ month old infant.

No. CC 201501958. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—April 9, 2018.

OPINION

Appellant, Kenneth Reeves (hereinafter referred to as "Reeves"), was charged with one count of criminal homicide – third-degree murder (18 Pa.C.S. § 2501(a)), one count of aggravated assault (18 Pa.C.S. § 2702(a)(1)), and one count of endangering the welfare of children (18 Pa.C.S. § 4304(a)(1)), in connection with the death of five-and-a-half-month-old Kamero Newton. Following a jury trial, Reeves was convicted on all charges. This appeal followed.

On Saturday, December 6, 2014, detectives with the Pittsburgh Police were notified that a five-and-a-half-month old female child was found unresponsive and not breathing inside of 417 Parklow Street in the City of Pittsburgh. Detectives were advised that the child, who would later be identified as Kamero Newton (hereinafter referred to as "victim"), was transported to Children's Hospital for evaluation and treatment. Upon receiving this information, detectives went to Children's Hospital, and, when they arrived, detectives observed medical personnel attempting to resuscitate the victim. The emergency room attending physician told investigators the victim was being placed on a ventilator in the Intensive Care Unit and was listed in critical but stable condition.

While at Children's Hospital, detectives spoke with paramedics who told them that, upon arrival at the victim's residence, they discovered the victim lying on the floor next to her crib. Paramedics informed detectives that the victim's crib was equipped with railings which would have prevented her from falling or rolling out of the crib on her own. Paramedics related that, when they initially assessed the victim, she was unresponsive, had no pulse, and was not breathing. Paramedics immediately began resuscitation efforts and continued those efforts as they transported the victim to Children's Hospital.

After speaking with doctors and paramedics, detectives conducted an initial interview of the victim's mother, Julie Vojtash (hereinafter referred to as "Vojtash"). Vojtash told detectives that she had placed the victim in her crib, located on the third floor of the residence, at approximately 8:00 p.m., and stated that the victim quickly fell asleep. Vojtash went on to explain that the victim had recently begun teething, which caused her to become fussy at times, but described her daughter as an otherwise happy, healthy baby.

During her initial interview, Vojtash told investigators that Reeves was her boyfriend, and explained that he arrived at her residence at approximately 9:30 p.m. on the date of the incident. At the time of the Reeves's arrival, Vojtash was babysitting her sister's children, who lived on the first floor of the residence. At approximately 10:00 p.m., Vojtash left Reeves and the victim – who was asleep in her crib – on the third floor and went downstairs to check on the other children. While downstairs speaking

with her brother, Vojtash heard the victim crying loudly, and, when she went back to the third floor, she observed the victim awake and crying in her crib.

When Vojtash asked Reeves what had occurred, he replied: “I don’t know.” Within minutes of Vojtash returning to the third floor, the victim lost consciousness and stopped breathing, while her mother was still holding her. After placing the victim on the floor and calling 911, Vojtash and her brother began performing CPR.

During a subsequent interview, Vojtash recalled two recent incidents in which she had briefly left the victim alone with Reeves. On both occasions, she returned to find the victim crying loudly for no obvious reason. Vojtash told detectives that she did not suspect anything unusual when she discovered the victim crying, telling investigators that she attributed the victim’s crying to teething pain.

In the course of their investigation, detectives traveled to the victim’s Parklow Street address. When they arrived at the victim’s residence, investigators approached a male occupant – who would later be identified as Kenneth Reeves – and asked the occupant to identify himself. Reeves told detectives that his name was “Kenny Direnna.” However, detectives later discovered that Reeves provided false identification information because he was on probation for a previous conviction of endangering the welfare of children and aggravated assault. Police also discovered a suboxone pill and two stamp bags of suspected heroin with Reeves’s belongings. After a brief conversation with detectives, Reeves was released from the scene and advised that he would receive a summons for the narcotics violations.

On Monday, December 8, 2014, detectives returned to Children’s Hospital to check on the condition of the victim. Detectives spoke with the attending physician and a social worker, who advised them that the victim was technically brain dead and that arrangements were being made with Vojtash to determine when lifesaving efforts would be discontinued. On the same day, detectives met with a caseworker from the office of Allegheny County Children, Youth & Families. The caseworker informed detectives that Dr. Rachel Berger from Children’s Hospital had diagnosed the victim suffered an acute subdural hematoma and cerebral edema. Dr. Berger indicated that the victim’s injuries were caused by recent head trauma, which would have caused her to exhibit signs and symptoms associated with head trauma not long after the precipitating injury occurred. Dr. Berger also advised the caseworker that the emergency room notes referenced bruising on the victim’s left temple and right arm.

Detectives subsequently attempted to contact Dr. Berger by telephone to confirm the findings of the caseworker’s report, but were instead directed to Dr. Janet Squires, who was on duty at that time. Dr. Squires confirmed Dr. Berger’s findings, and added that victim had also suffered extensive bilateral retinal hemorrhaging with vitreous hemorrhage, which, along with the other injuries, clearly evinced physical abuse. Doctors confirmed that the victim did not have any underlying medical conditions which would predispose her to the injuries which ultimately led to her death.

The victim was taken off of life support on December 9, 2014, and was subsequently pronounced deceased later that same day. On December 30, 2014, the Allegheny County District Attorney’s Office received confirmation from the Allegheny County Medical Examiner’s Office that the victim’s cause of death was blunt force trauma to the head, and the manner of death was homicide. Based upon the information gathered from their investigation, detectives requested a warrant for Reeves’s arrest for third-degree murder, aggravated assault, and endangering the welfare of children (hereinafter referred to as “EWOC”).

Prior to the commencement of Reeves’s jury trial on May 22, 2017, both the Commonwealth and Reeves filed numerous pretrial motions. These pretrial motions included, *inter alia*, cross motions to preclude medical expert evidence and testimony. Reeves also filed a pretrial motion to preclude the introduction of prior bad acts evidence, as well as a motion to preclude the introduction of his videotaped police interrogation. At trial, the Commonwealth offered the testimony of Dr. Rachel Berger, a board certified pediatric physician from Children’s Hospital, Dr. Abdulrezak Shakir, the pathologist who performed the victim’s autopsy, and Dr. Bennet Omalu, a world-renowned pathologist and Chief Medical Examiner of San Joaquin County, California who performed an independent investigation into the victim’s death at the Commonwealth’s request. Collectively, the Commonwealth’s medical experts opined that: (1) the victim’s cause death was blunt force trauma to the head; (2) the manner of death was homicide; (3) the victim did not have any preexisting medical conditions which would have predisposed her to the conditions which caused her death; and (4) the victim’s death was not accidental.

At the conclusion of his jury trial on May 31, 2017, Reeves was found guilty of criminal homicide – third-degree murder, aggravated assault, and endangering the welfare of children. On August 28, 2017, Reeves was sentenced to a term of incarceration of 20 to 40 years on the third-degree murder conviction, followed by a consecutive term of 2.5 to 5 years on the endangering the welfare of children conviction. On the same day, Reeves entered a negotiated guilty plea to multiple counts of possession of controlled substances and one count of possession of paraphernalia. This Court sentenced Reeves to a term of incarceration of 6 to 12 months at each count, concurrent to each other, and to the sentence imposed for his convictions for criminal homicide and EWOC.

On August 30, 2017, Reeves filed timely post-sentence motions, which were subsequently denied on October 20, 2017. Reeves thereafter filed a timely notice of appeal with the Pennsylvania Superior Court on October 24, 2017. This Court subsequently directed Reeves to file his concise statement of matters complained of on appeal pursuant to Pa.R.Crim.P. 1925(b). In his concise statement of matters complained of on appeal, Reeves raises multiple claimed errors, including assertions that the evidence presented at trial was insufficient to sustain the verdict at all counts, that the verdict at all counts was against the weight of the evidence, and that this Court abused its discretion at various stages of the proceedings.

I. Sufficiency of the Evidence

Reeves’s first claimed error is a general assertion that the Commonwealth failed to present sufficient evidence to sustain the verdict at all counts. Reeves argues that no evidence was presented to establish that he had any involvement in the victim’s death. Reeves then outlines why he believes the evidence presented at trial was insufficient to sustain his conviction at each count. Specifically, Reeves contends that the Commonwealth’s evidence was insufficient to prove that he possessed the requisite *mens rea* to sustain his conviction for third-degree murder. Reeves also asserts that the Commonwealth failed to prove that he possessed the requisite state of mind to sustain a conviction for aggravated assault. In addition, Reeves argues that the evidence presented at trial was insufficient to establish that he knowingly endangered the victim, and contends that the Commonwealth failed to present sufficient evidence to prove that he was within the class of persons on which criminal liability may be imposed pursuant to Pennsylvania’s EWOC statute.

The standard applied when 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. *Com. v. Golphin*, 161 A.3d 1009, *appeal denied*, 170 A.3d 1051 (Pa. 2017) (*citing Com. v. Harden*,

103 A.3d 107 (Pa.Super. 2014)). A trial court may not weigh the evidence and substitute its judgment for that of the fact-finder. *Id.* In addition, the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. *Id.*

The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. *Id.* Moreover, in applying the sufficiency of the evidence test, the entire record must be evaluated, and all evidence actually received must be considered. *Id.* The finder 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. *Id.* Lastly, in viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, the court must give the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Id.* 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. *Id.*

A. Third-Degree Murder

Reeves's first sufficiency argument relates to his third-degree murder conviction. Third-degree murder is defined as all other kinds of murder, other than first degree murder or second-degree murder. *Com. v. Marquez*, 980 A.2d 145, 148 (Pa.Super. 2009) (quoting 18 Pa.C.S.A. § 2502(c)). Third degree murder, as defined by Pennsylvania case law, is a killing done with malice. *Com. v. Marquez*, 980 A.2d at 148 (quoting *Com. v. MacArthur*, 629 A.2d 166, 167–68 (Pa.Super. 1993)).

Malice exists where there is a particular ill-will, wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences, and a mind regardless of social duty. *Com. v. Marquez*, 980 A.2d at 148 (quoting *Com. v. Melechio*, 658 A.2d 1385, 1388 (Pa.Super. 1995)). Malice can be proven by establishing that an actor consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm. *Com. v. Golphin*, 161 A.3d at 1018 (citing *Com. v. Devine*, 26 A.3d 1139, 1146 (Pa.Super. 2011)). Malice may be inferred by considering the totality of the circumstances. *Com. v. Golphin*, 161 A.3d at 1018 (citing *Com. v. Dunphy*, 20 A.3d 1215, 1219 (Pa.Super. 2011)).

In the instant appeal, Reeves simply asserts that the Commonwealth did not present sufficient evidence to prove that he acted with malice in bringing about the death of the victim. Reeves does not detail any claimed deficiencies in the evidence presented in support of his third-degree murder conviction. Rather, he simply offers a blanket assertion that the Commonwealth did not sustain its burden of proving that he acted with malice in bringing about the victim's death.

Malice, it must be remembered, may be proven by means of wholly circumstantial evidence. *Com. v. Golphin*, 161 A.3d 1009; *Com. v. Harden*, 103 A.3d 107. At Reeves's trial, the Commonwealth presented medical evidence from multiple medical expert witnesses, including Dr. Berger, Dr. Shakir, and Dr. Omalu. In addition to the expert witness testimony, the Commonwealth offered the testimony of the victim's mother and the detectives who investigated the circumstances of the victim's death. Collectively, the testimony of these witnesses established, to the jury's satisfaction, that Reeves acted with malice in bringing about the victim's death. The Commonwealth's evidence was therefore clearly sufficient to sustain Reeves's conviction for third-degree murder.

B. Endangering the Welfare of Children

Next, Reeves asserts that the Commonwealth's evidence was insufficient to support his conviction for endangering the welfare of children. Specifically, Reeves alleges that the Commonwealth failed to establish that he acted knowingly in endangering the victim. Like his other sufficiency arguments, Reeves points to no substantive evidence which supports his contention, nor does he address the fact that the Commonwealth may sustain an EWOC conviction by proving that a defendant acted with criminal intent or recklessness. *Com. v. Moore*, 395 A.2d 1328 (Pa.Super. 1978).

In Pennsylvania, "[a] parent, guardian, or other person supervising the welfare of a child under 18 years of age ... commits an offense if he knowingly endangers the welfare of the child by violating the duty of care, protection, or support." *Com. v. Leatherby*, 116 A.3d 73, 81 (Pa.Super. 2015) (quoting 18 Pa.C.S.A. § 4304(a)). The Commonwealth is not required to prove malice in order to sustain a verdict for EWOC; the prosecution must only establish that the defendant acted with criminal intent, knowledge, or recklessness. *Com. v. Moore*, 395 A.2d 1328. In his 1925(b) statement, Reeves does not attempt to address the criminal intent or recklessness elements. He merely asserts that the Commonwealth did not present sufficient evidence to prove that he acted knowingly in endangering the victim.

At trial, the Commonwealth presented medical expert testimony establishing that the victim's cause of death was blunt force trauma to the head. J.T.T., 405:23-25; 406:1-7. The Commonwealth's experts also testified that the injuries which caused the victim's death were not the result of any preexisting condition or accident. J.T.T., 261:13-25; 408:12-25; 409:1-4. In addition, the victim's mother testified generally that, aside from occasional teething pain, the victim was a generally happy, healthy child, and that, when she left the victim with Reeves, the victim was in no distress, and appeared to be normal.

After considering the evidence presented at trial, the jury found that the prosecution's evidence established that Reeves acted with the requisite criminal intent, knowledge, and/or recklessness in harming the victim. Accordingly, Reeves's argument that the Commonwealth did not prove that he possessed the state-of-mind necessary to sustain his conviction for EWOC must fail.

In addition to his argument that the Commonwealth failed to establish that he acted knowingly in harming the victim, Reeves contends that the Commonwealth failed to establish that he was within the class of persons that can be held criminally liable for endangering the welfare of children pursuant to § 4304(a). Pennsylvania's EWOC statute expressly provides that the class of persons subject to criminal liability includes, "...parent(s), guardian(s), or other person(s) supervising the welfare of a child under 18 years of age." 18 Pa.C.S.A. § 4304(a) (emphasis added). The Pennsylvania Supreme Court has interpreted the phrase, "person responsible for the child's welfare" to include persons such as baby-sitters and others who have permanent or temporary custody and control of a child. *Com. v. Kellam*, 719 A.2d 792, 796 (Pa.Super. 1998) (citing *Com. v. Gerstner*, 540 Pa. 116 (1995))¹. Criminal liability under § 4304(a) may be based on either an affirmative act or a failure to perform a duty imposed by law. *Com. v. Kellam*, 719 A.2d at 796 (citing 18 Pa.C.S.A. § 301)).

In *Kellam*, the defendant was charged with EWOC in connection with the death of his girlfriend's infant daughter. *Com. v. Kellam*, 719 A.2d 792. The victim's autopsy revealed that she had not had any food or fluids in the twenty-four to forty-eight-hour period preceding her death. *Id.* The Commonwealth presented evidence that, during the vast majority of this time, the defendant was the only adult who could care for the dying infant. *Id.* During Kellam's trial, the trial court defined the defendant's duty to the victim by explaining that, "a person responsible for the child's welfare" includes "[a] person who provides permanent or temporary care, supervision, ... or control of a child in lieu of parental care, supervision and control." *Id.*² At the conclusion of his jury trial, Kellam was convicted.

On appeal, Kellam challenged his EWOC conviction, arguing that the duty imposed under § 4304(a) is limited to natural and

adoptive parents. *Id.* Kellam argued that he could not be deemed to have had custody and control over the victim because the child's mother was in the house at the time of the infant's death. *Id.* The Pennsylvania Supreme Court squarely rejected Kellam's contention that he was not within the class of persons to which Pennsylvania's EWOC statute applies, finding that the mother's physical presence in the house was irrelevant. *Id.* The Supreme Court explained that: "[i]n this age where children reside in increasingly complex family situations, we fail to understand why criminal liability should be strictly limited to biological or adoptive parents." *Id.* at 796. The Kellam Court went on to state that, "whenever a person is placed in control and supervision of a child, that person has assumed such a status relationship to the child so as to impose a duty..." *Id.*

In reaching its decision in *Kellam*, the Pennsylvania Supreme Court also addressed the trial court's jury instructions, holding that the trial court's instructions defining Kellam's duty to the victim accurately stated the law of the Commonwealth. *Com. v. Kellam*, 719 A.2d 792. Accordingly, the Supreme Court concluded that the Commonwealth had presented sufficient evidence to support the jury's implicit finding that appellant provided control and supervision of the child while the infant's mother was otherwise occupied. *Id.* Relying on the same reasoning, the Supreme Court also determined that the jury's verdict was clearly not against the weight of the evidence. *Id.*

The facts of the instant matter are strikingly similar to those in *Kellam*. Reeves was involved in a romantic relationship with the victim's mother and had been entrusted with the care of the victim on multiple occasions. The victim's mother testified that Reeves had even acted as a babysitter for the victim while she was at work or attending to her other child. J.T.T., 124:17-25. Reeves's relationship to the victim was therefore clearly sufficient to subject him to criminal liability pursuant to Pennsylvania's EWOC statute. *See Kellam*, 719 A.2d at 796 (baby-sitters and others who have permanent or temporary custody and control of a child are subject to the provisions of § 4304). Accordingly, Reeves's sufficiency claims with respect to his conviction for endangering the welfare of children are without merit.

C. Aggravated Assault

Reeves's final sufficiency argument relates to his conviction for aggravated assault. At Reeves's sentencing, this Court found that the charge of aggravated assault merged into the third-degree murder count, and therefore no sentence was imposed in relation to Reeves's aggravated assault conviction. As such, the Court need not address the errors raised in Reeves's 1925(b) with respect to his aggravated assault conviction. This Court does, however, believe that the Commonwealth sustained its burden with respect to Reeves's aggravated assault conviction for the same reasons set forth in the preceding sections of this Opinion.

II. Weight of Evidence

In addition to his sufficiency arguments, Reeves also raises claims that the verdict at all counts was against the weight of the evidence. Much like his sufficiency arguments, Reeves generally asserts that the verdict at all counts was against the weight of the evidence, then proceeds to detail why he believes the verdict at each count was against the weight of the evidence. The gist of Reeves's argument is that the evidence presented by the Commonwealth was so weak and insubstantial that the Commonwealth could not prove various elements of each crime charged. Reeves offers little in the way of factual support for his contentions; he simply argues that the jury improperly focused on his prior bad acts and should have placed more – or less – significance on certain evidence presented at trial.

A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence. *Com. v. Davis*, 799 A.2d 860, 865 (Pa.Super. 2002) (citing *Com. v. Merrick*, 338 Pa.Super. 495 (1985)). The test is not whether the court would have decided the case in the same way, but whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail. *Id.*

When addressing a challenge to the weight of the evidence, 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. *Com. v. Stokes*, 78 A.3d 644, 650 (Pa. 2013) (quoting *Com. v. Widmer*, 744 A.2d 745, 751–52 (Pa. 2000)). In order for an appellant to prevail on a challenge to the weight of the evidence, "the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." *Com. v. Sullivan*, 820 A.2d 795, 806 (Pa.Super. 2003)).

The decision to grant or deny a motion for a new trial based on a challenge to the weight of the evidence is committed to the sound discretion of the trial court, because only the trial court observed witnesses and other evidence firsthand. *Com. v. Perez*, 664 A.2d 582 (Pa.Super. 1995), abrogated on other grounds. Where the record adequately supports the trial court's decision, the trial court has acted within the limits of its discretion. *Com. v. Clay*, 619 Pa. 423, 431 (2013) (quoting *Com. v. Brown*, 538 Pa. 410 (1994)) (internal quotations omitted).

Appellate review of a weight of the evidence claim is limited to a review of the trial judge's exercise of discretion, rather than underlying question of whether verdict was against weight of evidence. *Com. v. Widmer*, 689 A.2d 211 (Pa. 1997); *Com. v. Rodriguez*, 174 A.3d 1130 (Pa.Super. 2017); *Com. v. Brown*, 648 A.2d 1177 (Pa. 1994). Merely referring to contradictory evidence presented at trial – as Reeves does in the instant appeal – does not entitle a defendant to new trial on ground that verdict was against weight of evidence, nor is this a sufficient basis to support a finding that the trial court abused its discretion. *Com. v. Brown*, 648 A.2d 1177. Under the rigorous standards established by the Pennsylvania Supreme Court, Reeves's self-serving assertions are insufficient to support his contention that his convictions for third-degree murder, aggravated assault, and endangering the welfare of children were against the weight of the evidence.

III. Abuse of Discretion

A. Prior Bad Acts

Reeves's next argument is that this Court abused its discretion with respect to a litany of evidentiary issues during trial. On appeals challenging an evidentiary ruling of the trial court, the trial court's decision will not be reversed absent a clear abuse of discretion. *Com. v. King*, 959 A.2d 405, 411 (Pa.Super. 2008) (citing *Com. v. Bishop*, 936 A.2d 1136, 1143 (Pa.Super. 2007)). Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias, or ill will. *Id.*

Reeves's first claimed error is that this Court abused its discretion when it permitted the Commonwealth to introduce evidence of his prior bad acts. Specifically, Reeves argues that this Court erred in permitting the Commonwealth to introduce evidence of his prior criminal conviction for aggravated assault and EWOC, as well as testimony from multiple family members that they suspected that Reeves had previously physically abused the victim.

Reeves asserts that these prior bad acts were not sufficiently similar to the events alleged in the instant case, and that evidence of these acts did not meet the standard for any permissible exception to Pa.R.Evid. 404(b). Reeves contends that evidence of his prior bad acts served only to cause confusion on the part of the jury. In the alternative, Reeves argues that it was an abuse of discretion for this Court to permit the prosecution to introduce evidence from his prior conviction, rather than simply providing the certified conviction to the jury.

In addition to his assertions that this court abused its discretion in permitting the Commonwealth to introduce evidence of his prior bad acts, Reeves argues that this Court erred by admitting his videotaped interrogation at trial. Reeves asserts that the jury should not have been permitted to view his videotaped interrogation because the video impermissibly implied that he had a propensity for perpetrating crimes against children because he had previously pled guilty to charges involving children. In the alternative, Reeves contends that certain portions of his interrogation video to which he objects should not have been shown to the jury.³

Generally, evidence of prior bad acts or unrelated criminal activity is inadmissible to show that a defendant acted in conformity with those past acts, or to show criminal propensity. *Com. v. Aikens*, 990 A.2d 1181, 1185 (Pa.Super. 2010) (citing *Com. v. Powell*, 956 A.2d 406, 419 (Pa. 2008)). However, evidence of prior bad acts may be admissible when offered to prove some other relevant fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Before the Commonwealth is permitted to introduce evidence of prior bad acts, it is required to provide the defendant with notice of its intention to present such evidence pursuant to Pa.R.E. 404(b)(3).⁴

In determining whether evidence of other prior bad acts is admissible, the trial court is obliged to balance the probative value of such evidence against its prejudicial impact. *Com. v. Aikens*, 990 A.2d at 1185. In applying this balancing test, the trial court is not, “required to sanitize the trial to eliminate all unpleasant facts from the jury’s consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged.” *Com. v. Hairston*, 624 Pa. 143, 159–60 (2014) (quoting *Com. v. Lark*, 543 A.2d 491, 501 (Pa. 1988)); *Com. v. Powell*, 956 A.2d 406 (2008). Moreover, prejudicial evidence may be admissible so long as it is not unduly so. See *Com. v. Dillon*, 925 A.2d 131, 141 (Pa. 2007) (“Evidence will not be prohibited merely because it is harmful to the defendant.”).

In the instant matter, evidence of Reeve’s prior bad acts was admissible to establish the chain of events and pattern of abuse that eventually led to the victim’s death. See *Com. v. Powell*, 598 Pa. 224. The evidence was also admissible to show Reeves’s intent and malice towards the victim and absence of mistake in bringing about the victim’s death. *Id.* Finally, evidence of Reeve’s prior bad acts was admissible to show a common scheme or plan. *Id.* This is especially true, given the commonality of the age of the victim in the instant matter and that of Reeves’s previous victim.

B. Medical Expert Testimony

Reeves next claimed error is that this Court abused its discretion when it allowed the Commonwealth to introduce the testimony of Dr. Bennett Omalu. Reeves argues Dr. Omalu’s testimony was inadmissible because Dr. Omalu did not perform an independent evaluation of the victim, but rather adopted the findings of Dr. Clark. Reeves argues that this was a violation of his confrontation right to cross-examine Dr. Clark. Reeves also contends that this Court abused its discretion by allowing Dr. Omalu to testify regarding conclusions that were beyond the scope of his report.

Prior to trial, the defense moved to preclude the testimony of Dr. Omalu, arguing that this testimony would violate his confrontation clause rights. Deft.’s Mot. in Limine, filed May 2, 2017; Pretrial Mot. Hrg., May 12, 2017, 11:1-5. The Commonwealth challenged Reeves’s assertion that Dr. Omalu merely adopted Dr. Clark’s findings by pointing out that Dr. Omalu conducted a thorough, independent evaluation and only relied on Dr. Clark’s findings to the extent that those findings provided insight and background into the initial investigation. Pretrial Mot. Hrg., May 12, 2017. Reeves’s motion to preclude Dr. Omalu’s testimony, which raised the same arguments that Reeves asserts in the instant appeal, was properly denied.

Next, Reeves asserts that this Court abused its discretion by precluding the defense from calling Steven A. Koehler, MPH, PhD⁵ as an expert witness. In the instant appeal, Reeves argues that Pa.R.Evid. 701 and 702 define “expert witness” broadly, and that Dr. Koehler had relevant evidence which would have impeached the Commonwealth’s expert. Reeves does not address the deficiencies in Dr. Koehler’s qualifications, nor does he discuss Dr. Koehler’s misrepresentations to the Court regarding his education, training, and experience.

Prior to the commencement of trial, the Commonwealth moved to preclude the proposed testimony of Dr. Koehler on the basis that Dr. Koehler did not possess the requisite education and training to form conclusions as to the victim’s specific cause and manner of death. Com. Mot. in Limine, filed December 5, 2016; Pretrial Mot. Hrg. Tr., May 12, 2017, 2:9-12. The Commonwealth pointed out that Dr. Koehler is an epidemiologist, not a medical doctor, and would have only been competent to provide general statistical data. Com. Mot. in Limine, filed December 5, 2016; Pretrial Mot. Hrg. Tr., May 12, 2017, 2:14-25. The Commonwealth also asserted that Dr. Koehler had never testified as an expert regarding cause of death, and that he was unqualified to reach such medical conclusions. Com. Mot. in Limine, filed December 5, 2016; Pretrial Mot. Hrg. Tr., May 12, 2017, 2:18-20.

In addition to its contention that Dr. Koehler lacked the requisite qualifications to testify as to the victim’s cause and manner of death, the Commonwealth also alleged that Dr. Koehler’s *curriculum vitae* contained patent misrepresentations with respect to his educational background. Com. Mot. in Limine Mot., filed December 5, 2016; Pretrial Mot. Hrg. Tr., May 12, 2017, 4:6-23. Specifically, the Commonwealth advised this Court that, during the course of its investigation into Dr. Koehler’s background, it discovered patent misrepresentations related to his education, training, and experience. Tr. of Conference in Chambers, December 8, 2016, 3:15-8:18. The Commonwealth informed this Court that these misrepresentations were sufficient to warrant a criminal investigation by the Allegheny County District Attorney’s Office. Tr. of Conference in Chambers, December 8, 2016, 8:23-25.

This Court found the patent misrepresentations in Dr. Koehler’s CV to be so troubling that, after being made aware of the inaccuracies, this Court advised the defense that, should Dr. Koehler be called to testify at trial, the Court would be compelled to advise Dr. Koehler of his *Miranda* rights. Tr. of Conference in Chambers, December 8, 2016, 12:7-12. The Commonwealth’s motion to preclude the proposed testimony of Dr. Koehler was thereafter properly granted.

C. Jury Instructions

Reeves next claimed error is that this Court abused its discretion by instructing the jury that Reeves was the victim’s sole care giver. When evaluating the propriety of jury instructions, an appellate court will look to the instructions as a whole – not simply isolated portions – to determine if the instructions were improper. *Com. v. Rodriguez*, 174 A.3d 1130, 1146 (citing *Com. v. Antidormi*, 84 A.3d 736, 754 (Pa.Super. 2014)). The Pennsylvania Superior Court has noted that, “it is an unquestionable maxim of law in this

Commonwealth that a trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration.” *Id.* Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error. *Id.*

In the instant matter, Reeves has offered nothing which would indicate that this Court abused its discretion with respect to its jury instructions. This Court’s jury instructions clearly, adequately, and accurately stated the law. *Id.* Reeves has cited no evidence to the contrary. Accordingly, Reeves’s claimed errors with respect to this Court’s jury instructions are without merit.

D. Mistrials

Reeves’s final substantive argument is that this Court abused its discretion by failing to grant his mistrial requests at various stages of his jury trial. First, Reeves argues that this Court abused its discretion by failing to grant his request for a mistrial following the Commonwealth’s opening statement, during which the Commonwealth referenced evidence of Reeves’s prior bad acts. Reeves also argues that this Court abused its discretion in failing to grant his request for a mistrial following Dr. Omalu’s testimony to conclusions that Reeves asserts were beyond the scope of his report. For the reasons set forth in the preceding portions of this Opinion which address Reeves’s argument that evidence of his prior bad acts and Dr. Omalu’s testimony should not have been admitted, Reeves’s abuse of discretion claims with respect to his mistrial requests are without merit.

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

Dated: April 9, 2018

¹ Interpreting 42 Pa.C.S.A. § 5554, Tolling of Statute.

² Referencing the Child Protective Services Law, 23 Pa.C.S.A. § 6303.

³ Reeves argues that the jury should not have been permitted to hear comments made by investigating officers in the video because the officers’ comments served only to inflame the passions of the jury. Reeves also argues that portions of the interrogation video in which officers made comments concerning child abuse and the medical condition of the victim were impermissible under Rules 701 and 702 because the officers were not qualified to provide opinions related to medical conditions. Finally, Reeves alleges that the jury should not have been permitted to view portions of his interrogation video in which detectives referenced discovery of drugs with his belongings on the third floor of the victim’s residence.

⁴ The Commonwealth filed its notice of intention to present prior bad acts evidence on August 12, 2015.

⁵ Dr. Koehler is an epidemiologist who was appointed by the Court pursuant to Reeves’s Motion to Appoint Expert Witness.

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Richard B. Sandow, Esquire, John P. Corcoran, Jr., Esquire,

and Michael A. Carr, Esquire, t/d/b/a Jones, Gregg, Creehan & Gerace, LLP v.

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Entry of Judgment of Non Pros on counterclaim correct. Defendant waived counterclaim where he failed to file a Petition Requesting Relief from Judgment of Non Pros under Pa.R.C.P. 3051.

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Boundary Law—Vacated Street—Evidence of Claims—Local Ordinance (Zoning/Building)

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OPINIONS

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**Matthews International Corporation
d/b/a Gibraltar Mausoleum Construction Company v.
Floral Hills Memory Gardens**

Personal Jurisdiction

No personal jurisdiction in Pennsylvania where project site and all work completed in Ohio and where the only Pennsylvania contacts were phone calls, emails and written correspondence.

No. GD-16-016702. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—March 25, 2017.

MEMORANDUM ORDER

After Argument and review of the pleadings and the cases cited, I am of the opinion that personal jurisdiction of this matter is not in Pennsylvania.

Specifically the project is in Ohio and all the work was done in Ohio. The only Pennsylvania contact is telephone calls, e-mails and written correspondence. I do not believe this kind of contact satisfies the cases relied on by Plaintiff, specifically *GMAC v. Keller*, 737 A.2d 279.

I believe that *Hall-Woolford Tank Company vs. R.F. Kilns*, 698 A.2d 80 and *Fidelity Leasing v. Limestone County Board of Education*, 758 A.2d 1207 are more apposite than *Keller*.

Thus, I GRANT the Preliminary Objections of Floral Hills Memory Gardens and DISMISS the Complaint.

SO ORDERED,
/s/O'Reilly, S.J.

Date: April 25, 2017

**Richard B. Sandow, Esquire, John P. Corcoran, Jr., Esquire,
and Michael A. Carr, Esquire, t/d/b/a Jones, Gregg, Creehan & Gerace, LLP v.
Richard Hvizdak**

Judgment Non Pros—Waiver

Entry of Judgment of Non Pros on counterclaim correct. Defendant waived counterclaim where he failed to file a Petition Requesting Relief from Judgment of Non Pros under Pa.R.C.P. 3051.

No. GD 16-006580. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—April 28, 2017.

OPINION

This appeal arises from a Judgment of Non Pros entered on February 10, 2017 in favor of Plaintiffs Richard B. Sandow, Esquire, John P. Corcoran, Esquire, Michael A. Carr, Esquire t/d/b/a Jones, Gregg, Creehan & Gerace, LLP (“hereinafter “the law firm”) and against Richard Hvizdak, Appellant/Defendant (Appellant/Plaintiff for Appeal/Counterclaim purposes) for his failure to file a Certificate of Merit.

The law firm is a group of attorneys who filed a Complaint against Mr. Hvizdak in April of 2016 for failing to pay legal bills. Mr. Hvizdak filed Preliminary Objections on June 20, 2016. I overruled his Preliminary Objections and ordered him to file an Answer to the law firm’s Complaint. Mr. Hvizdak filed an Answer, New Matter and a Counterclaim on September 7, 2016. On February 10, 2017, the law firm filed a “Praecipe for Entry of Judgment of Non Pros on Defendant’s Counterclaim Pursuant to Rule 1042.12” for Mr. Hvizdak’s failure to file a Certificate of Merit in his Counterclaim. Mr. Hvizdak did not file a Certificate of Merit so this entry was proper. Mr. Hvizdak appealed the Judgment of Non Pros on March 7, 2017.

First and foremost, Mr. Hvizdak has no substantive claims to appeal since he failed to file a Petition requesting Relief from Judgment of Non Pros. Pa. R.C.P. 3051 states:

(a) Relief from a judgment of Non Pros shall be sought by petition. All grounds for relief, whether to strike off the judgment or open it, must be asserted in a single petition.

The Supreme Court of Pennsylvania concluded in *Sahutsky v. H.H. Knoebel Sons*, 782 A.2d 993 (Pa. 2001), that Rule 3051 requires a petition to open or strike with regard to all types of judgments of non pros. They also examined the consequence of failing to file such a petition. The Supreme Court specifically held that the failure to file a Rule 3051 petition operates as a waiver of any claims of error concerning the judgment of non pros entered by the Court of Common Pleas. In making this determination, the Supreme Court dismissed the appellant’s argument that an appellate court should quash an appeal as interlocutory, instead of finding the claims to be waived, when an appellant fails to file a petition to open or strike a judgment of non pros. When an appellant files an appeal directly from a judgment of non pros, “quashal is inappropriate [,] the proper consequence of the failure to file a Rule 3051 petition is a waiver of the substantive claims that would be raised.” *Sahutsky*, 782 A.2d at 1001 n. 3.

Therefore, based upon the foregoing, the entry of Judgment of Non Pros on Mr. Hvizdak’s Counterclaim was proper. Mr. Hvizdak has waived any substantive claims.

BY THE COURT:
/s/O'Reilly, S.J.

Date: April 28, 2017

**Laurel Crest Development, Inc. v.
Timothy Cowan and Margaret Cowan v.
Thomas R. Bueche**

Boundary Law—Vacated Street—Evidence of Claims—Local Ordinance (Zoning/Building)

Court dismissed Complaint seeking ownership of entire street and denied reference in order to local ordinance as separate litigation.

No. GD 10-12098. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

O'Reilly, S.J.—May 25, 2017.

MEMORANDUM ORDER

This matter involves a disputed “paper street” that abuts the properties of the parties herein. They are: Laurel Crest Development, Inc. (“Laurel Crest”), Timothy and Margaret Cowan (“the Cowans”) and Thomas R. Bueche (“Bueche”).

On November 19, 2014 I entered an order wherein I found that the Plaintiffs claim to the entire 40 foot width of a vacated “paper street” known as Tucker Street, was unsupported by sufficient evidence. I did find that Plaintiffs owned 20 feet of the vacated street to the center line thereof and the Defendants herein owned the other 20 feet.

In that Opinion I found that a shed of defendant Cowan was adjacent to the center line of the vacated street and I used that shed as a point of reference for the center line of the vacated street. At that time, I believed that by using that point of reference, Defendant Bueche’s shed was over the center line and on Plaintiff’s portion of the vacated street *and* that 3 trees that Defendant Bueche had cut were also on Plaintiff’s portion.

At that time, I also said “with respect to the encroachment that I found by Bueche, I will take this up after any appeal by Laurel Crest is decides, which I suspect will be filed” (See **Opinion, page 6, attached hereto as Exhibit A.**)

An appeal to the Superior Court was indeed taken but in view of my comment that I would take the Bueche matters up “later”, the Superior Court found that there was *not* a Final judgment in the case and therefore remanded the matter back to me.

Thereafter, I held conferences with the parties and counsel for Bueche asserted that a survey of the Bueche property would reveal that he had not encroached on Laurel Crest. Such survey was indeed done on August 30, 2016 and submitted to me. The parties did nothing thereafter until in March 2017, counsel for Laurel Crest inquired of my office the status of the case.

I thereafter scheduled a hearing on April 18, 2017 at which the August 20, 2016 survey was received in evidence. Counsel also argued that the survey showed that Bueche has *not* encroached on Laurel Crest. The Plaintiff argued otherwise and also continued to assert my basic decision was flawed and indicated it would appeal again once this interlocutory matter was resolved.

Based on a review of the specific survey of Bueche’s property, which survey was not before initially, I am now satisfied that Bueche’s shed is properly located on his portion of the vacated street and his felling of the 3 trees, claimed by Laurel Crest, was indeed lawful.

Thus I find that Laurel Crest does *not* own the 20 feet of Tucker Street on which Bueche has placed his shed and cut down trees. Accordingly, my prior order as to Bueche’s ownership of the 20 feet portion is vacated and the complaint of Laurel Crest is dismissed.

At the latest conference, counsel for Laurel Crest asked that I add language to the effect that Bueche is still subject to local ordinance as to this part of the vacated street. I said I would do so.

However, on second thought, I do not believe that to be appropriate since it seems to be seeking pre-judgment determination as to the propriety of the placement of Bueche’s shed and fence on the 20 foot portion. If in fact, this shed or fence is in violation of any local ordinance, that would have to be decided in any separate litigation that may ensue and it is totally *de hors* the record in this case.

On April 19, 2017, I gave counsel notice of my “second thought” and offered him an opportunity to respond. He did not and thus this order does not address any local ordinance issue that may apply to where Bueche placed his shed.

BY THE COURT,
/s/O’Reilly, S.J.

Date: May 25, 2017

EXHIBIT A

**Laurel Crest Development, Inc. v.
Timothy Cowan and Margaret Cowan v.
Thomas R. Bueche**

OPINION

O’Reilly J.

November 19, 2014

Plaintiff Laurel Crest Development, Inc., (“Laurel Crest”) initiated this action in Ejectment against Defendants Timothy and Margaret Cowan (“the Cowans”) and Thomas R. Bueche in an attempt to have them remove items from the Property at issue, a 40 feet wide, paper street known as Tucker Street. Laurel Crest is the owner of the land known as the Laurel Crest Development, a 3.895 acre parcel of land located on the westerly side of Tucker Street, located in Harrison Township. It contains a condominium development. The Defendants own parcels of land located in the Wilburt Park Plan of Acres (“Wilburt Park”). Tucker Street serves as a divider between Laurel Crest and Wilburt Park. Since 1950, pursuant to a written right-of-way Agreement between T.W. Phillips Gas and Oil Company and the then property owners, a main gas line is installed in the easterly half of Tucker Street running adjacent to the Defendants’ properties. Laurel Crest claims ownership of the full width of Tucker Street. They allege that even if they only own half of it, the Defendants have encroached upon it.

After a non-jury trial on September 9-10, 2013, I found for Defendants and against Laurel Crest. As to Defendants' Counterclaim, I found in favor of Defendants and against Laurel Crest, my Memorandum Order is attached hereto as Exhibit A. Laurel Crest filed a Motion for Judgment Notwithstanding the Verdict, an amendment or modification of the verdict or a new trial. Laurel Crest asserts in its Motion for Post-Trial Relief certain allegations of error. Each allegation of error is ultimately grounded in Laurel Crest's contention that the Court may not, given the facts of this case, find that the Defendants own half (20 feet) of Tucker Street. They allege that Defendants should be estopped from the use and enjoyment of the Property.

During the trial, the testimony established that the Defendants have maintained and used the easterly 20 feet of Tucker Street for their personal use and enjoyment. The Cowans testified that they had their property surveyed to properly determine the placement of a garden storage shed: They secured a written right-of-way agreement to enable T.W. Phillips Gas and Oil Co. to install, maintain and/or relocate the main gas line located within Tucker Street. That Agreement permitted the Cowans to keep their storage shed and T.W. Phillips re-routed the gas line around it. Mr. Bueche testified that in 2010 he secured a certified survey which reinforced his belief that Tucker Street was adjacent to the westerly line of his property. He noted that he received oral permission from T.W. Phillips Gas and Oil Co. to place decorative fencing on the rear most section of his property on the easterly side of Tucker Street. Charles Means, the Township solicitor, opined that the Defendants own in fee to the center point of Tucker Street. Stanley Graff, a registered surveyor testified that "in, on and over" may be distinguished from "adjacent to" when referencing the language of a right-of-way agreement. He further explained that Tucker Street has never been formally dedicated or developed. Daniel Martone also testified for the Defendants and stated that it is not clear what "adjacent" means in a deed or right-of-way description. He concluded that the totality of the circumstances supports the location of Tucker Street to be fully adjacent to the westerly line of Wilburt Park. The testimony established that Tucker Street was never developed, opened or accepted by the Township as a street or road so it is not a public way.

On December 20, 2013, Laurel Crest filed a Motion for Post-Trial Relief and on May 21, 2014, I heard arguments. Laurel Crest seeks a Judgment Notwithstanding the Verdict, an amendment or modification of the verdict or a new trial.

A JNOV can be entered upon either of two bases: (1) where the movant is entitled to judgment as a matter of law; and/or (2) where the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. *Parker v. Freilich*, 803 A.2d 738, 744 (Pa. Super. 2002).

Laurel Crest seeks ejectment of Defendants from their Property and the removal of the Cowans' shed (and other fixtures). They also seek the removal of Mr. Bueche's fence from the right-of-way. In an action in ejectment the plaintiff has the burden of establishing a right to possession of the premises. *Lampenfeld v. Seitz*, 676 A.2d 684 (Pa. Super. 1996).

Laurel Crest first claims that the right-of-way is an easement and therefore, must be located on the parties' lots, rather than on a separate parcel between the parties' lots. They allege that the Court's conclusion that the Tucker Street right-of-way is on a separate property between the parties' properties is not supportable. Laurel Crest also notes that the language of the deeds describes the right-of-way as "covering" a portion of land "within" the Defendants' properties, not separate or adjacent to Defendants' properties. However, the first known reference to what is now known as Tucker Street, comes from the 1914 deed of transfer from George H. Burtner, et. ux. to William F. Burtner. That reference is included in all deeds within the chain of title until the most recent. That chain of title refers to all conveyances made and accepted under and subject to the easement or right-of-way in, on and over the ground abutting or adjacent to the westerly line of the Wilburt Park Plan of Acres at Deed Book Volume 380, Page 722 (Plaintiff's Trial Exhibit 19). Mr. Martone relied on the totality of the circumstances and the information that was available when he determined the location of Tucker Street. He concluded that it is fully adjacent to the westerly line of the Wilburt Park Plan of Acres.

Laurel Crest also argues that the T.W. Phillips right-of-way and location of the Gas Line are irrelevant to a determination of the issues in this case. However, I find that the best determination on how Tucker Street was created is relative to the Cowans' garden shed that was involved when a gas line was installed. Defendants' Exhibit 14, is a drawing of the gas line and the Cowans' garden shed. When the gas line approached the Cowans' garden shed, the line took a "jog" around it and did not require the shed to be moved. The drawing accurately shows the shed, the line and the location of Tucker Street.

Tucker Street is an abandoned public street that has not been opened or accepted by the Township. When a municipality does not open a street within 21 years of its dedication to the public, abutting lot owners acquire in fee in the street to the center line. *Leininger v. Trapizona*, 645 A.2d 437 (Pa. Cmwlth. 1994). It was established in *Rahn v. Hess*, 106 A.2d 461 (Pa. 1954) that the phrase "owner or owners" refers to the abutting lot owners. Additionally, Title 36, Section 1961, recognizes that an abandoned public street or right-of-way is lost after 21 years if it is not accepted by the municipality, but the private right-of-way is not lost to abutting property owners. In the instant case, for over 50 years, the land owners along Tucker Street have maintained and used the land without interruption.

Based upon the foregoing, the Defendants in this case have the right of access to use, cross or enter on and over the abandoned public street commonly known as Tucker Street. The Defendants and other property owners along Tucker Street have maintained the gas line and the Tucker Street right-of-way. They have planted vegetable and flower gardens and constructed storage sheds and fences. It is clear that they recognize and believe that Tucker Street is never going to be developed, opened or accepted by the municipality. Subject to the T.W. Phillips Gas and Oil Co. right-of-way, Defendants are the owners in fee of 20 feet of Tucker Street. As was confirmed by my view of the premises, the edge of the Cowans' shed is adjacent to the center line of Tucker Street. However, my view also suggested to me that Mr. Bueche's shed was over the line and not on his portion of Tucker Street. The center line of Tucker Street is to be established by reference to the Cowans' shed. If Mr. Bueche's shed is beyond the line, then he is into Laurel Crest's land and the shed must be moved back. The Court's ruling will stand.

With respect to the encroachment that I found by Bueche, I will take this up after any Appeal by Laurel Crest is decided, which I suspect will be filed.

SO ORDERED
BY THE COURT:
/s/O'Reilly, J.

Commonwealth of Pennsylvania v. Rocky Antill

Criminal Appeal—Sentencing (Discretionary Aspects)—Child Sex Offenses—voir dire Question—Opinion Testimony by Layman—Character Evidence

Court held that voir dire question asking if juror can convict based upon victim testimony alone is not improper.

No. CP-02-CR-08977-2016. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Rangos, J.—April 17, 2018.

OPINION

On July 10, 2017¹, a jury convicted Appellant, Rocky Antill, of one count each of Rape of a Child², Involuntary Deviate Sexual Intercourse (IDSI) with a Child³, Aggravated Indecent Assault⁴, Unlawful Contact With a Minor⁵, Indecent Assault-Person Less than 13 Years of Age⁶, Endangering the Welfare of Children⁷, and Corruption of Minors.⁸ This Court sentenced Appellant on December 11, 2017, to an aggregate term of 200 to 450 months incarceration and a consecutive term of 10 years of probation. On January 3, 2016, this Court denied Appellant's Post-Sentence Motion. Appellant filed a Notice of Appeal on February 2, 2016 and his Statement of Errors Complained of on Appeal on March 12, 2018.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges four errors on appeal. First, Appellant alleges that this Court abused its discretion by permitting an improper *voir dire* question. Next, Appellant alleges that this Court erred by granting a motion *in limine* to exclude evidence. Appellant further alleges that this Court erred in permitting opinion testimony by a lay witness. Lastly, Appellant alleges that his sentence is excessive and that this Court failed to place on the record the reasons for the sentence imposed. (Statement of Errors to be Raised on Appeal, p. 3-5, unnumbered)

DISCUSSION

Appellant alleges that this Court abused its discretion by permitting the following *voir dire* question: “Under Pennsylvania law, a victim’s testimony standing alone, if believed by you, is sufficient proof to find the defendant guilty in a sexual assault case. Are you able to follow this principle of law?” Appellant argued in his “Objection to Commonwealth’s Proposed Voir Dire Questions” that this question was improper because *voir dire* is not intended to provide a basis for exercising peremptory challenges. Further, Appellant asserts that *voir dire* may not include questions covering subject matter falling within the province of the court. Appellant asserts that the question is more appropriate as a jury instruction, if reasonably related to the circumstances of the case. Appellant asserts that the question is at best, an incomplete statement of the law, and is confusing to jurors because it suggests that an accuser’s testimony should be given greater weight than other witnesses.

This Court allowed the *voir dire* question as it is an accurate statement of the law and, based on prior experience in these types of cases, aides in the selection of competent and fair jurors.

The singular purpose of *voir dire* examination is to secure a competent, fair, impartial and unprejudiced jury. In pursuit of that objective, the right of a litigant to inquire into bias or any other subject which bear on the impartiality of a prospective juror has been generally recognized. Nevertheless, the scope of *voir dire* examination rests in the sound discretion of the trial judge and [her] decisions will not be reversed unless there is an abuse of that discretion.

Commonwealth v. Futch, 366 A.2d 246, 248 (Pa. 1976). The proposed question delves into the potential bias of a juror who may be unable to follow the law that, in a case like this one, a victim’s testimony on its own, if believed, is sufficient to find a defendant guilty. As such, this Court did not abuse its discretion in permitting the question.⁹

Next, Appellant alleges that this Court erred by granting a motion *in limine* to exclude evidence of an occasion in which the victim in this case was escorted home by police officers after having been found near the river with a group a friends. Appellant argues that this evidence, in addition to testimony that Appellant did not physically discipline her afterwards, would undermine her credibility regarding her testimony that she delayed reporting abuse by Appellant because she feared his physical discipline repercussions.

This Court ruled that the probative value of the proposed testimony was outweighed by its danger of unfair prejudice. This Court ruled that counsel was “trying to unduly prejudice the jury by bringing in that she was involved in some murky way. I don’t think that it is relevant in any way.” (Jury Trial Transcript, Volume I, hereinafter TT1, at 5) This issue is governed by Pa.R.E. Rule 403, which states:

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Comment: Pa.R.E. 403 differs from F.R.E. 403. The Federal Rule provides that relevant evidence may be excluded if its probative value is “substantially outweighed.” Pa.R.E. 403 eliminates the word “substantially” to conform the text of the rule more closely to Pennsylvania law. *See Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982).

“Unfair prejudice” means a tendency to suggest decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.

Pa.R.E. 403. Furthermore,

“Evidence is admissible if it is relevant—that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact—and its probative value outweighs the likelihood of unfair prejudice.” *Commonwealth v. Boczkowski*, 577 Pa. 421, 846 A.2d 75, 88 (2004) (citations omitted). Admissibility of evidence is within the sound discretion of the trial court and we will not disturb an evidentiary ruling absent an abuse of that discretion. *Commonwealth v. Arrington*, 624 Pa. 506, 86 A.3d 831, 842 (2014), *citing Commonwealth v. Flor*, 606

Pa. 384, 998 A.2d 606, 623 (2010). Moreover, “evidence of prior bad acts, while generally not admissible to prove bad character or criminal propensity, is admissible when proffered for some other relevant purpose so long as the probative value outweighs the prejudicial effect.” *Boczkowski*, 846 A.2d at 88. See also *Arrington*, 86 A.3d at 842, citing Pa.R.E. 404(b)(1); *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715, 720 (1981) (law does not allow use of evidence which tends solely to prove accused has “criminal disposition”). Such evidence may be admitted to show motive, identity, lack of accident or common plan or scheme. *Arrington*, 86 A.3d at 842, citing Pa.R.E. 404(b)(2); *Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291, 337 (2011) (Rule 404(b)(2) permits other acts evidence to prove motive, lack of accident, common plan or scheme and identity). In order for other crimes evidence to be admissible, its probative value must outweigh its potential for unfair prejudice against the defendant, Pa.R.E. 404 (b)(2), and a comparison of the crimes proffered must show a logical connection between them and the crime currently charged. *Arrington*, 86 A.3d at 842.

Commonwealth v. Hicks, 156 A.3d 1114, 1125, (Pa. 2017) cert. denied sub nom. *Hicks v. Pennsylvania*, 138 S. Ct. 176, (2017). Appellant argues that the probative value is significant because it established that Appellant was not physically abusive regardless of the circumstances. However, this Court noted that not only is it already of record that Appellant was never physically abusive to the victim, the severity of the incident at the river is unclear. Although the victim was brought home by the police, she was not charged with a crime and may have simply received a ride home for her own safety. This line of questioning would have unnecessarily attacked the character of the victim regarding an unrelated incident to make a point that was already made by other evidence. As the probative value was minimal and outweighed by the prejudicial effect, this Court did not err in precluding the evidence.

Appellant further alleges that this Court erred in permitting opinion testimony by a lay witness. This Court permitted Detective Mayer to testify, based on his training and extensive experience, as to some of the reasons child victims of sexual abuse may not promptly report the abuse. Detective Mayer testified that he has been a police officer for 25 years and has spent the past 11 years investigating “hundreds and thousands” of child sexual and physical abuse cases. (Jury Trial Transcript, Volume II, July 6, 2017, hereinafter “TT2” at 147) This Court permitted the Officer to testify to his experience of past investigations of sexual abuse and the reasons that victims generally gave for failing to promptly to report. The Officer testified that younger victims in previous cases he has investigated felt confused or embarrassed or concerned about what would happen, especially when the perpetrator was a family member. (Jury Trial Transcript, Volume III, July 7, 2017, hereinafter “TT3” at 8) Detective Mayer did not offer an opinion as to any reason this particular victim failed to promptly report. Therefore, this Court properly concluded that his testimony was not impermissible opinion testimony.

Lastly, Appellant alleges that his sentence is excessive and that this Court failed to place on the record the reasons for the sentence imposed. Appellant further alleges that this Court abused its discretion by failing to consider all the required sentencing factors set forth in 42 Pa.C.S. § 9721 (b), which states:

(b) General standards.--In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole and recommitment ranges following revocation). In every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence, resents an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resents following remand, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence or resentence outside the guidelines adopted by the Pennsylvania Commission on Sentencing under sections 2154 (relating to adoption of guidelines for sentencing), 2154.1 (relating to adoption of guidelines for county intermediate punishment), 2154.2 (relating to adoption of guidelines for State intermediate punishment), 2154.3 (relating to adoption of guidelines for fines), 2154.4 (relating to adoption of guidelines for resentencing) and 2154.5 (relating to adoption of guidelines for parole) and made effective under section 2155, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines to the commission, as established under section 2153(a)(14) (relating to powers and duties). Failure to comply shall be grounds for vacating the sentence or resentence and resentencing the defendant.

42 Pa.C.S. § 9721 (b).

Appellant alleges that this Court abused its discretion by imposing a manifestly excessive sentence of 200 to 450 months.

In order to address an alleged sentencing error, Appellant must first establish a substantial question that his sentence is 1) inconsistent with a specific provision of the Sentencing Code; or 2) contrary to the fundamental norms which underlie the sentencing process. *Id.* at 364. 42 Pa.C.S. §9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa. Super. 1995). This determination is evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa. Super. 1988). It is appropriate to allow an appeal “where an appellant advances a colorable argument that the trial judge’s actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process.” *Commonwealth v. Losch*, 535 A.2d 115, 119-120 n. 7 (Pa. Super. 1987).

Generally, a bald claim of excessiveness will not raise a substantial question. See *Commonwealth v. Moury*, 992 A.2d 162, 171–172 (Pa. Super.2010). However, “[a] claim that a sentence is manifestly excessive such that it constitutes too severe a punishment raises a substantial question.” *Commonwealth v. Derry*, 150 A.3d 987, 995 (Pa. Super. 2016). Appellant’s allegation that this Court failed to place a statement of reasons on the record for the sentence constitutes a substantial question. As such, this Court will address Appellant’s sentence in greater detail.

The standard of review with respect to sentencing is whether the sentencing court abused its discretion. *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996). A court will not have abused its discretion unless “the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.” *Id.* It is not an abuse of discretion if the appellate court may have reached a different conclusion. *Grady v. Frito-Lay, Inc.*, 613 A.2d 1038, 1046 (Pa. 2003). Appellant’s mere unhappiness with his sentence does not constitute grounds for relief. “Since the court more than adequately considered the pertinent sentencing factors and merely weighed them in a manner inconsistent with Appellant’s desires, we find his [only] issue does not entitle him to relief.” *Commonwealth v. Dodge*, 77 A.3d 1263, 1276 (Pa. Super. 2013).

The record reflects that at the sentencing hearing, this Court considered the pre-sentence report, the 42 Pa.C.S. § 9721(b) factors, as well as the totality of information presented to fashion an individualized sentence. (Transcript of Sentencing Hearing, Dec. 11, 2017, hereinafter “ST” at 47) The Pennsylvania Supreme Court has held:

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

Commonwealth v. Devers, 546 A.2d 12, 18 (Pa.Super. 1988).

This Court stated its reasons for sentencing Appellant to a standard range sentence as follows:

I have reviewed the pre-sentence investigation report and considered its history, which does include some evidence of aggressive, assaultive behavior based on the criminal record and the PFA violation. That would be consistent with the trial testimony as well.

I have also considered the memorandum in aid of sentencing [prepared by trial counsel for Appellant] as well as the evaluative report of the SOA[B] as we have discussed.

And the SOA[B] report does note that his behavior is predatory. He violated a position of trust and continued to do so by threats to keep [the victim] quiet.

In light of all of the factors, including the fact that he does not have a history of mental health or drug and alcohol by his report, his rehabilitative needs appear to be centered around his sexually assaultive behavior.

(ST 47-48) As illustrated above, this Court did not impose a manifestly excessive sentence, it considered the sentencing factors of 42 Pa.C.S. § 9721 and placed on record its statement of reasons for the sentence imposed. Therefore, Appellant’s final claim is without merit.

CONCLUSION

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

BY THE COURT:

/s/Rangos, J.

¹ On March 10, 2017, a jury found Appellant not guilty of Recklessly Endangering Another Person, 18 Pa.C.S. § 2705, but was unable to reach a verdict on the remaining counts. This Court declared a mistrial and the case proceeded to a second trial.

² 18 Pa.C.S. § 3121 (c).

³ 18 Pa.C.S. § 3123 (b).

⁴ 18 Pa. C.S. § 3125 (a) (1) and (b).

⁵ 18 Pa.C.S. § 6318 (a) (1) and (b) (1).

⁶ 18 Pa.C.S. §3126 (a) (7).

⁷ 18 Pa.C.S. § 4304 (a) (1).

⁸ 18 Pa.C.S. § 6301 (a) (1).

⁹ This Court further notes that this question would not provide a basis for a peremptory challenge, as it relates to a juror’s ability to follow the law and this Court’s instructions, but rather would lead to a strike for cause.

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PLJ

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OPINIONS

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**Trizechahn Gateway, LLC v.
Paul H. Titus, et al**

Attorney's Fees—Garnishee

Attorney's fees claimed by law firm were not reasonably related to their duties as a garnishee and were denied as excessive.

No. GD-00-13044. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, S.J.—September 13, 2017.

MEMORANDUM IN SUPPORT OF ORDER

Introduction

The pertinent history of the instant matter, involving execution proceedings against the capital account of Defendant David Oberdick, Esq., was set forth in an earlier Memorandum filed on December 5, 2007, in support of an order also filed that date.

In the summer of 2006, during the pendency of the appeal of the original judgment against the defendants and after execution proceedings had commenced (no appeal bond having been posted), Mr. Oberdick contended that his capital account was exempt from execution as being wages. Eight years later, on May 5, 2014, he filed a different claim for exemption from execution and no longer pursued the argument that the Capital Account was wages (which had been rejected by the Bankruptcy Court). Instead, he contended that the capital account was exempt from execution because it was entireties property. On the same day, his wife, Sally Oberdick, filed a property claim with the Sheriff, stating that the capital account was entireties property.

Meyer, Unkovic & Scott, LLP ("MUS") filed preliminary objections to the writ of execution against the capital account of judgment debtor David Oberdick. The objections raised (and overruled) were (1) that service of the writ was improper and (2) that the capital account was exempt from execution because it was in the nature of wages since Mr. Oberdick's partnership interest was very small. MUS also argued that a charging order rather than a garnishment proceeding was the appropriate way for the judgment debtor, Plaintiff herein, to seek to obtain the monies in Mr. Oberdick's capital account. After the undersigned overruled those objections, Mr. Oberdick sought bankruptcy protection, on January 23, 2008. Several years later, the capital account dispute was referred back to our Court to resolve and was eventually assigned to the undersigned. MUS then filed an amended answer and new matter to the interrogatories in garnishment, asserting that the capital account was entireties property as set forth by Mr. Oberdick; MUS also claimed it was entitled to more than \$52,000 in related fees and costs.

Both of the Oberdicks' claims are now ripe for decision, as is the claim of MUS for counsel fees for responding to the Interrogatories propounded to it as Garnishee.

Discussion

1. The monies in Mr. Oberdick's Capital Account are not entireties property and are not exempt from execution.

Mr. and Mrs. Oberdick rely on case law dealing with marital property in divorce situations. Those cases would apply only if the Oberdicks were getting a divorce and had disputes with each other regarding equitable distribution. They have no applicability to whether or not property is held jointly by a married couple and is therefore held by the entireties.

The Capital Account is in the name of Mr. Oberdick only. It is not entireties property.

2. The attorney's fees claimed by MUS are not reasonably related to their duties as a garnishee and must be denied as excessive.

A garnishee's duties are very limited: to truthfully answer interrogatories and to hold the money until an order of court resolves any disputes between the judgment debtor and the judgment creditor. A garnishee has no duty to defend the judgment debtor; at most, the garnishee has only to notify the judgment debtor that the monies have been garnished. Any actions MUS took beyond that were as a volunteer and the fees for such actions are not reimbursable by the judgment creditor.

However, we cannot say it was absolutely unreasonable for MUS to file its preliminary objections to service of the writ or to contend that the Capital Account was in the nature of wages and was exempt from execution. However, once those objections were overruled, it had no further duties to the judgment debtor, Mr. Oberdick, merely because he was a partner and later an employee.

Because the fee demand is so overreaching, we might be justified in denying it in full. However, we will award MUS the amount of \$1,000.00 for the clerical time spent in looking up the value of Mr. Oberdick's Capital Account and for drafting, presenting and arguing the preliminary objections.

Conclusion

David Oberdick's claim for exemption and Sally Oberdick's property claim must be denied. The claim of MUS for fees in excess of \$52,000 must also be denied and the full balance in the Capital Account of David Oberdick must be delivered to Plaintiff, less only the sum of \$1,000.00 for reasonable costs and counsel fees. See order filed herewith.

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

Date: September 13, 2017

ORDER

AND NOW, to-wit this 13th day of September 2017, for the reasons set forth in the Memorandum in Support of Order filed herewith, it is hereby ordered as follows:

1. The property claim of Sally Oberdick and the claim for exemption of David Oberdick are denied.
2. The claim for attorney's fees and costs of Garnishee Meyer, Unkovic and Scott is granted in part and it is awarded the reasonable amount of \$1,000.00.
3. The full amount in the Capital Account of David Oberdick must be delivered to the Plaintiff, less only the sum of \$1,000.00 described above.

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

**BCJ Management, L.P. v.
Maxine Thomas**

Credibility

Court found that the plaintiff's failure to rebut earlier testimony when it was in a position to do so is relevant and probative. The Court, as fact-finder, accepted the implication that the testimony would have been unfavorable to plaintiff.

No. LT-15-000913. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, S.J.—October 3, 2017.

OPINION

PROCEDURAL HISTORY

Plaintiff had filed a “Motion to Schedule Judicial Evidentiary Hearing to Determine Whether Defendant Should Be Found in Default of Settlement Agreement.” The hearing on whether or not Defendant should be found in default was conducted in our General Motions Court where the undersigned was sitting at the time. We entered an order with a supporting memorandum denying Plaintiff’s Motion on October 19, 2016. Plaintiff filed Post-Trial Motions rather than a direct appeal.

We handled the Post-Trial Motions in the ordinary course without focusing on the issue of whether they were inappropriate in this instance, where a motion was denied by an order after a hearing had been held. We had to wait for a transcript of the hearing to be prepared before setting a briefing schedule. By order of February 2, 2017, we set that schedule and further directed Plaintiff to explain why a direct appeal of our order should not have been filed. We are not convinced by his argument but do not take any position on timeliness in this opinion.

We do note, however, that the Motion probably should have been denied without a hearing since it appears to be asking for an advisory opinion, which the Rules of Court do not permit. We take no position on this issue either, except to express regret that we did not perceive the problem at the time we reviewed the case prior to the hearing.

The Plaintiff’s Motion for Post-Trial Relief was denied on the merits, judgment was entered and this appeal followed.

ISSUES ON APPEAL

Plaintiff raises five issues in its Statement of Matters Complained of on Appeal. They are rather lengthy and not easy to summarize so they are simply incorporated herein by reference. We will address them in the order used by Plaintiff. We note that the main complaint seems to be our determination of credibility, which is generally not appealable.

DISCUSSION

1. The credible evidence showed that Defendant’s adult son, Sherman Thomas, Sr., had been given “limited permission” to be on the Plaintiff’s premises and to go to Defendant’s home to pick up and drop off his children.

Plaintiff argues that we should have rejected Mr. Thomas’s testimony because he did not specify when he had been given limited permission to pick up and drop off his children, before or after his mother and the Plaintiff entered into the Settlement Agreement. This was something that could have been asked by Plaintiff during cross-examination. More importantly, Plaintiff did not call anyone in rebuttal to refute Mr. Thomas’s testimony regarding his having been given such permission. Mr. Rowan, the Senior Property Manager was in Court and had testified in Plaintiff’s case on other matters.

We found Mr. Thomas credible and had no other credible evidence available to make us disbelieve him.

2. The court’s determination was indeed supported by the weight of the evidence.

It is Plaintiff who failed to meet its burden to support its contention that Defendant was in breach of her lease.

3. There were no improper evidentiary rulings made.

Our review of the Hearing Transcript (HT) reveals that counsel for Plaintiff made seven objections, some of which were overruled and some of which were sustained. See HT, page 44, ll. 8-14; page 51, ll. 15-22; page 54, ll. 7-17; page 54, l. 23 - page 55, l. 4; page 65, ll. 5-7, p.86, l. 25 - page 87, l.7; p. 117, l.17 - page 118, l.17. None of the rulings made were improper.

4. The evidence, or lack thereof, considered by the Court was relevant.

The failure to rebut earlier testimony when one is in a position to do so is certainly relevant and highly probative. Plaintiff could have questioned Mr. Rowan regarding the issue of limited permission having been granted to Mr. Thomas by the prior senior property manager, Mr. Madden, when it re-called Mr. Rowan, but failed to do so. Under well-settled principles, the Court, as factfinder, can accept the implication that the testimony would have been unfavorable to Plaintiff.

The testimony of Mr. Thomas, that he had limited permission to be on the premises, was certainly relevant to the question of whether his mother, the Defendant, had wrongly allowed him to be there.

The other items are minor comments and certainly did not provide the basis for our decision.

5. Ordinarily, an order of court entered after a hearing on a motion is to be directly appealed within thirty days of its entry.

We believe that the mere fact that there might have been a hearing on a motion does not mean that resultant order is a “verdict,” necessitating the filing of a motion for post-trial relief. The Court, at HT page 106, l. 8, clearly stated “This is a hearing rather than a trial, so I think we will hear from [Movant/Plaintiff] first.” In a trial, the Plaintiff usually has the last word. At a hearing on a motion, the movant has to argue why the motion should be granted before the opponent of the motion is required to respond, and the court then issues a ruling, memorialized, as here, in an order.

We also note that Plaintiff’s Motion for Post-Trial Relief, paragraph A.1.a., expressly recognizes that the Court entered an “Order of Court and Memorandum in Support of Order.”

We leave it to the appellate courts to decide whether our failure to immediately perceive Plaintiff’s procedural mistake gives it a free pass on the 30-day deadline and whether the interests of justice requires the motion for post-trial relief be deemed appropriate in the circumstances. We note only that we have no duty to alert parties to possible procedural errors so we doubt that our misunderstanding corrects Plaintiffs failure to file a timely appeal within 30 days of our order filed October 19, 2016.

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

Date: October 3, 2017

Village Land Company, LLC v. Stonebrook Condominium Association

Pennsylvania Uniform Condominium Act—Amendments to Declaration of Condominium

The Pennsylvania Uniform Condominium Act, 48 Pa. C.S. s.3211(a) requires that amendments to a Declaration of Condominium be done by the declarant. Therefore, an amendment to a condominium declaration reallocating common expense liabilities was excepted from the requirement of unanimous unit owner consent under 68 Pa.C.S. s.3219(2)(1). The termination of the period of declarant control does not terminate a valid reservation of rights to property owned by the declarant.

No. GD 15-8202. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—October 4, 2017.

OPINION

Village Land Company created the Stonebrook Condominium in 2003 by recording a declaration of condominium that submitted its real estate in the town of McCandless into a flexible condominium. At that time there were nine condominium units, eight of them being townhomes in two separate two story buildings and the ninth being an assisted living unit in a three story building containing thirty-one apartments. This thirty-one apartment assisted living building is known as Unit 700. Being a flexible condominium, the Condominium Declaration permitted Village Land Company to add real estate during the next seven years and to amend the percentage interest in the common expense liability for additional units.

The Declaration of Condominium recorded in 2003 contemplated the future construction of one more assisted living unit and an indefinite number of townhome units. However, Declarant Village Land Company first focused on the construction and sale of approximately fifty additional townhome units and postponed construction of the other assisted living unit until approximately 2015. This second assisted living unit, known as “Building 600,” contains sixteen apartments.

Control of the Stonebrook Condominium Association transitioned from Declarant Village Land Company to the other unit owners in June of 2009. *See* 68 Pa. C.S. §3303(c). In April of 2015 the Stonebrook Condominium Association adopted bylaws that contained a provision that prevented more than fifteen percent of the units in the condominium from being used as rental property. In May of 2015 Village Land Company initiated this litigation by filing a complaint requesting a declaratory judgment invalidating the bylaw rental provision. Stonebrook Condominium Association filed a counterclaim that alleged Village Land Company was delinquent in paying its common expenses on the newly constructed assisted living unit, Building 600. Stonebrook Condominium Association alleged the delinquency resulted from the allocation of common expense liability for only one unit to Village Land Company for the sixteen apartments in Building 600 when its allocation should have been for sixteen units. The counterclaim also alleged that Village Land Company’s conduct in allocating only one unit of common expense liability for Building 600 was deceptive in violation of the Unfair Trade Practices and Consumer Protection Law. *See* 73 P.S. §201-1 et seq. Finally, the counterclaim alleged that Village Land Company negligently constructed the Condominium.

The dispute was resolved with a non-jury trial before me on March 30 and 31, 2017. My verdict invalidated the rental bylaw provision, denied the counterclaim for delinquent common expenses on Building 600 and Unfair Trade Practices but granted the counterclaim as to negligent construction of the road that runs through the Condominium. After I denied the Motions for Post-Trial Relief, judgment was entered on my verdict. Stonebrook Condominium Association then timely appealed to the Commonwealth Court of Pennsylvania and thereafter filed a concise statement of the errors complained of on appeal (“concise statement”). Because it is not in the concise statement, my decision to invalidate the bylaw limiting rentals to fifteen percent of the condominium units is not being appealed. The balance of this Opinion, per Pennsylvania Rule of Appellate Procedure No. 1925(a), sets forth the reasons for each ruling complained of in the concise statement.

Stonebrook Condominium Association contends that I made an error by allowing the same common expense percentage for Building 600 as was allocated to each townhome unit. It argues that Village Land Company did not have the unanimous consent of the unit owners required by the Pennsylvania Uniform Condominium Act (*see* 68 Pa. C.S. §3219(d)(1)) when it allocated the common expense percentage for Building 600 in an Amendment to the Declaration of Condominium recorded in July of 2010. Stonebrook is correct that the July, 2010 Amendment lacked unanimous consent. However, it was the Fourth Amendment to the Declaration recorded in August of 2008, with the unanimous consent of the unit owners, that allocated the same common expense percentage for Building 600 as each townhome. *See* trial exhibit 3. A chronological examination of the relevant provisions in the Declaration and its Amendments is necessary to explain how the August, 2008 Amendment created this new allocation of common expenses. In the 2003 Declaration, under the heading *Defined Terms*, subsection 1.2.21 defines “Assisted Living Units” as “the two(2) Units consisting of buildings of three stories each, with each containing 20-40 apartments.” *See* trial exhibit 1, p.2. In EXHIBIT “B” to the 2003 Declaration, Assisted Living Unit 700 is allocated 65.6 percent and the townhomes 34.4 percent (4.3 percent apiece) of the common expenses. *Id.* at p. 17. Also in the 2003 Declaration under the heading *Percentage, Interests, Votes and Common Expense Liabilities*, subsection 2.1.1 allows the amendment of the Percentage Interest “by the Declarant upon the addition of Units described in this Declaration as ‘NEED NOT BE BUILT,’ or the Additional Real Estate as herein described.” *Id.*, p. 3. This occurred in June of 2006 when the Declaration was amended with the addition of real estate that includes “PROPOSED BUILDING 600, 25 TO 40 UNITS (NEED NOT BE BUILT).” *See* trial exhibits 2 and 15, p. 2. Then, in August of 2008, the Fourth Amendment to the Declaration was recorded, and it contains the unanimous consent of the unit owners. In EXHIBIT “B” to this August, 2008 Amendment, Assisted Living Unit 700 is allocated 2.7028 percent and each of the thirty-six townhome units existing at that time is allocated 2.7027 percent of the common expenses. *See* trial exhibit 3. Importantly, the August, 2008 Amendment adds this sentence under the heading *Percentage Interests, Votes and Common Expense Liabilities* in Section 2.1: “Each Unit shall have the same percentage interest.” Thus, from Declaration subsection 1.2.21 it is clear that assisted living building Unit 700 is one unit and assisted living building 600 also is one unit. With the June of 2006 Amendment adding building 600 and the August of 2008 Amendment apportioning the same percentage interest to each unit, indeed there was unanimous consent when Building 600 was allocated the same percentage interest in the common elements as each townhome unit. Therefore, I was correct in allowing the same common expense percentage for Building 600 as was allocated to each townhome unit.

Even if the August of 2008 Amendment did not accomplish the allocation of the same common expense percentage for Building 600 as for each townhome unit, the July, 2010 Amendment did not require the unanimous consent of the unit owners. Stonebrook Condominium Association argues unanimous consent of the unit owners is required by 68 Pa. C.S. §3219(d)(1), which states:

Except to the extent expressly permitted or required by other provisions of this subpart, no amendment may create or increase special declarant rights, increase the number of units or change the boundaries of any unit, the common element interest, common expense liability or voting strength in the association allocated to a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

Stonebrook Condominium Association, however, neglects any analysis of the exception for “the extent expressly permitted or required by other provisions of this subpart....” In fact, this provision in the Pennsylvania Uniform Condominium Act, 68 Pa. C.S. §3211(a), requires amendments adding units in a flexible condominium to be done by the declarant:

General rule—To convert convertible real estate or add additional real estate pursuant to an option reserved under section 3206(1) (relating to contents of declaration; flexible condominiums), the declarant shall prepare, execute and record an amendment to the declaration (section 3219) and comply with section 3210 (relating to plats and plans). The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each unit formed in the convertible or additional real estate and reallocate common element interests, votes in the association and common expense liabilities....

Italics added. Since there is not a reference to unit owners or the condominium association, this provision expressly requires the amendment adding Building 600 and reallocating common expense liabilities to be made exclusively by the declarant, Village Land Company. Therefore, the addition of Building 600 and reallocation of the common expense liabilities are excepted from the unanimous consent of the unit owners required under 68 Pa. C.S. §3219(2)(1). Since the July, 2010 Amendment was done exclusively by Village Land Company, as required by 68 Pa. C.S. §3211(a), it is valid.

Stonebrook Condominium Association also contends the plans for Building 600 in Supplement No. 1 from July of 2010 (*see* trial exhibit 11) “conclusively establish....common expense liability for Building 600 must be calculated based on sixteen (16) separate units, rather than one (1) Unit.” Concise statement, p. 3. I strongly disagree with the Condominium Association. Instead, Supplement No. 1 states “the percentage interests appurtenant to each unit which is part of the Condominium, including Building 600, shall henceforth be as set forth in Exhibit ‘B-3’”, and Exhibit “B-3” is a schedule designating the same 1.72414 percent common element interest for the one unit identified as Building 600, the one unit identified as Unit 700 and for each unit identified as a townhome. *See* trial exhibits 11 and 12. While the plans in Supplement No. 1 contain a unit number inside each of the sixteen apartments, it is apparent that the architect, artist or other individual who made the plans did not intend them to be “an identifying number to each unit” within the meaning of 68 Pa. C.S. §3211(a) in the Pennsylvania Uniform Condominium Act. Assisted Living Unit 700’s plans also contain a unit number inside each of the thirty-one apartments, but it has been treated as one condominium unit since the Condominium’s creation in 2003. The fact that the individual who made the plans intended “unit” to mean a living unit rather than a condominium unit identifying number also is borne out by the fact that adopting the Condominium Association’s argument would result in having two units with identical unit numbers throughout the Condominium (e.g., there is a townhome unit 201 in the Schedule of Unit Identifying Numbers and Building 600’s plans have a unit 201). Stonebrook Condominium Association therefore is mistaken, as Building 600’s plans do not establish it as having sixteen condominium units.

Stonebrook Condominium Association additionally contends that assigning only one condominium unit to Building 600 discriminates in favor of the units owned by Declarant Village Land Company. Stonebrook argues that an allocation of the percentage interest in the common elements that discriminates in favor of the units owned by the declarant is prohibited by the Pennsylvania Uniform Condominium Act. *See* 68 Pa. C.S. §3208, Uniform Law Comment No. 1. However, Robert Pritchard, the President of the Condominium Association since 2013, acknowledged during the trial that the Association is not responsible for the insurance, maintenance, upkeep, repair or replacement for Building 600 and the acreage surrounding it. *See* Transcript of Non-jury Trial, March 30-31, 2017 (“T.” hereafter), pp. 262-276 and trial exhibit 3, pp. 3-4. Because the Condominium Association has no direct expenses for Building 600 and the surrounding acreage, Mr. Pritchard believes the common charge for indirect expenses to the Condominium Association proportionate to Building 600 should be for two, rather than sixteen units. *See* T., p. 267. I found the testimony of Donald Pohl, the owner of Village Land Company, is more credible relative to the Condominium Association’s expenses from Building 600. Mr. Pohl credibly testified that the total monthly expense to the Condominium Association for both Building 600 and Unit 700 is \$251.45, while each currently pays common expenses of \$195 or a total for both of \$390 per month. *See* T., 7 p. 306. Since the expense to the Condominium Association of Building 600 is actually less than what Village Land Company pays, there is no discrimination in favor of Village Land Company, the owner of Building 600.

Stonebrook Condominium Association also contends that “no formula was introduced into evidence to explain the common expense liability other than the formula in the original” 2003 Declaration of Condominium. Concise statement, pp. 4-5. 68 Pa. C.S. §3208(a) does require a condominium declaration to “allocate a fraction or percentage of...the common expenses of the association...to each unit and state the formulas used to establish those allocations.” However, Stonebrook is incorrect about no formula being introduced into evidence other than the formula in the original 2003 Declaration. Exhibit 3, the August of 2008 Fourth Amendment to the Declaration, was admitted into evidence. In Section 2.1.1 of this Amendment, which is the Section number containing the formula in the original 2003 Declaration, that formula is replaced with this statement: “Each Unit shall have the same percentage interest.” Implicit from very basic math is the formula of dividing one hundred by the total number of units in the condominium to calculate the same percentage interest for each unit in the condominium. Therefore, Stonebrook is wrong in its argument that no formula was introduced into evidence.

Stonebrook Condominium Association additionally contends that Village Land Company’s July, 2010 Amendment reallocating the common expense liabilities is invalid because it was done after control of the Stonebrook Condominium Association transitioned from Declarant Village Land Company to the other unit owners. However, as mentioned above, 68 Pa. C.S. §3211(a) requires amendments that reallocate common expense liabilities reserved in a flexible condominium declaration to be done by the declarant. Hence, whether control of the Stonebrook Condominium Association was turned over to the unit owners has no impact on Village Land Company’s ability to reallocate common expense liabilities in accordance with the reservation to do so contained in the flexible Condominium Declaration. This concept, that termination of the period of declarant control does not terminate a valid reservation of rights to property owned by the declarant, also is acknowledged by the Superior Court of Pennsylvania in *MetroClub Condominium Ass’n v. 201-59 North Eight Street*, 2012 PA Super 122, 47 A.3d 137 (holding that the Declarant’s reservation of rights to assign parking spaces owned by it as limited common elements or to rent them was unaffected by termination of the period of declarant control). Thus, there is additional authority that shows Stonebrook Condominium Association’s argument lacks merit.

Stonebrook Condominium Association also contends that I erroneously considered arguments based on equitable considerations. *See* concise statement, p. 8, ¶ no. 5. First, this contention is too vague for me to respond to other than with an equally vague response that I am unaware of having considered arguments based on equitable considerations. In any event, the Pennsylvania Uniform Condominium Act “contemplates application of general ‘principles of law and equity’....” *Metroclub v. Condominium Assn.*, *supra*, p. 145 citing *Country Classics at Morgan Hill Homeowners’ Association, Inc. v. County Classics at Morgan Hill, LLC*, 780 F.2d 367, 374 (E.D. Pa. 2011).

Stonebrook Condominium Association’s final contention is that Village Land Company’s July, 2010 Amendment violated the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1 et seq., (“UTCPL”) because it was recorded after the period of declarant control had ended and was not approved by the Condominium Association. However, as explained above, the recording of the July, 2010 Amendment was proper and therefore not deceptive under the UTCPL. In addition, the declarant is required to provide all unit purchasers a “Public Offering Statement” that discloses various features of the condominium. *See* 68 Pa. C.S. §3402. But, Stonebrook Condominium Association failed to produce this disclosure statement that could have revealed any alleged deception by Village Land Company. In any event, Mr. Pohl of Village Land Company credibly and repeatedly testified that all purchasers of units knew that Building 600 would be treated as one unit, with no unit owner being deceived. *T.*, pp. 50, 150, 151, 158, 161, 180, 188, 316-317 and 327. Therefore, Stonebrook Condominium Association failed to prove a violation of the UTCPL.

BY THE COURT:
/s/Hertzberg, J.

¹ As constructed in 2015, the second “Assisted Living Unit” is three stories but contains only 16 apartments and residents are not provided with assisted living.

**Barbara Stemmerich v.
Glenn Massung, III and
Pittsburgh Mobile Television, Inc.**

Auto Collision—Pain and Suffering—Damages

Court found jury verdict of \$600 for pain and suffering allegedly suffered in auto collision adequate. Jury had a basis for finding plaintiff’s pain and suffering complaints were not credible or were caused by pre-existing injuries.

No. GD 15-23133. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—September 28, 2017.

OPINION

The issue addressed in this Opinion is whether a jury verdict for pain and suffering of \$600 is adequate compensation for Plaintiff Barbara Stemmerich’s injuries. I find this jury verdict of \$600 for pain and suffering is adequate, and my reasons for this decision are set forth below.

On January 31, 2014, Defendant Glenn Massung, while employed by Defendant Pittsburgh Mobile Television, Inc., was driving a tractor trailer on Butler Street in the City of Pittsburgh. The trailer component of the vehicle consisted of a tank used to haul recycled oil, but the tank was empty. It was 5:00 p.m., hence it was rush hour, traffic was heavy and Mr. Massung was moving slowly towards an intersection controlled by a traffic light. The traffic in front of him stopped, requiring him to stop by pressing both the clutch and brake pedals. Mr. Massung had oil on his boots, and his foot slipped off the clutch pedal, which caused the truck to lunge forward and collide with the rear of a car being driven by Mrs. Stemmerich. At impact, Mr. Massung did not think his truck was moving very fast, and if he had to guess, less than twenty miles per hour. While the collision crushed a portion of the trunk of Mrs. Stemmerich’s trunk, the air bag inside of her vehicle did not deploy. Mrs. Stemmerich’s car seat back broke during the collision and she collapsed backwards in the car and could not control the continuing movement of the car or see where it was going. Her car ultimately stopped due to lack of momentum, but she then needed assistance from paramedics to exit her car. This experience severely upset Mrs. Stemmerich.

Mrs. Stemmerich, then 68 years old, had multiple pre-existing medical conditions. In June of 2006, she had reconstructive surgery of her right foot and ankle followed by reflex sympathetic dystrophy/complex regional pain syndrome of her right leg. In 2009, Mrs. Stemmerich developed sacroiliitis that caused low back pain, which was treated with injections into the sacroiliac joint. She also was diagnosed with fibromyalgia (overactive nerves that magnify the aches and pains over her entire body). In May of 2011, Mrs. Stemmerich had right knee replacement surgery. In December of 2013, she developed right shoulder rotator cuff tendonitis after reaching behind herself to grab something. It was being treated with physical therapy, anti-inflammatories, pain medication and steroid injections. Before the collision, Mrs. Stemmerich also had “bone on bone” arthritis of her left knee (another knee replacement surgery was contemplated), severe stenosis of the lumbar spine and a bone spur and arthritis in her right shoulder joint.

Paramedics took Mrs. Stemmerich from her vehicle to the emergency room of West Penn Hospital. Mrs. Stemmerich complained of pain in her right knee from it hitting the dashboard and of pain in her chest from the pressure of her seatbelt. An x-ray showed no fracture or other obvious injury to her artificial right knee joint, and there was ecchymosis (bruising below the surface of the skin) visible on the left side of her chest. After diagnosing no serious injury, West Penn Hospital discharged Mrs. Stemmerich on the same day as the collision.

Due to her pre-existing medical conditions, Mrs. Stemmerich had a regular appointment with her pain management specialist, Dr. Conerman, three days later. She complained of pain in her low back and mid back radiating down the leg. Dr. Conerman treated Mrs. Stemmerich by continuing previously prescribed physical therapy, muscle relaxants and Vicodin, with the prescribed amount of Vicodin increased. During additional appointments, he also injected steroids into the most painful areas of her back. Three days after the collision Mrs. Stemmerich also was able to see the orthopedic surgeon who had been regularly treating her, Dr. Groff. She

reported that her right shoulder felt much worse due to the collision. Dr. Groff treated Mrs. Stemmerich with continued physical therapy, pain medication and steroid injections. Mrs. Stemmerich, however, did not seem to be improving, and on August 20, 2014 an MRI test was done on her right shoulder that showed a partial tear of the rotator cuff. Then, on October 31, 2014, Dr. Groff performed arthroscopic surgery on her right shoulder, debriding the partial tear of her rotator cuff, decompressing the area around the rotator cuff, removing the pre-existing bone spur and removing the end of the clavicle bone to treat the pre-existing arthritis.

Mrs. Stemmerich filed a lawsuit against Mr. Massung and his employer on December 30, 2015 by means of a writ of summons, and she filed a complaint on March 22, 2016. On March 31 and April 3-4, 2017 I presided over a jury trial of the parties' dispute. Mr. Massung testified as the plaintiff's first witness and admitted that his negligence caused the collision, which left Mrs. Stemmerich's money damages as the only dispute for the Jury to resolve. Mrs. Stemmerich's treating physicians, Dr. Conerman and Dr. Groff, testified by videotaped deposition, as did a pain management physician hired by the Defendants, Dr. Cosgrove. Dr. Conerman opined that the collision caused injuries to Mrs. Stemmerich's back and that her treatment would extend into the future. Dr. Groff opined that the collision caused the partial tear of Mrs. Stemmerich's right rotator cuff and the arthroscopic surgery he performed to repair it. Dr. Cosgrove, however, opined that the only injuries caused by the collision were the bruises from the seatbelt and aggravation of her pre-existing back problems, which resolved in a few months. The Jury also received an itemized list of past medical expenses in the total amount of \$9,936.57.

The written Jury Verdict that I prepared classified damage amounts into three separate categories: (1) past medical expenses; (2) future medical expenses; and (3) pain and suffering. The Jury returned a verdict of \$1,170 for past medical expenses, \$0 for future medical expenses and \$600 for pain and suffering. Mrs. Stemmerich appealed the verdict to the Superior Court of Pennsylvania following my denial of her Motion for Post-Trial Relief. In her appeal Mrs. Stemmerich argues that the Jury Verdict of \$600 for pain and suffering must be set aside because it is inadequate and shocks one's sense of justice. I disagree and set forth below why I disagree.

"Generally, a verdict will not be disturbed merely on account of the smallness of the damages awarded or because the reviewing court would have awarded more." 22 Am. Jur. 2d, *Damages*, §1029 (1988). Furthermore, "[i]t is the exclusive province of the jury, as factfinder, to hear evidence on damages and decide what amount fairly and completely compensates the plaintiffs." *Matheny v. West Shore Country Club*, 436 Pa. Super. 406, 407, 648 A.2d 24, 24 (1994). A jury verdict is not to be set aside on the basis of inadequacy unless the injustice of the verdict shines "forth like a beacon" and "where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff." *Kiser v. Schulte*, 538 Pa. 219, 648 A.2d 1, 4 (1994) (citing *Elza v. Chovan*, 396 Pa. 112, 152 A.2d 238 (1959)).

Under this standard Mrs. Stemmerich is able to reference instances from other cases where the test for setting aside a jury verdict is met. For example, in *Yacobonis v. Gilvickas* (376 Pa. 247, 101 A.2d 690 (1954)) the Pennsylvania Supreme Court upheld the trial court's grant of a new trial. Following an automobile accident, a passenger was hospitalized for nineteen days with eight fractured ribs, caught pneumonia in the hospital and was in an oxygen tent for twelve days and then went home where she stayed in bed for four months. The Pennsylvania Supreme Court determined that the jury's award to the passenger of medical expenses but nothing for pain and suffering was totally inadequate and affirmed the trial judge's decision to grant a new trial.

In *Davis v. Mullen* (565 Pa. 386, 773 A.2d 764 (2001)), the Pennsylvania Supreme Court explained the existence of two seemingly inconsistent lines of its cases. In the first line of cases the trial court correctly granted a new trial when a jury awarded medical expenses but no pain and suffering. See, e.g., *Yacobonis* above. The plaintiffs' injuries were too severe for the jury to have a reasonable basis for awarding medical expenses but no pain and suffering. In the second line of cases, the granting of a new trial when a jury awarded medical expenses but no pain and suffering was incorrect. See, e.g., *Boggavarapo v. Ponist*, 518 Pa. 162, 542 A.2d 516 (1988) and *Catalano v. Bujak*, 537 Pa. 155, 642 A.2d 448 (1994). The Pennsylvania Supreme Court explained that the second line of cases differed because the jury either had a basis to find a plaintiff's pain and suffering complaints were not credible or were caused by a pre-existing injury. Hence, in *Davis v. Mullen* the trial judge was correct to deny Mr. Davis a new trial when the jury awarded him medical expenses but no pain and suffering because Mr. Davis missed no work, waited twenty days after the accident to be treated by a chiropractor for neck and back pain and the chiropractor was uncertain about whether the injuries could have been caused by three prior automobile accidents. The Pennsylvania Supreme Court also attributed the appropriateness of the jury verdict of no pain and suffering by Mr. Davis to "the power of the jury as the ultimate finder of fact and the need for the judiciary to guard against usurping the role of the jury." 565 Pa. 386, 393, 773 A.2d 764, 768.

While the Jury did award Mrs. Stemmerich a small amount for pain and suffering, the principles set forth in *Davis v. Mullen* when a jury awards no pain and suffering are applicable. Mrs. Stemmerich's injuries undoubtedly place her in the second line of cases because the Jury had a basis for finding many of her pain and suffering complaints were not credible or were caused by pre-existing injuries. Since she complained of only knee and chest pain at the Emergency Room (see Jury Trial transcript, p. 148), the Jury may have found her later complaints of back and shoulder pain were not credible. Both of Mrs. Stemmerich's physicians acknowledged it was very difficult to tell whether her pain was caused by the collision or her pre-existing medical conditions. Dr. Conerman was unable to state the percentage of her pain that was caused by the collision (see Videotaped Deposition Transcript of Dr. Conerman, p. 74), while Dr. Groff acknowledged there was no way to definitively know whether her rotator cuff had been torn before the collision because no MRI study was done until after the collision (see Videotaped Deposition Transcript of Dr. Groff, pp. 55-56). Dr. Groff relied on Mrs. Stemmerich saying her shoulder pain increased after the collision for his opinion that the collision caused the rotator cuff tear (see Dr. Groff Transcript, p. 39), but the Jury may not have believed Mrs. Stemmerich was being honest with Dr. Groff. Dr. Conerman also acknowledged Mrs. Stemmerich's pre-existing and ongoing back pain was due to chronic ankle and knee problems that made her gait uneven (see Dr. Conerman Transcript, p. 57) as well as her severe lumbar spine stenosis (see Dr. Conerman Transcript, pp. 64-65 and 68-69).

Dr. Cosgrove, the physician hired by Mr. Massung, disagreed with both of Mrs. Stemmerich's physicians and attributed only the aggravation of Mrs. Stemmerich's pre-existing low back and neck pain, "primarily during the early months of 2014," to the collision. Videotape Deposition Transcript of Dr. Cosgrove, p. 66. Dr. Conerman additionally stated that Mrs. Stemmerich had pain on a 1-10 scale of 2 before the collision, 6 just after the collision, but the pain decreased to a level of 2 by April 2, 2014. See Dr. Conerman Transcript, pp. 54 and 80. Therefore, the Jury may have found this testimony by Dr. Conerman to be the most objective test of her pain from the collision, which in duration lasted no more than the 61 days from January 31 to April 2. Finally, to the extent photographs showing bruising from the seatbelt are an indication of pain, Dr. Cosgrove explained that Mrs. Stemmerich was more susceptible to the bruises because she was taking a blood thinner called Plavix. See Dr. Cosgrove Transcript, pp. 28-29.

Ms. Stemmerich, her husband and her daughter all testified that the collision, which had a significant emotional impact, was a life changing experience that prevented her from continuing to care for her grandchildren and doing many activities of daily living she used to do. With her physicians opining that her shoulder surgery and ongoing back pain were caused by the collision, Mrs. Stemmerich appeared convinced of this and therefore was very disappointed by the Jury's verdict of only \$600 for her pain and suffering and other non-economic losses. However, a jury is "not obliged to believe that every injury causes pain or the pain alleged." *Boggavarapu v. Ponist*, 518 Pa. 162, 542 A.2d 516, 518. Mrs. Stemmerich's Jurors may have found her collision related pain was minimal, or it may have placed a lower value on her pain than she expected. But, "there is no mathematical formula to arrive at a figure for the intangible damages of pain and suffering." *Kaufman v. Campos*, 2003 PA Super 229, 827 A.2d 1209, 1212. In summary, the \$600 pain and suffering Verdict does not shine forth like a beacon of injustice, and there is contradictory evidence of the losses sustained in the collision. See *Elza v. Chovan*, 396 Pa. 112, 152 A.2d 238. Therefore, granting a new trial would usurp the proper role of the Jury. Accordingly, I was correct in denying Mrs. Stemmerich's request for a new trial.

BY THE COURT:
/s/Hertzberg, J.

Matthew Deivert v. Pittsburgh Chauffeur, LLC

Personal Injury—Pain and Suffering—Damages

Plaintiff sustained third degree burn on knee due to overcrowded limousine. Jury returned a verdict in favor of plaintiff and against limousine owner/operator. Trial court denied motion in limine seeking to preclude plaintiff's medical expert under Frye where defendant claimed the expert's conclusion was novel rather than his methodology. Trial court allowed \$500,000 jury verdict to stand where there was evidence of pain, suffering, embarrassment and disfigurement.

No. GD 15-19904. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—October 26, 2017.

OPINION

I. Background

Plaintiff Matthew Deivert, age 25, was invited to celebrate the birthday of a friend named Chelsy during the evening of February 1, 2014. Mr. Deivert took a taxi to get to Chelsy's home located in the Southside Slopes neighborhood of Pittsburgh. A group of between thirty and forty people, which included friends Mr. Deivert knew from attending Allegheny College, began the celebration by socializing and drinking alcoholic beverages at Chelsy's home. Then, the birthday celebration moved via a party bus provided by Defendant Pittsburgh Chauffeur, LLC to a dance club in Pittsburgh's Strip District called Cavo Nightclub.

Mr. Deivert and the others danced, socialized and consumed alcoholic beverages until Cavo Nightclub closed at 2:00 a.m. For the trip back to Chelsy's home, Pittsburgh Chauffeur provided a limousine designed to accommodate ten passengers. Mr. Deivert was one of the first passengers to get inside the limousine and take a seat. It was cold outside and most members of the group were tired and desirous of getting out of the cold and back to Chelsy's home as quickly as possible. This resulted in approximately twenty people rapidly cramming into the limousine in a situation that Mr. Deivert later described as "sardines in a can fitting any way we could." Transcript of Jury Trial, Date: May 9, 10, 11, 2017 ("T." hereafter), p. 111.

At a speed of approximately fifteen miles an hour, the limousine ride lasted for twenty to twenty-five minutes, with it "bottoming out" when going around some corners. Mr. Deivert's right knee was driven against the knee of the man next to him with such force that it became painful. Of course, he attempted to extricate his leg, but people were so tightly squeezed together that his knee remained wedged in place. Although Mr. Deivert played small college and semi-professional football, his size, five feet five inches tall and less than one hundred fifty pounds, is atypical for a football player and he did not appear to be unusually strong. He pleaded with people to please move, but they were unable to do so. He screamed because the pain on the side of his knee was increasing as he squirmed to try to remove his knee from the vice-like situation. He screamed to the driver to stop the limousine and let him out (T., p. 80), but this did not happen. Mr. Deivert was finally able to "break free" about one or two minutes before the vehicle reached its destination.

Immediately after Mr. Deivert got out of the limousine, with both men and women present, he pulled his pants down to look at the side of his right knee. Mr. Deivert and the other passengers saw a "softball size red mark" that "looked kind of like a brush burn" with the top layer of skin removed. T, pp. 81-82. Apparently it was a gruesome sight as "[a] couple of people were like, whoa, what is that, then turned around or turned away." T., p. 82. A day later Mr. Deivert photographed the wound with his cell phone and sent the photograph by text message to some of his friends who had been in the limousine.

The wound did not improve, and on February 6 Mr. Deivert went to a UPMC Walk-In Clinic. A physician there examined the wound and directed Mr. Deivert to go to the emergency room at Mercy Hospital. From Mercy Hospital's emergency room Mr. Deivert was transferred to the burn unit. The physicians there first attempted to heal the wound by applying creams and wrapping it, but the technique was unsuccessful. Instead, Mr. Deivert had a surgical procedure later in February involving the placement of cadaver skin over the wound. In March Mr. Deivert had a second surgical procedure. The physicians harvested skin from Mr. Deivert's right thigh and grafted it to the wound. While the skin graft eventually healed the wound, Mr. Deivert was left with two large, permanent scars on his right leg. One scar is located on the outside of his knee and the other scar is located on his thigh where the skin was harvested from his thigh.

Mr. Deivert commenced this litigation in November of 2015 by filing a complaint averring negligence by Pittsburgh Chauffeur. The depositions of nine of the other passengers were taken during the discovery process, but all provided testimony consistent with Mr. Deivert's description of the limousine ride. The dispute was assigned to me for resolution by way of a jury trial.

Preliminarily, counsel argued motions *in limine* to obtain rulings on evidentiary issues expected to arise during the trial. Pittsburgh Chauffeur submitted a motion *in limine* to exclude the causation testimony of physician Gregory Habib, because he

allegedly utilized novel science that is not generally accepted among physicians. See *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923) (adopted first in Pennsylvania in *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977) and then in Pennsylvania Rule of Evidence no. 702(c)). After hearing argument from counsel, I denied the motion and allowed the Jury to view Dr. Habib's videotaped deposition. The Jury also received live testimony from Mr. Deivert, two of his friends, the limousine driver, the owners of Pittsburgh Chauffeur, as well as the videotaped deposition of its physician expert witness, Dr. James Cosgrove. Pittsburgh Chauffeur's defense was that the injury resulted from some unidentified cause other than its overcrowded limousine. Rejecting this defense, the Jury reached a unanimous verdict in favor of Mr. Deivert in the amount of \$500,000.

Pittsburgh Chauffeur appealed from the judgment entered on the verdict, and I write this Opinion to explain the rulings identified in its Concise Statement of Errors Complained of on Appeal ("Concise Statement" hereafter). See Pennsylvania Rule of Appellate Procedure No. 1925(a). Most of Pittsburgh Chauffeur's complaints concern my rulings on Dr. Habib's videotaped deposition. See Concise Statement, ¶ nos. 1, 2, 3, 4 and 5.

II. Plaintiff's Expert Testimony

Pittsburgh Chauffeur first contends I erroneously denied its motion *in limine*. It argues Dr. Habib's opinion on causation is inadmissible pursuant to *Frye v. United States*, because he relies on novel science that is not generally accepted among physicians. However, Pittsburgh Chauffeur incorrectly interprets *Frye*. The Pennsylvania Supreme Court has emphasized that valid challenges under *Frye* must be made to a novel methodology and not to an expert's conclusions, which need not be generally accepted by the relevant scientific community. See *Commonwealth v. Puksar*, 597 Pa. 240 at 254, 951 A.2d 267 at 276 (2008) citing *Commonwealth v. Dengler*, 586 Pa. 54, 890 A.2d 372 at 382 (2005). Dr. Habib's methodology was to take a history from Mr. Deivert, perform an examination of his injury, review photographs of the injury, review medical records and deposition transcripts, then provide an opinion on causation based on his education, training and experience. This methodology is by no means novel as it is the methodology almost universally employed by medical experts in personal injury cases. See *Folger ex rel. Folger v. Dugan*, 876 A.2d 1049 at 1058 (Pa. Super. 2005). Because it is Dr. Habib's conclusion and not his methodology that Pittsburgh Chauffeur alleges is novel, denial of its motion *in limine* was appropriate.

Assuming, for the sake of Pittsburgh Chauffeur's argument, that it may challenge Dr. Habib's conclusion by claiming it relies on novel science, Mr. Deivert proved pursuant to *Frye* that the conclusion is generally accepted by physicians. Dr. Habib testified to general acceptance by other physicians of his conclusion that the combination of pressure and friction caused the burn. See Videotaped Deposition of Gregory Habib, D.O. pp. 7-8, 12-15, 20, 38, 46-47 and 60-61. In addition, Pittsburgh Chauffeur's medical expert witness actually agreed with Dr. Habib that "pressure and friction [can] combine together to form a burn...." Videotape Deposition of James L. Cosgrove, M.D., p. 56. Therefore, since Dr. Habib's conclusion is generally accepted by other physicians, I correctly denied the motion *in limine*.

Pittsburgh Chauffeur next contends Dr. Habib "did not support his opinion with any medical literature or epidemiological studies." Concise Statement, ¶ no. 1. However, an expert medical witness may rely on experience and need not support his or her opinion with medical literature. See *Catlin v. Hamburg*, 56 A.3d 914 at 921 (Pa. Super. 2012), *appeal denied* 74 A.3d 124 (Pa. 2013). Therefore, I was correct to allow Dr. Habib to give his opinion.

Pittsburgh Chauffeur next contends Dr. Habib "falsely testified to a bony prominence when photographic evidence, medical records and a view of Plaintiff's leg located the injury on the thigh...." Concise Statement, ¶ no. 1. Ironically, Mr. Deivert's counsel argued to the Jury that Dr. Cosgrove (Pittsburgh Chauffeur's medical expert) had inaccurately concluded the wound was to the thigh because he neither examined Mr. Deivert nor took a history from him. T., pp. 334-339. The Jury saw the photographic evidence and viewed Mr. Deivert's leg, and based on its verdict, the Jury likely agreed with Mr. Deivert's counsel. I also found Dr. Cosgrove's conclusion that the wound did not develop over a bony prominence was not credible. Hence, there was no false testimony by Dr. Habib. Instead, there was testimony by Dr. Cosgrove that lacked credibility. Thus, allowing Dr. Habib to testify that the wound developed over a bony prominence was proper.

Pittsburgh Chauffeur next contends Dr. Habib's testimony about necrotic tissue was contradictory and he was unable to quantify the amount of force necessary to cause the injury. See Concise Statement, ¶ no. 1. However, this is simply an argument that Dr. Habib was not credible, which Pittsburgh Chauffeur's counsel made to the Jury. See T., pp. 314-317. Since this clearly does not make Dr. Habib's opinion or any other part of his testimony inadmissible, his opinion on the cause of Mr. Deivert's injury was properly admitted into evidence.

Pittsburgh Chauffeur next contends I should have granted judgment notwithstanding the verdict or a new trial because there was not competent evidence that the pressure and friction from the overcrowded limousine caused Mr. Deivert's injury. See Concise Statement, ¶ nos. 2 and 3. This argument is meritless. The testimony by Mr. Deivert and two of his friends who were in the limousine was competent evidence that the overcrowded limousine caused Mr. Deivert's injuries. In addition, the expert medical testimony from Dr. Habib was competent evidence that the overcrowded limousine caused Mr. Deivert's injuries. Finally, even though it was Dr. Cosgrove's opinion that the overcrowded limousine did not cause Mr. Deivert's injury, he acknowledged seeing pressure injuries develop over bony prominences, and he would not rule out the possibility that pressure and friction from the overcrowded limousine injured Mr. Deivert. See Deposition of Cosgrove, pp. 55-57. Therefore, I correctly denied the motions for judgment notwithstanding the verdict and for a new trial.

Pittsburgh Chauffeur next contends I should have granted judgment notwithstanding the verdict or a new trial because Dr. Habib's causation opinion was given "without medical or scientific support or foundation...." Concise Statement, ¶ no. 4. However, as I previously explained, the methodology employed by Dr. Habib is standard for medical experts in personal injury cases, his conclusion that pressure and friction caused the wound is generally accepted by physicians and he is permitted to rely on his own education and experience for his opinion. Therefore, this contention lacks any merit.

Pittsburgh Chauffeur next contends I erroneously permitted Dr. Habib "to give testimony outside of the scope of his report." Concise Statement, ¶ no. 5. In the Brief in Support of Defendant's Post-Trial Motions, that testimony from Dr. Habib is described as criticism of Dr. Cosgrove, the force required to cause pressure sores and the way burns progress. Pennsylvania Rule of Civil Procedure No. 4003.5(c) prohibits "direct testimony of the expert at trial...beyond the fair scope of his or her" expert's report. With the purpose for this rule being avoidance of unfair surprise, the focus of the analysis is on the word "fair." See *Mansour v. Linganna*, 787 A.2d 443 (Pa. Super. 2001) *appeal denied* 796 A.2d 984, 568 Pa. 702. With respect to Dr. Habib's criticism of Dr. Cosgrove, one should not be surprised but instead should be expecting this. In any event, Dr. Cosgrove's testimony was equally critical of Dr. Habib. See Deposition of Cosgrove, pp. 24-25 and 45-46. As to force and pressure sores, pressure sores are mentioned

in Dr. Habib's expert report. Additionally, most of the testimony on the amount of force was elicited during cross examination. With respect to the way burns progress, there was no surprise since Dr. Cosgrove testified extensively about the size of the wound. In addition, Dr. Habib was describing the photographs mentioned in his expert's report when he provided the testimony. Therefore, no direct testimony outside the "fair scope" of Dr. Habib's expert report was given.

Pittsburgh Chauffeur next contends I erroneously permitted Dr. Habib to give testimony in the form of argument and to comment on the credibility of other witnesses. *See* Concise Statement, ¶ no. 5. In the Brief in Support of Defendant's Post-Trial Motions, the argumentative testimony is described as Dr. Habib saying no cause of the injury was identified other than the overcrowded limousine. This testimony, however, is appropriate because it is a fact assumed by Dr. Habib in rendering his opinion. The comment on credibility is described as Dr. Habib saying he believed Mr. Deivert and his friends had given truthful deposition testimony about what occurred during the limousine ride. Again, these are facts that Dr. Habib properly could assume in rendering his opinion. In any event, the testimony is no different than Dr. Cosgrove's comment that Mr. Deivert "has a case of what is called false attribution." Deposition of Cosgrove, p. 43. Therefore, this testimony by Dr. Habib was permissible.

Pittsburgh Chauffeur next contends that Dr. Habib's testimony about the overcrowded limousine being the only identified cause of injury assigned "an unfair burden of proof upon the Defendant." Concise Statement, ¶ no. 5. This contention lacks any merit because I instructed the Jury that "[t]he Plaintiff has the burden of proving...the defendant's negligence was a factual cause in bringing about the harm." T., p. 345; Pennsylvania Suggested Jury Instruction (Civil) No. 5.00. Hence, an unfair burden of proof was not assigned.

Pittsburgh Chauffeur next contends I erroneously permitted Dr. Habib "to testify that Defendant's expert testimony was defective for failing to provide an alternative theory of causation." Concise Statement, ¶ no. 5. However, as pointed out above, Dr. Cosgrove is critical of Dr. Habib. He criticized Dr. Habib for not being a treating physician and having an inconceivable opinion on causation. *See* Deposition of Cosgrove, p. 24-25 and 45-46. Relative to causation, Dr. Cosgrove also testified Mr. Deivert falsely attributed the wound to the limousine ride. Since it would therefore be unfair to disallow criticism of Dr. Cosgrove's opinion on causation, I properly permitted the testimony from Dr. Habib.

III. Jury Charge and Written Verdict Form

Pittsburgh Chauffeur next takes issue with my instructions to the Jury on the applicable law. It contends "the Court abused its discretion and committed error in denying Defendant's Points for Charge...regarding the mere happening of an accident, the mere fact of damages and speculation not being a basis for any award." Concise Statement, ¶ no. 6. Instructions or the "charge" to the jury is adequate "unless there is an omission in the charge which amounts to a fundamental error." *Quinby v. Plumsteadville Family Practice, Inc.*, 589 Pa. 183, 197, 907 A.2d 1061, 1069-1070 (2006). My denial of the charge, that the plaintiff has the burden to prove the defendant negligent by a preponderance of the evidence with the occurrence of an accident not being evidence of negligence, was not fundamental error. Such a charge would have been repetitious or the concept sufficiently covered by the charge I gave the Jury that defined preponderance of the evidence and instructed "[t]he Plaintiff has the burden of proving...[t]he Defendant was negligent..." T., p. 345. Since Pittsburgh Chauffeur acknowledged the limousine was carrying more passengers than was appropriate (*see* T., pp. 282-285) and the dispute was focused on whether this caused Mr. Deivert's injury, the requested charge also could have misled the Jury from focusing on the main dispute.

I denied the charge, that sustaining damages by itself is not a reason to award damages, because it is highly repetitious. Before I instructed the Jury on damages I said "[t]he fact that I am now going to instruct you about damages does not imply any opinion on my part as to whether damages should be awarded. If you find that the Defendant is liable to the Plaintiff you must then find an amount of money damages..." T., p. 348. I also instructed the Jury that the Plaintiff has the burden to prove the extent of damages. *See* T., p. 345. In addition, the written verdict template I prepared required the Jury to find negligence and factual cause in order to award damages.

I denied the charge, that speculative expert testimony is to be disregarded, because it was repetitious or the concept sufficiently covered by another charge. I instructed the Jury that the Plaintiff had the burden to prove negligence and factual cause and that "[a] factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm." T., p. 346. I also provided the Jury with extensive, suggested guidance on evaluating expert witness testimony. *See* T., pp. 354-356. Giving the instruction also could have misled the Jury to focus on whether one of the experts speculated when the real dispute between experts boiled down to which one was more credible. Finally, the Superior Court of Pennsylvania deemed a very similar charge unnecessary in *Gillingham v. Consol Energy, Inc.*, 2012 PA Super 133, 51 A.3d 841 at 858 (2012).

Pittsburgh Chauffeur next contends I erroneously prepared a written verdict template (or verdict slip) that asked if Pittsburgh Chauffeur's conduct "fell below the highest standard of care" instead of asking if Pittsburgh Chauffeur "was negligent." Concise Statement, ¶ no. 7. According to Pittsburgh Chauffeur, this confused and misled the Jury. *Id.* However, as I said on the record during the charging conference (*see* T., pp. 295-297), in this case asking if the defendant was negligent had the potential to confuse the Jury.

Even though Pittsburgh Chauffeur is a "common carrier," neither party submitted a proposed jury instruction on a common carrier's duty to passengers. *See, e.g., Connolly v. Philadelphia Transp. Co.*, 420 Pa. 280, 283, 216 A.2d 60, 62 (1966) declaring "[a] common carrier...owes its passengers the highest degree of care." Hence, Pittsburgh Chauffeur did not object when I proposed to give Pennsylvania Suggested Jury Instruction (Civil) no. 13.120 on a common carrier's duty of care. At the same time, Pittsburgh Chauffeur insisted that Mr. Deivert was negligent and that the verdict slip ask if he was negligent. With a higher standard of care applicable to Pittsburgh Chauffeur than the ordinary negligence standard of care applicable to Mr. Deivert, using the same negligence standard for both parties could have confused the Jury. It is within my discretion to grant or refuse a proposed verdict slip. *See Wiggins v. Synthes*, 2011 PA Super 172, 29 A.3d 9 at 18. Therefore, I properly exercised my discretion by eliminating the potential for jury confusion with a verdict slip that asked if Pittsburgh Chauffeur's conduct fell below the highest standard of care.

IV. Verdict Amount

Pittsburgh Chauffeur's final contentions relate to the amount of the verdict, \$500,000. It first contends the verdict is excessive because there only were noneconomic damages. *See* Concise Statement, ¶ no. 8. However, to analyze an excessive verdict claim, one begins "with the premise that large verdicts are not necessarily excessive verdicts." *Paliometros v. Loyola*, 2007 PA Super 242, 932 A.2d 128, 135. A verdict is not to be deemed excessive because it does not include medical expenses, lost earnings or other similar expenses. *Id.* At 136 (1998 sexual assault resulted in \$590,000 jury verdict involving only noneconomic damages) *citing Botek v. Mine Safety Appliance Corp.*, 531 Pa. 160, 611 A.2d 1174 (1992) (1982 incident resulted in \$350,000 jury verdict involving

only \$783 in economic losses). The factors relevant in determining whether the \$500,000 verdict is excessive include the severity of the injury, whether it is manifested by objective physical evidence and whether it is permanent. *Id.* at 135.

Mr. Deivert's injury clearly is manifested by objective physical evidence and has left permanent scars. The injury is severe. It is a third degree burn. The Jury saw a progression of photographs of the wound and also viewed the actual scars from it while Mr. Deivert testified during the trial. The injury appeared very ugly in its early stages. Both experts agree the injury was painful when it was sustained, the two surgeries were painful and recovery was painful. The severity of the injury also is apparent from the high degree of embarrassment and humiliation it has inflicted on Mr. Deivert. He is asked, "what happened to you?" when people at his gym notice the scar, and his level of frustration and embarrassment increases further when he tells them "an overcrowded limo." T., p. 95. When he goes to walk dogs at the dog park "[t]here will be people pointing. Kids go there. You know how honest kids are. They'll be like eww, eww, gross." T., p. 96. The injury also negatively impacts Mr. Deivert's romantic life. See T., p. 95. Pittsburgh Chauffeur disputed none of this, and I found Mr. Deivert and his two friends were extremely credible witnesses. The \$500,000 verdict for Mr. Deivert's uncontroverted pain and suffering, embarrassment, humiliation, loss of enjoyment of life and disfigurement is not so "grossly excessive as to shock [my] sense of justice." See *Paliometros v. Loyola* at 134. Therefore, my decision to let the Jury's decision stand was correct.

Pittsburgh Chauffeur next contends "[t]he Jury's questions revealed confusion and misunderstanding as to their determination of damages." Concise Statement, ¶ no. 8. This alleged confusion, according to Pittsburgh Chauffeur, resulted when Mr. Deivert's failure to offer his medical expenses into evidence¹ left the Jury "with nothing to fairly gauge the value of the case...." Brief in Support of Defendant's Post-Trial Motions, p. 35. The written questions the Jury submitted to me during deliberations were:

1. "Can we get the total amount of medical expenses because of the injury?" T., p. 365.
2. "We are having trouble determining an amount for an award of damages. Is there any evidence we can review that would assist with that or can the Judge clarify how we decide?" T., p. 369.
3. "Is the amount we write down going to be the final amount awarded?" T., p. 373.

I do not interpret these questions as an indication of "confusion" or "misunderstanding," and those terms or similar terms are not contained in any of the questions. The questions certainly indicate the Jury was struggling to determine the appropriate amount of compensation. The amount of medical expenses, however, have no relevance to the degree and extent of a person's pain and suffering or other noneconomic losses. See *Martin v. Soblotney*, 502 Pa. 418, 466 A.2d 1022(1983). In addition, longstanding Pennsylvania jurisprudence prohibits attorneys from suggesting the amount of an award for noneconomic damages. Hence, this Jury, similar to many Pennsylvania juries, expressed the difficulty inherent when intangible losses must be quantified without the use of any mathematical formula. The verdict, therefore, did not result from confusion, and the questions submitted by the Jury reflect the difficulty inherent in determining noneconomic damages².

Lastly, Pittsburgh Chauffeur contends the verdict "represents a value guided only by emotion, sympathy for the Plaintiff or speculation." Concise Statement, ¶ no. 9. Pittsburgh Chauffeur, however, offers no direct evidence that emotion, sympathy or speculation influenced the Jury, and I did instruct the Jury "[n]either sympathy nor prejudice should influence your deliberations." T., p. 362. Pittsburgh Chauffeur seems to argue the influence of emotion, sympathy or speculation in the \$500,000 Verdict can be inferred because of the allegedly insignificant damages. I disagree because the damages to Mr. Deivert were significant and the Verdict therefore not the product of emotion, sympathy or speculation.

BY THE COURT:
/s/Hertzberg, J.

¹ Mr. Deivert's counsel announced the decision not to offer medical bills into evidence during an on the record discussion about Pittsburgh Chauffeur's "Motion in Limine Re: Insurance Benefits and Medical Expenses." Pittsburgh Chauffeur had argued that evidence the lien for medical expenses would be satisfied from any recovery would be prejudicial. As would be expected, Pittsburgh Chauffeur had no objection to Mr. Deivert's medical bills not being offered into evidence. See T., pp. 14-15.

² Counsel for Pittsburgh Chauffeur agreed that the answers to each question that I provided to the Jury were appropriate. See T., pp. 365-377.

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PLJ

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OPINIONS

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Commonwealth of Pennsylvania v. Terrence Ross

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—After Discovered Evidence—Untimely

PCRA counsel's ineffectiveness is not a fact which will impact timeliness requirements.

No. CP-02-CR-15085-2013, CP-02-CR-15091-2013. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Rangos, J.—April 23, 2018.

OPINION

Appellant appeals the dismissal of his untimely filed second PCRA Petition.¹ Appellant filed a *pro se* Post Conviction Relief Act (“PCRA”) Petition, his second, on December 11, 2017. This Court dismissed the Petition without a hearing on January 31, 2018. Appellant filed a Notice of Appeal on March 15, 2018 and a Concise Statement of Errors Complained of on Appeal on April 18, 2018.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises four issues on appeal, all of which allege that counsel on his first PCRA Petition rendered ineffective assistance of counsel. (Concise Statement of Errors Complained of on Appeal at 1)

DISCUSSION

Before addressing the merits of the issues raised, Appellant must establish that his PCRA petition is timely filed. 42 Pa.C.S. § 9545(b). “A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final.” *Commonwealth v. Brown*, 111 A.3d 171, 175 (Pa. Super. 2015). The “one-year limitation is a jurisdictional rule that precludes consideration of the merits of any untimely PCRA petition, and it is strictly enforced in all cases, including death penalty appeals.” *Whitney v. Horn*, 280 F.3d 240, 251 (3d Cir. 2002). “A judgment is deemed final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” *Commonwealth v. Brown*, 111 A.3d at 175 (see 42 Pa.C.S. § 9545 (b) (3)). “The PCRA’s time limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits. The period for filing a PCRA petition “is not subject to the doctrine of equitable tolling.” *Commonwealth v. Rizvi*, 166 A.3d 344, 347 (Pa. Super. 2017) (citations omitted).

Appellant’s judgment became final on January 14, 2015, thirty days after sentencing. Appellant filed this petition over two years later on December 11, 2017. Three statutory exceptions to the timeliness provisions allow for limited circumstances under which the late filing of a petition will be excused. *Commonwealth v. Brown*, 111 A.3d at 175.

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, “government officials” shall not include defense counsel, whether appointed or retained.

42 Pa.C.S. 9545 (b) (1-4).

Appellant, in his “Response to the Proposed Dismissal of PCRA,” alleged that the facts upon which his claim is based were not available to him until the initial PCRA Petition was amended by counsel. Appellant’s appeal of the dismissal of his first PCRA Petition terminated on November 28, 2017, when the Supreme Court of Pennsylvania denied his Petition for Allowance of Appeal. His second PCRA Petition was filed on December 11, 2017, which would make it timely filed if the after-discovered evidence exception applied. *Commonwealth v. Lark*, 746 A.2d 585, 588 (Pa. 2000). However, counsel’s alleged ineffectiveness in his first PCRA Petition is not a “fact” for the purpose of this statute.

[R]eview of previous counsel’s representation and a conclusion that previous counsel was ineffective is not a newly discovered “fact” entitling Appellant to the benefit of the exception for after-discovered evidence. In sum, a conclusion that previous counsel was ineffective is not the type of after-discovered evidence encompassed by the exception.

Commonwealth v. Gamboa-Taylor, 753 A.2d 780, 785 (Pa. 2000).

Therefore, the PCRA Petition is untimely, without exception, and this Court did not err in dismissing it.

CONCLUSION

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

BY THE COURT:
/s/Rangos, J.

¹ For a factual summary and procedural history through the appeal of his first PCRA Petition, see *Commonwealth v. Ross*, 885 WDA 2016 (Pa. Super., May 18, 2017).

Commonwealth of Pennsylvania v. Richard Krista

Criminal Appeal—Homicide—Double Jeopardy—Fundamental Fairness—Bad Faith of Prosecutor

Homicide defendant, after winning a new trial on appeal, alleges a violation of double jeopardy principles after new conviction.

No. CP-02-CR-07547-2012. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Rangos, J.—March 6, 2018.

OPINION

Appellant, Richard Krista, was charged with two counts of homicide regarding a shooting which took place on May 11, 2012. Two jury trials before the Honorable Joseph K. Williams ended in mistrials as the juries were unable to reach a unanimous verdict. On June 5, 2014, a third jury convicted Appellant of two counts of first-degree murder. J. Williams sentenced Appellant on July 29, 2014 to consecutive terms of life imprisonment without the possibility of parole. On August 9, 2016, the Superior Court of Pennsylvania vacated the judgment of sentenced and remanded for a new trial, finding that the prosecutor had made an improper statement with respect to Appellant's decision not to testify. Upon remand, the case was reassigned. Appellant filed a Motion to Bar Retrial which, after a hearing, this Court denied on December 8, 2017.¹ Appellant filed a Notice of Appeal on January 4, 2018 and a Statement of Errors Complained of on Appeal on January 25, 2018.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges that this Court erred in failing to bar retrial and dismiss the charges based on the double jeopardy clauses of the U.S. and Pennsylvania Constitutions. Additionally, Appellant alleges this Court erred by failing to bar retrial and dismiss the charges based upon fundamental fairness. (Concise Statement of Errors alleged on Appeal at 1-2).

DISCUSSION

Appellant's claims regarding the Pennsylvania and Federal Constitutions may be considered together as one claim, as the Pennsylvania Constitution provides no greater double jeopardy protection.

With respect to appellants' contention that the Pennsylvania Constitution provides greater double jeopardy protection than the Federal Constitution, we likewise find no merit. Appellants neither proffer, nor are we aware, of any caselaw which establishes a higher standard in Pennsylvania.

* * *

Moreover, the double jeopardy provision of the Pennsylvania Constitution is essentially identical to that found in the United States Constitution; and Pennsylvania courts have not given its citizens broader double jeopardy protection than that provided by the United States Supreme Court interpreting the United States Constitution.

Commonwealth v. Breeland, 664 A.2d 1355, 1359 (Pa. Super. 1995).

“The double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.” *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. Super. 1992). The standard for the double jeopardy bar following the declaration of a mistrial, when the mistrial is granted on the defendant's request, is “whether the conduct on the part of the judge or prosecutor amounts to overreaching.” *Commonwealth v. Clark*, 430 A.2d 655, 659 (Pa. Super. 1981).

The two basis types of overreaching are as follows:

- (1) prosecutorial misconduct intentionally calculated to trigger the declaration of a mistrial in order to secure a more favorable opportunity to convict an accused; and
- (2) prosecutorial misconduct undertaken in bad faith to harass an accused by successive prosecutions or prejudice his prospects for an acquittal.

United States v. Dinitz, 424 U.S. 600, 611 (1976), *Lee v. United States*, 432 U.S. 23, 32 (1977). Generally, if there is no overreaching, the barrier for reprosecution is removed and the motion for mistrial is denied. *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). “The circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.” *Id.*

In *Commonwealth v. Clark*, 430 A.2d 655 (Pa. Super. 1981), the Superior Court found the following guidelines relevant to determine whether a prosecutor acted in bad faith:

- (1) the absence of any actions undertaken by the prosecutor to preserve the trial and to enhance the defendant's prospects for a fair trial after the misconduct occurred,
- (2) the absence of either abundant or convincing evidence of the defendant's guilt, so that the prosecutor's misconduct might reasonably be perceived as an attempt to rescue an inadequate prosecution,
- (3) the absence of misconduct causing serious and incurable prejudice to the defendant,
- (4) the absence of any neutral explanations, including inexperience, trial strategy, or inadvertence on the part of the government, to show that it did not, in fact, act purposely,
- (5) observations of the trial judge concerning the prosecutor's motives, and
- (6) defiance by the prosecutor of any direct order or clear admonition by the trial court to refrain from specific conduct prejudicing the defendant's prospects for acquittal.

Id. at 661.

Following a hearing, this Court found no evidence that the prosecutor's statement, while certainly egregious, was intended to deny a fair trial. (Transcript of the Motion Hearing, Dec. 8, 2017, hereinafter "MT" at 22) This Court further stated:

And I cite specifically to the guidelines for bad faith that have been set forth in some of the case law. The Superior Court indicated that while the statement was not a fair response to misconduct on the defense counsel's part, it was a single incident, no subsequent attempts by the prosecutor to exploit the Appellant's silence and the comment did arise in the context of a discussion with the Judge and opposing counsel, not a direct address to the jury, such as during opening or closing arguments. That's contained on Page 19 of the Superior Court's opinion.

On Page 21, the Superior Court also states, "Here we have a statement that went well beyond the borderline permissible statement at issue in *Ross*, yet it also does not appear to be calculated to affect the jury, as was the case in *Henderson*."

Then finally, on Page 24, the Superior Court notes that the prosecutor in the *Wesley* case was reacting to the Defendant's impromptu and impermissible outburst, while in the *Krista* case, this case, the prosecutor was reacting to defense counsel's improper questioning.

So these comments, as well as Judge Williams' comments and my reading of the case law and circumstances in this case, the fact that the jury then did convict, and there is nothing to indicate that the Commonwealth believed that their case was going poorly[.]

* * *

I do think that tensions were high; the parties and counsel were, both of them at that point, let's say, pushing each other's buttons, and while it was not a proper response, it was not calculated to create a mistrial or deny a fair trial, but rather an impromptu statement made out of frustration with defense counsel's questioning.

(MT 22-25)

Lastly, Appellant asserts that "the interests of justice" would not be served by a retrial. As stated above, this Court found, under the circumstances, that the appropriate remedy for prosecutorial misconduct is a retrial, as the statement made by the prosecutor was not intended to deprive Appellant of a fair trial. See *Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999).

CONCLUSION

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

BY THE COURT:
/s/Rangos, J.

¹ After denying the merits of the Motion, this Court found pursuant to Pa. R.C.P. 587 (b) (4) that the Motion was not frivolous.

Commonwealth of Pennsylvania v. Aaron Scott Johnson

Criminal Appeal—Suppression—Rule 600—Waiver—Reasonable Suspicion—Refiling Charges

Charges against defendant initially dismissed because officer failed to appear for preliminary hearing; refiling the charges is appropriate.

No. CC 200. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Manning, P.J.—April 19, 2018.

OPINION

The defendant, Aaron Scott Johnson, was charged by criminal information with one count of Possession of a Firearm by a Prohibited Person (18 Pa. C.S.A. § 6105(A)(1)); Firearms Not to be Carried Without a License (18 Pa. C.S.A. § 6106(A)(1)); Tampering With and/or Fabricating Evidence (18 Pa. C.S.A. § 4910(1)); Resisting Arrest (18 Pa. C.S.A. § 5104); and Defiant Trespass (18 Pa. C.S.A. § 3503(b)(1)(ii)). A Pre-Trial Motion to Suppress was denied, as was a Petition for Writ of *Habeas Corpus*.¹

The defendant then proceeded to a non-jury trial, at the conclusion of which he was adjudged guilty of all counts. He waived his right to a presentence report and proceeded to sentencing. At the charge of Possession of a Firearm by a Prohibited Person, he was sentenced to not less than sixteen (16) nor more than thirty-two months (32) months incarceration to be followed by five years' probation. He was given credit for time served. No further penalty was imposed on the remaining counts.

On June 16, 2017, the defendant filed a *Pro-Se* Notice of Appeal. He also filed a *Pro-Se* Concise Statement of Matters Complained of on Appeal on August 15, 2017. As the defendant was still represented by counsel, counsel thereafter filed a Concise Statement of Errors Complained of on Appeal on March 19, 2018, in which he raised the following claims:

1. The Court erred in denying the Motion to Suppress;
2. The Court erred in denying his Petition for Writ of Habeas Corpus; and
3. The defendant's charges should have been dismissed pursuant to Pa. R. Crim. P. 600.

Turning first to the Suppression Motion, the evidence revealed that on September 2, 2014, Detective Matthew Poling was on patrol in the City of Pittsburgh with his partner, Officer Schweitzer. At approximately 8:28 p.m., he received a 9-1-1 call indicating that a burglar alarm had been set off at the Imani Christian School Academy. (N.T. 7)² Detective Poling arrived at the Academy and he and his partner began to walk around the perimeter of the property to look for open doors, broken windows or any other

evidence of forced entry. Both he and Officer Schweitzer were in uniform. He observed that the school appeared to be closed with no lights emanating from within. (N.T. 8-9). As they rounded the corner of the building, with Officer Schweitzer in front, Detective Polling observed an individual dressed in all black, later identified as the defendant, Aaron Johnson, at the rear of the building. The defendant looked in the direction of the officers, said, "Oh shit" upon seeing them, stood up, grabbed the right front side of his waistband and began to run from the officer. Officer Schweitzer yelled "STOP POLICE" and began pursuit. (N.T. 20).

During the pursuit, the defendant tripped and fell down a couple of steps. As he got up to continue running, Officer Schweitzer observed the top of a black pistol protruding from his waistband. Earlier, he had seen the defendant reach to his waistband when he began running which, in his experience, is common as those fleeing police to hold on to the weapon to prevent it from falling out of the waistband. At one point, another individual, later identified as Jasan Pearson, interfered with Schweitzer's pursuit and yelled to the other defendant, "go bro, go bro." Officer Schweitzer stopped and placed the other individual under arrest while Detective Poling continued in pursuit of the defendant.

At one point in the pursuit, he observed the defendant take the firearm from his waistband and hold it in his hand as we was running. He then observed the defendant throw the firearm into some shrubbery along where he was running. He continued pursuit, tackled the defendant and placed him under arrest. (N.T. 13-15). The firearm was later retrieved.

The defendant claimed at the suppression hearing that the officers lacked reasonable suspicion to chase or detain him when they began to pursue him. Accordingly, he claims that the firearm that was recovered was the product of forced abandonment flowing from the unlawful pursuit. The law in this area is well established:

In order to justify an investigatory stop, the police must have, at its inception, reasonable suspicion that criminal activity is afoot. The police must be able to point to specific and articulable facts which reasonably support that suspicion. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). See *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969).

Particularly, police must possess both suspicious conduct on the part of the persons so detained and a reasonable belief of some sort of criminal activity. *Commonwealth v. Espada*, 364 Pa.Super. 604, 528 A.2d 968 (1987).

In determining whether reasonable suspicion exists, we must look to the totality of the circumstances. *Commonwealth v. Wright*, 448 Pa.Super. 621, 672 A.2d 826 (1996). Merely because a suspect's activity may be consistent with innocent behavior does not alone make detention and limited investigation illegal. *Commonwealth v. White*, 358 Pa.Super. 120, 516 A.2d 1211 (1986). Rather, we view the circumstances through the eyes of a trained officer, not an ordinary citizen. *Commonwealth v. Fink*, 700 A.2d 447 (Pa.Super.1997). We are mindful that some of the factors to be considered include various objective observations, information from police reports, if such reports are available, and consideration of modes or patterns of operation of certain kinds of lawbreakers. *Id.*

Commonwealth v. Riley, 715 A.2d 1131, 1135 (Pa. Super. 1998).

The officers clearly had reasonable suspicion that warranted the attempt to stop the defendant. They received a dispatch indicating that a silent alarm had gone off at the Imani Christian School Academy. This certainly created reasonable suspicion to believe that someone may have been attempting to break in. Upon arriving at the scene, they observed the defendant, dressed in black, in the shadows directly outside the building where the alarm had gone off. Upon seeing the officers, in their full uniform, the defendant exclaimed, "oh shit" and proceeded to run from the scene. At the beginning of that pursuit and during that pursuit, the officers became aware that the defendant also possessed a firearm. The silent alarm, coupled with the observation of the defendant dressed in black directly outside of the building where the alarm went off, added to his immediate flight upon seeing the officers, amounted to reasonable suspicion sufficient to warrant an investigation detention. This reasonable suspicion ripened into probable cause to arrest when the defendant was observed throwing the gun away and as he resisted arrest when the officer caught up to him.

Next, the defendant contends that his Petition for Writ of *Habeas Corpus* should be granted in violation of Pennsylvania Rule of Criminal Procedure 544. Pennsylvania Rule of Criminal Procedure 544(A) provides:

When charges are dismissed or withdrawn at, or prior to, a preliminary hearing, or when a grand jury declines to indict and the complaint is dismissed, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the re-filing of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.

The record in this matter indicates that at docket number MJ-05003-CR-9054-2014, a criminal complaint was filed against this defendant arising out of the same incident and listing the same charges. It was postponed on September 16th and again on September 29, 2014 and then the charges were withdrawn on October 14, 2014. According to the Assistant District Attorney at the May 11, 2017 hearing, the charges were dismissed because the officer failed to appear. (N.T. 3). At docket number MJ-05003-CR-10761-2014, the criminal complaint was refiled in the same magisterial district on October 21, 2014. After several postponements, all charges were held for Court following a preliminary hearing.

The criminal complaint was entered into evidence as Commonwealth Exhibit 1 at the May 11, 2017 hearing. Attached to the complaint was an affidavit of probable Cause. The affidavit explained that the charges had been dismissed on October 14, 2014 by Judge Martini and that this was a re-filing of those charges. As the criminal complaint bears the signature of the Assistant District Attorney, it is clear that that office approved the re-filing of the charges.

In *Commonwealth v. Bowman*, 840 A.2d 311 (Pa. Super.2003), the Superior Court addressed a similar argument and held that "... the presence of the Assistant District Attorney at the preliminary hearings in this matter certainly implied the authorization for the re-filing of the complaint." at 3016. Here, there is no need to rely on any implication. The affidavit made it clear that this was a re-filing and the signature of the Assistant District Attorney on the refiled complaint explicitly authorized the re-filing. Accordingly, the Court did not err in dismissing the Petition for Writ of *Habeas Corpus* based on violation of Rule 544 if the rule was not, in fact, violated.

Finally, the defendant contends that the charges should have been dismissed due to violation of Rule 600. This claim was raised by the defendant *pro se*. As pointed out above, because the defendant was represented by qualified counsel throughout this matter, the Court was not required to address the claims raised in any *pro se* pleading. None of defendant's attorneys raised a claim that that the charges should be dismissed due to a violation of Rule 600. This claim was not mentioned at the May 11, 2017 hear-

ing. Accordingly, any Rule 600 claim defendant raises in this appeal is waived. *Commonwealth v. Ali*, 10 A.3d 282 (Pa. 2010). Because defense counsel did not raise the Rule 600 claim, no evidentiary hearing was held.

For the reasons set forth above, the defendant's judgment of sentence should be affirmed.

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

Date: April 24, 2018

¹ The defendant also filed numerous pro-se pleadings. Other than his several requests for new counsel, this Court did not consider or rule on these pleadings. The defendant was represented by qualified counsel through these proceedings and this Court was not required "... to struggle through the *pro se* filings of (the) defendant[s] when qualified counsel represent[s] [those] defendant[s]." *Commonwealth v. Pursell*, 724 A.2d 293, 302 (Pa. 2005).

² N.T. refers to the notes of testimony of the Motion/Trial held on May 11, 2017.

Commonwealth of Pennsylvania v. Carl Collins

Criminal Appeal—Homicide—Sentencing (Discretionary Aspects)—Juvenile Homicide Defendant—Ex Post Facto Claim—Rehabilitation

Defendant, who was a juvenile when he committed 2nd degree murder, has exhibited efforts toward rehabilitation and thus is sentenced to 30 years to life.

No. CC 1993-12112. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—March 15, 2018.

OPINION

The Defendant has appealed from the judgment of sentence entered on October 11, 2017, following a resentencing hearing. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with Criminal Homicide,¹ Possession of a Firearm Without a License,² Robbery,³ Criminal Conspiracy⁴ and Aggravated Assault⁵ in connection with the August 31, 1993 shooting death of Odell Mahaffey. At the time of the killing, the Defendant was 16 years old. Following a jury trial held in February, 1994 before the Honorable Walter Little, then of this Court, the Defendant was found guilty of Second-Degree Murder and all other counts. On May 17, 1994, he was sentenced to a term of life imprisonment at the Second-Degree Murder count, plus an additional aggregate term of 15-43 years consecutive to the life sentence. Timely Post-Sentence Motions were filed and denied on June 8, 1994. The judgment of sentence was affirmed by the Superior Court on May 15, 1996 and his subsequent Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on October 31, 1996.

No action was taken until July 16, 1998, when the Defendant sought leave to reinstate his post-conviction rights *nunc pro tunc*. The Motion was granted and the Defendant filed a *pro se* PCRA Petition on August 12, 1998. Counsel was appointed to represent the Defendant, but a *Turner* letter was filed and she was granted permission to withdraw. After giving the appropriate notice, and reviewing the Defendant's response to that notice, Judge Little dismissed the Defendant's PCRA Petition on January 17, 2001. The Superior Court affirmed the dismissal on December 10, 2001 and the Defendant's Petition for Allowance of Appeal was denied on June 28, 2002.

On June 25, 2003, the Defendant filed a second *pro se* PCRA Petition. For reasons unclear to this Court,⁶ counsel – Scott Coffey, Esquire – was appointed to represent the Defendant. However, after filing a *Turner* letter, counsel was permitted to withdraw. On June 30, 2005, Judge Little gave Notice of his Intent to Dismiss the Petition and the Defendant responded to the proposed dismissal. However, Judge Little never entered an Order dismissing the Petition.

Then, on September 16, 2005, the Defendant filed a third *pro se* PCRA Petition alleging a claim of after-discovered evidence in the form of a witness named Merrior Coleman. By this time the case had been transferred to Judge Cheryl Allen, also formerly of this Court. Again, for reasons unknown to this Court, Judge Allen appointed counsel – Scott Coffey, Esquire – to represent the Defendant. However, because he had formerly represented the Defendant at a prior stage of these proceedings, Attorney Coffey was permitted to withdraw and the Defendant elected to proceed *pro se*. On April 20, 2006, the Defendant filed an Amended Petition again alleging a second after-discovered witness – this time, Ronald Williams.

After giving the appropriate notice, Judge Allen denied post-conviction relief on September 19, 2006. On appeal, the Superior Court found that Judge Allen's Order pertained only to the September 16, 2005 Petition regarding Merrior Coleman, and did not resolve the April 20, 2006 Petition regarding Ronald Williams and so it remanded the case to this Court for an evidentiary hearing.

The proscribed evidentiary hearing was held before this Court on September 24 and 25, 2008. Following the hearing, this Court denied the Defendant's April 20, 2006 Amended Petition regarding the after-discovered evidence of Ronald Williams. That Order was affirmed by our Superior Court on July 22, 2011 and the Defendant's subsequent Petition for Allowance of Appeal was denied on December 28, 2011.

No further action was taken until July 10, 2012, when the Defendant filed a fourth⁷ PCRA Petition raising a claim based on *Miller v. Alabama*, 132 S.Ct. 2455 (2012). This Court took no immediate action on the Petition while awaiting guidance from our appellate courts. Following our Supreme Court's decision in *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013), this Court gave notice of intent to dismiss the Petition on November 13, 2013 and subsequently dismissed it on December 5, 2013.

Meanwhile, unbeknownst to this Court, attorney Erika Kreisman filed a Motion to Grant Leave to Amend PCRA with Judge Manning of this Court. Judge Manning responded with a Notice of Intent to Dismiss on November 6, 2013 and purported to dismiss

the Petition on December 9, 2013, four (4) days after this Court had already dismissed it. Upon discovery of the filing error and the proper assignment of the case to this Court, Judge Manning vacated his Orders on January 8, 2014.

Despite the mix-up, the Defendant, through Attorney Kreisman, filed a timely Notice of Appeal from this Court's Order of December 5, 2013. On appeal, he took issue with the validity of the *Cunningham* ruling and argues that this Court erred in dismissing his Petition as untimely. After the appeal was initially dismissed for the Defendant's failure to file a brief, the appeal was reinstated and this Court's Order was affirmed on January 27, 2015. A Petition for Allowance of Appeal was filed but was discontinued shortly thereafter.

On February 23, 2016, the Defendant filed his fifth pro se Post Conviction Relief Act Petition, again raising a *Miller* claim, this time pursuant to the United States Supreme Court's decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) Suzanne Swan, Esquire, was appointed to represent the Defendant, but Attorney Kreisman once again entered her appearance on behalf of the Defendant and Attorney Swan withdrew. An Amended Petition seeking resentencing was subsequently filed and this Court granted relief in the form of a re-sentencing hearing, which was held on October 11, 2017. At the conclusion of that hearing, this Court vacated the sentences imposed on May 17, 1994 and imposed a term of imprisonment of 30 years to life at the second-degree murder charge. Timely Post-Sentence Motions were filed and were denied on October 30, 2017. This appeal followed.

On appeal, the Defendant raises two (2) claims of error, which are addressed as follows:

1. *Ex Post Facto* Violation

Initially, the Defendant argues that this Court erred in applying 18 Pa.C.S.A. §1102.1 retroactively because the killing occurred before the effective date of Section 1102.1. This claim is meritless.

In *Miller v. Alabama*, 132 S.Ct. 2455 (June 25, 2012), the United States Supreme Court declared that mandatory life sentences for juveniles convicted of murder were unconstitutional. Life sentences were still permitted however, but they could only be imposed after consideration of a number of factors, including the "juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation." *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013) Although the Pennsylvania Courts declined to make *Miller* retroactive [see *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013)], the United States Supreme Court subsequently held that *Miller's* holding should be applied retroactively in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016)

In response to *Miller*, the Pennsylvania Legislature enacted 18 Pa.C.S.A. §1102.1 which states, in relevant part:

§1102.1. Sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a law enforcement officer.

Effective: October 25, 2012

...

(c) *Second degree murder.* - A person who has been convicted after June 24, 2012, of a murder of the second degree, second degree murder of an unborn child or murder of a law enforcement officer of the second degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:

(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of imprisonment the minimum of which shall be at least 30 years to life.

...

(d) *Findings.* - In determining whether to impose a sentence of life without parole under subsection (a), the court shall consider and make findings on the record regarding the following:

(1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.

(2) The impact of the offense on the community.

(3) The threat to the safety of the public or any individual posed by the defendant.

(4) The nature and circumstances of the offense committed by the defendant.

(5) The degree of the defendant's culpability.

(6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.

(7) Age-related characteristics of the defendant, including:

(i) Age.

(ii) Mental Capacity.

(iii) Maturity.

(iv) The degree of criminal sophistication exhibited by the defendant.

(v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.

(vi) Probation or institutional reports.

(vii) Other relevant factors.

(e) *Minimum sentence.* - Nothing under this section shall prevent the sentencing court from imposing a minimum sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing may not supersede the mandatory minimum sentences provided under this section.

18 Pa.C.S.A. §1102.1

However, the intersection of *Miller* (which held that mandatory life sentences for juveniles were found to be unconstitutional), *Cunningham* (which applied *Miller* retroactively) and 18 Pa.C.S.A. §1102.1 (which created a new sentencing scheme for offenses committed after October 25, 2012 only), creates a unique procedural problem for the sentencing court. In *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) (*Batts II*), our Supreme Court addressed the issue and held that it was proper to impose a minimum term-of-years and maximum life sentence upon resentencing. It stated: “for juveniles convicted prior to *Miller* for whom a sentence of life without parole was unconstitutional, the prohibition against paroling inmates sentenced to serve life in prison could be severed from section 6137(a) of the Parole Code. Thus, a court may sentence affected defendants to a minimum term-of-years sentence and a maximum sentence of life in prison, exposing these defendants to parole eligibility upon the expiration of their minimum sentences.” *Commonwealth v. Batts*, 163 A.2d 410, 439 (Pa. 2017) Thereafter, in *Commonwealth v. Melvin*, 172 A.3d 14 (Pa.Super. 2017), our Superior Court reiterated the *Batts* finding and concluded that the imposition of a sentence for a killing which occurred before June 24, 2012 does not raise an *ex post facto* violation claim as long as the sentencing factors of Section 1102.1 are considered. *Commonwealth v. Melvin*, 172 A.3d 14, 22 (Pa.Super. 2017)

As discussed more fully below, this Court engaged in an extensive analysis of the Section 1102.1 factors when imposing its sentence. This Court’s actions were in accordance with the guidance provided by our appellate courts in *Batts* and *Melvin*, *supra* and so this claim must fail.

2. Excessive Sentence

The Defendant also argues that this Court erred in imposing a manifestly excessive sentence which failed to take into account his nonviolent prison adjustment and family support network. Again, this claim is meritless.

It is well-established that “sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. *Commonwealth v. Hardy*, 939 A.2d 974, 980 (Pa.Super. 2007) “An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. In more expansive terms... an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness or partiality, prejudice, bias or ill-will, or such lack of support as to be clearly erroneous.” *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa.Super. 2008) “Where pre-sentence reports exist, [the appellate court] shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant’s character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. *Commonwealth v. Macias*, 968 A.2d 773, 778 (Pa.Super. 2009)

Our Supreme Court has mandated consideration of a number of factors including the “juvenile’s age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation” when considering a sentence for a juvenile convicted of murder. *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013)

At the re-sentencing hearing, this Court noted that it had read and considered two (2) Pre-Sentence Investigation reports as well as an expert report on behalf of the Defendant, and it detailed its review of the record:

THE COURT: Okay. Before we begin, I would like to place on the record that the Court has ordered both Pre-Sentence Reports. I have received two very well written sentencing memos. I have gone over - you can sit down if you want - all of the information that was gleaned from Dr. Applegate as well as my entire file which is about four inches thick.

So because I was not the trial Judge in this case, I have made a real effort to learn as much as I can. I spent many, many hours this weekend with this case, and I’ll ask you both to remember that when you’re presenting evidence.

(Re-sentencing Hearing Transcript, 10/11/17, p. 3)

This Court then listened to and considered the testimony of psychologist Dr. Alice Applegate and numerous witnesses including Sheila Miles, a nurse from SCI Greensburg, Cordell Collins, the Defendant’s brother, Tia Collins, the Defendant’s sister-in-law, Antoine Bailey, a friend of the Defendant, the Defendant himself and victim impact testimony from Linda Mahaffey, Odel Mahaffey’s sister. At the conclusion of the testimony, this Court listened to arguments presented by defense counsel and the Commonwealth and placed its own analysis on the record. It stated:

THE COURT: All right. As I stated, I have two pre-sentence reports, two excellent sentencing memos. I have Dr. Applegate’s insight as well as my entire - shouldn’t be quite this big - four-inch thick file. I took extra caution to review the file because I was not the trial Judge in the case nor was I the original Judge assigned after Judge Little passed away.

I do find the defendant was clearly 16 years old when this happened and three months. The crime has always identified the defendant as the shooter. This is a totally senseless crime. The victim had no money. There was certainly no reason to shoot him let alone to humiliate him as well as his friend. I find this to be a particularly heinous crime.

Mr. Collins’ childhood has two stories. He had a very difficult childhood and was raised by an abusive, alcoholic mother who was also mentally ill. There, however, was some support from his father and clearly support from his brother. Today, the defendant claims to have a relationship with his brother. I question this to be true - to be not true because of his background. I do not question, however, that his brothers are supportive of him, have been a good influence and continue to support him.

Although the defendant was hanging - and I put that in air quotes - with the Bloods in this case when the crime occurred, he said that he was not an active member. I have no reason to disbelieve that. There was also some admissions of drug and alcohol use.

However, I find most significant in this case the defendant's development at the institutions in which he has been placed. In the beginning, he had some minor misconduct, but none for the past many years. I do find it interesting, as Mr. Wabby pointed out, that in 2008, he was still professing his innocence and did so through a PCRA hearing before this Court which the Court found to be, his witness not to be credible.

I do also find that he, in part at least, began his rehab in 1999 - 1995 which was when the first certificate was issued, and this was long before the Miller decision. This is important to me because I've had a number of juveniles that have come before me that started rehabilitating after the Miller decision. Mr. Collins has a huge list of accomplishments, and most important is his dedication to help others and to improve their lives. I think, Mr. Collins, that you were sincere in making yourself a better person, so the sentence is vacated, and I'm going to sentence the defendant at the second degree murder case to serve a term of 30 years to life imprisonment. The defendant is not RRRI eligible. There will be no concurrent sentences on this case.

(R.H.T., p. 50-52)

As the record reflects, this Court appropriately considered the lay and expert testimony, his exhibits and evidence of his rehabilitation activities, evaluated the *Miller* age-related factors and imposed a sentence which took all of these factors into consideration. The new sentence - 30 years to life - is a significant downward departure from the prior life sentence without the possibility of parole and reflects the Defendant's efforts towards rehabilitation. Moreover, the record reflects great deliberation and consideration in the formulation of the sentence. Given the facts of this case, the sentence imposed was appropriate, not excessive and well within this Court's discretion. This claim must fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on October 11, 2017 following resentencing must be affirmed.

BY THE COURT:
/s/McDaniel, J.

¹ 18 Pa.C.S.A. §2501 - CC 9312112

² 18 Pa.C.S.A. §6106(a) - CC 9313464

³ 18 Pa.C.S.A. §3701(a)(1) - (2 counts) - CC 9313464

⁴ 18 Pa.C.S.A. §903(a)(1) - CC 9313464

⁵ 18 Pa.C.S.A. §2702(a) - CC 9313464

⁶ The Defendant not being entitled to appointed counsel for second and subsequent PCRA Petitions, see Pa.R.Crim.Pro. 904(d)

⁷ The Commonwealth considers this Petition the Defendant's fifth (5th), ostensibly because it considered the April 20, 2006 Amended Petition relating to Ronald Williams as a separate Petition

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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Jory and Joeanna Rand, Husband and Wife v. Brian J. Young, an adult individual, and Win Realty Advisors, LLC, a Pennsylvania limited liability company, f/k/a Win Realty PA, LLC v. Barristers Land Abstract Co., a Pennsylvania Close Corporation and Capital Region Land Transfer, Inc., a Pennsylvania Corporation d/b/a Barristers Land Abstract Company, Hertzberg, J.Page 197
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PLJ

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Unfair Trade Practices and Consumer Protection Law (UTPCPL)—Vicarious Liability

Seller/Agent of residential property mislead buyers about structural problems and the lack of an occupancy permit for the new garage in disclosure statement and therefore violated the Unfair Trade Practices and Consumer Protection Law. Broker found vicariously liable.

No. GD 13-7617. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
 Hertzberg, J.—December 15, 2017.

OPINION

I. Background

After graduating from Boston College and working in sales for a sportswear company, defendant Brian Young purchased a home in Pittsburgh. He had a contractor make some updates to it and placed it for sale with his mother, a real estate agent. It sold quickly, and Mr. Young said it was a successful project. He then decided to change careers and became a full time “real estate investor.” Mr. Young’s investments, however, are exclusively what is commonly called “house flipping” in which he will “buy cheap, rehab and sell for a profit....” Transcript of Non-Jury Trial (“T.” hereafter), p. 18. Mr. Young’s next project was the purchase of a home in Dormont Borough for \$30,000 that he also said went well. He then purchased and quickly sold two more homes in Dormont. All three Dormont projects were minor renovations involving updating esthetics, with Brandon Colella serving as the contractor in charge of the renovations.

As Mr. Young was “flipping” the three homes in Dormont, he determined he could make a larger profit if he saved on sales commissions by becoming a licensed real estate agent. In 2009 Mr. Young took the required courses, passed the examination, and in March of 2010, became a licensed real estate agent. Mr. Young then turned his attention to the Southside of Pittsburgh and purchased a home on Fox Way that “was a gut job. [Brandon Colella] gutted the property and rewired it, replumbed it, installed new drywall, new floors, new kitchen. It was more extensive than the Dormont properties.” T., p. 615. It also sold quickly, and Mr. Young said there were no complaints.

In the fall of 2010 Mr. Young purchased a three story home with a detached garage on the Southside of Pittsburgh known as 2315 Jane Street. The home was built over one hundred years ago, and Mr. Young purchased it for \$152,000. Brandon Colella recommended that Mr. Young completely gut 2315 Jane Street, but Mr. Young instead decided to save money by limiting renovations to those that created a more attractive appearance, such as an “open concept” first floor. In October of 2011 Mr. Young listed the home for sale for over \$400,000 with his broker, Win Realty Advisors. This broker catered to agent/investors with a commission split of 70-30 in favor of the agent and agents permitted to engage exclusively in transactions involving themselves as purchaser or seller. 2315 Jane, however, did not sell quickly at that price, hence Mr. Young reduced the price.

The price reductions were noticed by plaintiffs Jory and Joeanna Rand, who had outgrown the townhouse they occupied on the Southside. They were interested in finding another home on the Southside that was larger, had a garage and yard and needed minimal renovations. They found 2315 Jane Street had everything they were looking for and purchased it from Mr. Young for \$315,000 on August 30, 2012.

On December 24, 2012, during a rain storm, water poured into the home from a leak in the roof. Early in January the Rands had a contractor named Tennis Roofing install a new roof. In creating the “open concept,” a load-bearing wall that ran from the front to the rear of the home was removed and replaced with columns and beams. Almost immediately after the roof replacement the Rands began to feel “that the house was changing, the floors were sinking” (T., p. 529) and they saw cracks in the drywall that covered the mid-span support column on the first floor. It turned out the directive from the engineer who designed the columns and beams to “assure continuous load path to the footing in the basement” (T., p. 354) was not followed. The Rands then had to spend \$70,126 to replace the system of beams and columns Mr. Young had installed and to repair other impacted components of the home.

In April of 2013 the Rands sued Mr. Young, Mr. Colella and Win Realty¹. In September of 2014 Mr. Young filed a praecipe for a writ to join Barristers Land Abstract Co., the settlement agent that closed the real estate transaction, as an additional defendant. Prior to trial Mr. Colella reached a settlement with the Rands, and this Court excused him from further participation in the litigation. The dispute was assigned to me for disposition via non-jury trial, which was held on May 1, 2, 3 and 4, 2017. On May 9, 2017 I issued a verdict in favor of the Rands for \$35,764.35, with \$11,921.45 owed jointly by Mr. Young and Win Realty, \$11,921.45 owed by Barristers Land Abstract and an additional \$11,921.45 owed only by Mr. Young for violating the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL” hereafter). *See* 73 P.S. §201-1 *et seq.*

The Rands filed the first post-trial motions, requesting clarification of the award of damages, counsel fees and expenses of \$53,419.30 under the UTPCPL and delay damages under Pennsylvania Rule of Civil Procedure no. 238. All the other parties then also filed post-trial motions, alleging I committed a multiplicity of errors in my verdict. I awarded the Rands counsel fees and expenses of \$12,286.54 and delay damages of \$3,161.57 but denied all other post-trial motions. Judgment was entered and appeals taken to the Superior Court of Pennsylvania by Mr. Young, Win Realty and Barristers. Each filed a concise statement of errors complained of on appeal. *See* Pennsylvania Rule of Appellate Procedure no. 1925. The balance of this opinion will address each error identified in the concise statements.

II. Errors Claimed by Mr. Young

In paragraph 1 of Mr. Young’s concise statement, he contends my “Non-Jury Verdict and Verdict Explanation is uncertain and ambiguous....” The first parties that registered a problem with my verdict and explanation were the Rands in their post-trial motion request for “clarification” of the award of damages. Mr. Young, Win Realty and Barristers also then raised this issue in their

post-trial motions as well as in Mr. Young's and Barristers' concise statements. The Rands alleged a conflict existed between the verdict amounts of \$11,921.45 against defendants Young and Win Realty and \$11,921.45 against additional defendant Barristers because my explanation stated that these defendants and additional defendants were liable for damages of \$23,842.90, with this amount "split equally between the remaining Defendants and the Additional Defendants." Because the defendants and additional defendants are comprised of three parties, the Rands construed the "split equally" language to call for division of the \$23,842.90 equally among each of the three parties. However, that was definitely not what I intended in the verdict. I determined Win Realty was vicariously liable for Mr. Young's conduct, hence Win Realty could only be jointly liable with Mr. Young. On August 18, 2017 I attempted to clarify that the explanation "was intended to inform the parties that the amount of \$23,842.90 was split equally between two groups, the Defendants and the Additional Defendants, with each group thus being responsible for an equal amount (the Defendants are responsible for \$11,921.45 and the Additional Defendants are responsible for \$11,921.45)." Apparently, this clarification is acceptable to the Rands and Win Realty but not acceptable to Mr. Young and Barristers. With several factors that made the verdict complicated (e.g., behavior attributable to a settling defendant and enhanced damages under the UTPCPL applicable to only one defendant), I hoped my "Verdict Explanation" would assist the parties in understanding the verdict. I apologize if the parties were not assisted, but am unaware of any authority for this constituting reversible error.

In paragraph 2 of Mr. Young's concise statement, he contends I made an error by finding Mr. Young failed to disclose material defects because there was no evidence he knew or should have known of the defects. Mr. Young, however, took the unusual step of having a home inspection done before he listed 2315 Jane Street for sale. Mr. Young was present for the August 30, 2011 inspection that exposed him to a support column in the center of the basement that was not secured to the floor. *See T.*, pp. 116-120. The inspection report actually contains a photograph showing the inspector pushing the unsecured column with his foot along the floor. *See Exhibit 29*, p. 15. Under the headings "Summary of Areas Requiring Further Evaluation" and "General Information," the report also states:

Amateur work-It appears that non professional or an unqualified person or persons attempted to perform repairs. The work is not to the typical building standards of the area. Repairs will generally be more expensive because of the amateur work.

Mr. Young did not disclose this inspection report to the Rands before they purchased 2315 Jane Street, and he did not voluntarily provide it to them when they requested it during discovery in this proceeding.

Pennsylvania's Real Estate Seller Disclosure Law required Mr. Young to include "Structural problems" (68 P.S. §7304 (b)(6)) in the Property Disclosure Statement provided to the Rands, but Mr. Young's disclosure statement answered "No" to the question "Are you aware of any past or present movement, shifting, deterioration, or other problems with walls, foundations, or other structural components." *Exhibit 15*, ¶ no. 6(b). Since Mr. Young was present for the inspection and was provided the report showing movement in the column, he knew of a past problem with a structural component but failed to disclose it. Hence, there was evidence Mr. Young knew of the defect and my determination that he failed to disclose it was correct.

Mr. Young testified Brian Colella told him he would repair all the problems in the inspection report, hence Mr. Young argues he is not liable for the omission in the property disclosure statement because the "omission was based on a reasonable belief that a material defect...had been corrected...." 68 P.S. §7309 (a)(2). This provision cannot be applicable to a seller's disclosure of a past defect because it would allow a seller to mislead a buyer to believe there never had been a past defect. Instead, the provision applies when a seller denies a defect currently exists because the seller reasonably believes it was corrected. Because Mr. Young's omission concerned the existence of a structural defect in the past, 68 P.S. §7309(a)(2) is not applicable.

Even if 68 P.S. §7309(a)(2) were applicable, it was not reasonable for Mr. Young to believe Brian Colella corrected the structural defect. The purchaser of the Fox Way home testified that Mr. Young was notified that Brian Colella failed to make repairs Mr. Young had assigned to him in the summer of 2011. *T.*, pp. 703-710. Also, with Mr. Young's home inspector saying Brian Colella's work appeared to be done by "an unqualified person" and was below local building standards, it is not reasonable to expect he could correct the structural defect. Therefore Mr. Young did not have a "reasonable belief" that Brian Colella corrected the structural defect.

In paragraphs 3 and 11 of Mr. Young's concise statement, he contends I made an error by finding he violated the UTPCPL. The sale of residential property is subject to the UTPCPL (*see Gabriel v. O'Hara*, 368 Pa. Super. 383, 534 A.2d 488 (1977)), and misleading conduct by a seller is a violation of the "catchall provision" of the UTPCPL. *See Bennett v. A.T. Masterpiece Homes v. BROADSPRINGS, LLC*, 2012 PA Super 60, 40 A.3d 145 and 73 P.S. §201-2(4)(xxi). The statement in the written disclosure provided to the Rands that Mr. Young was unaware of a past structural problem was misleading conduct. In addition, a City Building Inspector informed Mr. Young he needed to obtain an occupancy permit because the old garage had been demolished and a new one erected without fire-rated drywall. *See T.*, pp. 194-196 and 205. Mr. Young, however, failed to obtain the occupancy permit, which resulted in the City issuing a citation to the Rands for violating the Building Code. The property disclosure statement mislead the Rands about the problem by indicating "final inspections/approvals" were obtained and Mr. Young was unaware of violations of local laws or building ordinances. *Exhibit 15*, ¶ nos. 7, 19(c) and 19(d). Since Mr. Young mislead the Rands about the structural problem and the lack of an occupancy permit for the new garage, my finding that he violated the UTPCPL was correct.

In paragraphs 4, 5, 6 and 8 of Mr. Young's concise statement, he contends I erroneously found him liable for repairs to items identified as defects in the Rands' home inspection. There is no merit to this contention because I held Mr. Young liable exclusively for repair costs related to the structural problem and other impacted components of the home, such as the floor and drywall. In the Verdict Explanation, I began my calculation of damages with \$70,126.18, which is the total of the invoices admitted into evidence that relate to repair of the structural problem and other impacted components of the home.² I then reduced the damages by \$46,283.28 for sixty-six percent of the behavior attributable to the settling defendant, to \$23,842.90. The joint verdict against Mr. Young and Win Realty was for half of that amount, \$11,921.45, with another \$11,921.45 against Mr. Young alone for violating the UTPCPL. Since all damages against Mr. Young are from the cost of repairs necessary to resolve the structural defects, he was not found liable for the repair of defects identified in the Rands' home inspection. Hence, I did not make the error claimed by Mr. Young.

In paragraph 7 of Mr. Young's concise statement, he contends I erroneously held him liable for structural problems that were not visible to him prior to closing and that did not occur until after the closing. However, Mr. Young was present for the inspection of 2315 Jane Street on August 30, 2011 when the photograph was taken showing movement along the floor of the basement support column. *See T.*, pp. 116-120. Hence, contrary to Mr. Young's contention, the structural problem was visible to him prior to closing.

Relative to Mr. Young's claim that the structural problems did not occur until after closing, the credible, uncontradicted opinion of Roy Kim, Jr., P.E. was that multiple deviations from his design caused the structural problems. *See* T., pp. 327-334. Since these deviations occurred during the renovation overseen by Brandon Colella, they did not occur after the closing. Therefore, I did not make the errors alleged by Mr. Young.

In paragraph 9 of Mr. Young's concise statement, he contends I made an error because a provision in the Agreement of Sale releases him from liability. This provision, paragraph no. 25, states:

Buyer releases, quit claims and forever discharges SELLER, ALL BROKERS, their LICENSEES, EMPLOYEES and any OFFICER or PARTNER of any one of them and any other PERSON, FIRM or CORPORATION who may be liable by or through them, from any and all claims, losses or demands, including, but not limited to, personal injury and property damage and all of the consequences thereof, whether known or not, which may arise from the presence of termites or other woodboring insects, radon, lead based paint hazards, mold, fungi or indoor air quality, environmental hazards, any defects in the individual on-lot sewage disposal system or deficiencies in the on-site water service system, or any defects or conditions on the Property. Should Seller be in default under the terms of this Agreement or in violation of any Seller disclosure law or regulation, this release does not deprive Buyer of any right to pursue any remedies that may be available under law or equity. This release will survive settlement.

Clearly, the provision does not release Mr. Young from liability if he violated any seller disclosure law. Since Mr. Young did violate Pennsylvania's Real Estate Seller Disclosure Law, I correctly determined that he was not released from liability.

In paragraph 10 of Mr. Young's concise statement, he contends I made an error because the Rands waived their claims of defects to 2315 Jane Street by signing condition satisfaction documents at the closing and a release of escrow money after the closing. These documents do contain waivers, but none purport to waive unknown claims due to Mr. Young's concealment of defects. Instead, they indicate that the defects revealed by the Rands' home inspection have been repaired or they have waived their right to have them repaired, and with the release of escrow money, how the \$15,000 escrowed at closing with Barristers due to unrepaired defects was to be disbursed. With the Rands not having waived unknown claims due to Mr. Young's concealment of defects, my decision was correct.

In paragraph 12 of Mr. Young's concise statement, he contends I erroneously failed "to determine whether Plaintiffs had a fee agreement with counsel, the amount of Plaintiffs' responsibility for paying their fees out-of-pocket, or whether there was a contingency recovery in total or in part for their attorney's fees." This contention is incorrect. The thirty-eight pages of detailed invoices provided to Mr. Young and I and the Rands' motion for attorneys' fees and costs contained the information I used to make the determinations Mr. Young alleges I did not make. These documents established that the Rands would pay their counsel at the rate of \$175 per hour, that the Rands would pay their counsel no more than \$30,000 in attorney fees and expenses (the invoices demonstrate receipt by counsel of \$30,000 from the Rands), and that the amount over \$30,000 (\$53,419.30 was requested in the motion) would be contingent on an award from the court. Since I did determine the Rands' fee agreement with their counsel, there was no error in my attorney fee award.

In paragraph 13 of Mr. Young's concise statement, he contends I erroneously failed "to direct Plaintiffs to file of record invoices setting forth their counsel's professional services and time spent for each service performed, and the costs claimed, thereby causing the record to be incomplete, whether for review by the trial Court or for appellate review." This contention is disingenuous because the invoices would have been offered into evidence if I held an evidentiary hearing. I provided Mr. Young with the opportunity for an evidentiary hearing, but he declined to have an evidentiary hearing. *See* 6/23/17 Order of Court ("all of counsel having agreed during a telephone conference call held yesterday that there will be no evidentiary hearing on Plaintiffs' Motion for Attorneys Fees and Costs...."). The fact that the thirty-eight pages of counsel's invoices were provided to Mr. Young and I but were not either offered into evidence at a hearing or attached to the Rands' Motion had no effect on the ability of Mr. Young and I to review them. Hence, there is no prejudice to Mr. Young and no impact on "review by the trial Court." Relative to Mr. Young's argument that the record is incomplete for appellate review, a document with counsel's hours and hourly rate submitted at the end of trial with counsel's assertion that the hourly rate was fair and reasonable was held by the Superior Court of Pennsylvania to be sufficient information for the trial court's determination of an attorney fee award under the UTPCPL. *See Wallace v. Pastore*, 1999 PA Super 297, 742 A.2d 1090 at 1094. Since I possessed more information than the trial judge in *Wallace v. Pastore*, I was correct in not requiring the Rands to file of record their attorney's invoices.

Mr. Young's final contention, set forth in paragraph 14 of his concise statement, is that I erroneously failed to consider the factors for assessing the reasonableness of Plaintiff's counsel fees set forth in *Boehm v. Riversource Life Ins. Co.* (2015 PA Super 120, 117 A.3d 308). The factors are:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the case; (2) The customary charges of the members of the bar for similar services; (3) The amount involved in the controversy and the benefits resulting to the clients from the services; and (4) The contingency or certainty of the compensation.

Id. at 335. Mr. Young, once again, makes an incorrect contention because I, in fact, considered these four factors in assessing the \$12,286.54 counsel fee award. I determined attorney James spent more time than another attorney with more experience would have spent and allowed only 6.5 of the 276 hours he devoted to the dispute in 2013 and 2014. Most of the time I credited to attorney James thereafter involved his attendance at witness and party depositions and preparation for the lengthy trial, which either was not within his control or was reasonable. Attorney James charged \$175 per hour, a rate Mr. Young did not complain about,³ and that I believe is customary for similar services. I considered the approximately \$109,000 the Rands spent repairing 2315 Jane Street and that attorney James' representation was successful in producing a \$50,000 settlement from Brandon Colella plus a verdict of \$35,764. In doing so, I awarded a smaller percentage of the counsel fees credited to attorney James before the Colella settlement, 17 percent (based on 6 defendants), than the 50 percent I awarded afterwards. I considered that payment for attorney James' services from September of 2015 to the May, 2017 trial was contingent on my award and not yet paid, but I still eliminated 25 of the 111 hours he spent during that time period because they were not necessary. Having considered the appropriate factors and awarding attorney James 23 percent of the fees and expenses he requested, my counsel fee award was reasonable and not erroneous.

III. Errors Claimed by Win Realty

In paragraph 1 of Win Realty's concise statement, it contends I made an error by holding it vicariously liable for the misleading property disclosure statement prepared by Mr. Young. Win Realty admits that a broker is vicariously liable for the misleading conduct of its agent committed in the course of his or her employment. *See Aiello v. Ed Saxe Real Estate, Inc.*, 508 Pa. 553, 499 A.2d 282 (1985). But, Win Realty argues that preparation of the property disclosure statement was done by Mr. Young in his capacity as the seller, not as a real estate agent, therefore the misleading conduct was not committed in the course of his employment. However, Pennsylvania's Real Estate Seller Disclosure Law plainly establishes that a real estate agent is liable when he or she knows the property disclosure statement prepared by the seller is misleading. *See* 68 Pa. C.S. §§7308 and 7310. While Mr. Young acted in the capacity of seller and real estate agent, it would be impossible for his knowledge as a real estate agent to be different from his knowledge as the seller. Since real estate agent Young knew the property disclosure statement was misleading, I correctly found broker Win Realty vicariously liable.

In paragraph 2 of Win Realty's concise statement, it contends I made an error by finding it vicariously liable for Mr. Young's negligent remodeling activities. However, all remodeling activity was performed under the direction of Brandon Colella, and I found Win Realty was vicariously liable based on Mr. Young's knowledge that the property disclosure statement was misleading. Hence, there is no merit to this allegation of error.

In paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of Win Realty's concise statement, it makes the same contentions that I previously addressed under the errors claimed by Mr. Young.

IV. Errors Claimed by Barristers

In paragraph 1 of Barrister's concise statement, it contends my verdict was erroneous because there was no evidence that it owed a duty to Mr. Young or that it was negligent. While the Agreement of Sale between Mr. Young and the Rands places the obligation on Mr. Young to obtain an occupancy permit and/or zoning certificate, this obligation routinely is assumed by Barristers and its competitor title companies as part of the services title companies are paid to perform when serving as settlement agents in charge of closing a real estate transaction.⁴ *See* T., pp. 612-617 and 654-655. In assuming this obligation, Barristers had a duty to Mr. Young to use reasonable care. *See Pearson v. Central Nat. Bank of Philadelphia*, 102 Pa. Super 111, 156 A. 560 (1931) (holding settlement agent liable to purchaser, who did not purchase title insurance, for delinquent water rents). The evidence of Barristers' negligence essentially was by admission of its vice president and general manager that it should have, but failed to notify Mr. Young or the Rands, when the zoning certificate provided to it by the City of Pittsburgh stated that no occupancy permit had been issued and the proposed use "is illegal." *See* T., pp. 671-680. Since there was undisputed evidence of a duty owed by Barristers to Mr. Young and Barristers' negligence, my verdict against Barristers was correct.

In paragraph 2.a. of Barristers' concise statement, it contends I erroneously imposed a contractual duty when it was not a party to the Property Disclosure Statement or the Agreement of Sale. However, Barristers admitted that it agreed to obtain the occupancy permit and zoning certification. Hence, Barristers had a contractual duty.

In paragraph 2.b. of Barristers' concise statement, it contends it was released from liability under the terms and conditions of the Property Disclosure Statement and the Agreement of Sale. However, there is no statement in either document that releases the settlement agent from negligent conduct or breaching its agreement to provide settlement services. Therefore, Barristers was not released from liability.

In paragraph 2.c. of Barristers' concise statement, it contends "no evidence was presented at trial that Barristers was required to obtain an occupancy permit." To the contrary, there was uncontradicted evidence presented at trial that Barristers was required to obtain an occupancy permit.

In paragraph 2.d. of Barristers' concise statement, it contends there was no evidence that the lack of an occupancy permit adversely affected the title to the property. While this is true, liability was not premised on Barristers title insurance responsibility. Instead, Barristers liability was premised on performance of its settlement agent duties.

In paragraph 2.e. of Barristers' concise statement, it contends there was no evidence that lack of an occupancy permit resulted in any damage to Mr. Young or the Rands. To the contrary, the Rands credibly testified that they would not have closed on the purchase of 2315 Jane Street if Barristers had informed them there was no occupancy permit and their proposed use "is illegal." Hence, the damages sustained as a result of the purchase of the property would have been avoided had Barristers done its job properly. These damages include not only the \$70,126.18 the Rands spent to repair the structural problem, but the additional amount they spent to remove the drywall in the garage and replace it with fire rated drywall after being cited for violating the City Code.⁵

Paragraph 3 of Barristers' concise statement makes the same contention about the alleged inconsistency in the Verdict and Verdict Explanation that I previously addressed under the errors claimed by Mr. Young.

In paragraph 4 of Barristers' concise statement, it contends I erroneously calculated damages by failing "to deduct set-offs from the gross amount claimed by the Plaintiffs." The only argument for deducting set-offs that was not addressed under the errors claimed by Mr. Young is that rent received and the higher sale price obtained when the Rands relocated to California should have been deducted from the calculation of damages. However, it would be improper to deduct either of these items for at least two reasons. First, receiving rent and appreciation in the value of real estate over time typically accrue to any purchaser of realty, and the Rands hoped for these benefits before they purchased the home. Second, if they could be deducted from the damages, numerous collateral issues would have become relevant (e.g., any offsetting cost of rent the Rands paid when they relocated, whether rent received was offset by the mortgage payment and other expenses and whether the cost of any new home purchased by the Rands exceeded the sale price obtained for 2315 Jane Street). Therefore, not deducting the rent received and higher sale price obtained was appropriate and not erroneous.

Barristers' final contention, set forth in paragraph 5 of its concise statement, is that my verdict was erroneous because the title insurance policy excludes claims relating to zoning and occupancy permits. Since Barristers' liability was not premised on the title insurance policy, my verdict was correct

BY THE COURT:
/s/Hertzberg, J.

¹ The Rands also sued Mr. Young's parents, who signed the deed, but they were dismissed from the case before trial.

² *See*, in exhibits 38, 39 and 40, NYCE INC invoices for \$2,000, \$54,474, \$5,378, \$1,200, Roy Kim, Jr., P.E. invoices for \$700, \$600, \$1,600 and \$600 and Lumber Liquidators invoice for \$3,574.18 for a total of \$70,126.18.

³ In fact, near the end of Mr. Young's answer to plaintiff's motion for post-trial relief, Mr. Young seems to indicate \$175 per hour is lower than the customary charges, averring "that rate reflects the lack of experience of Plaintiffs' attorney in handling civil litigation matters."

⁴ The "HUD-1" Settlement Statement from the 8/30/12 closing shows Barristers charging \$2,215 for title insurance, \$175 for deed preparation and \$15 for notary fees and being reimbursed \$202.70 for lien letters, which included \$100 Barristers advanced to the City of Pittsburgh for the zoning certificate.

⁵ The Rands paid for this work in the garage but were unable to locate an invoice that itemized the cost of material and labor for the garage.

Catherine A. Conley v. County of Allegheny

Tree Removal—Police Power

Where two professional engineers credibly testified that trees on plaintiff's property were a roadside hazard, court permitted county to enter plaintiff's property under its police power to remove trees.

No. GD 17-13552. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—April 2, 2018.

OPINION

Thompson Run Road, located in Ross Township, is owned and maintained by Allegheny County. Some time around 2016, Allegheny County received funding approval for a "betterment project" on 2.3 miles of Thompson Run Road. A "betterment project" is not a reconstruction of the road. It involves milling and paving of the road and its shoulders, drainage repairs and safety upgrades. Allegheny County hired M.S. Consultants to provide design services for the Thompson Run Road betterment project.

In April of 2017 the County sent a letter to Plaintiff Catherine Conley, the owner of 327 Thompson Run Road, notifying her that the County's consultant engineer identified three trees near her home and the Vilsack Road intersection that should be removed to improve safety. The letter indicated that Ms. Conley could remove the trees or the County would have its contractor remove them as part of the road project. Ms. Conley contacted the County and said she objected to the removal of the trees, and in August of 2017 County and M.S. Consultants representatives had a site meeting with Ms. Conley. In September of 2017 the County sent Ms. Conley another letter notifying her that there was no alternative than removal of the three trees. By this time the County had removed twenty-eight other trees also found to be unsafe along the 2.3 mile project.

In early October of 2017 Ms. Conley filed a complaint in equity and a motion for preliminary injunction in an effort to enjoin the County from removing the trees. I presided over the preliminary injunction hearing, and on October 25, 2017 I signed an order denying it. On November 16, 2017, the County's contractor went to remove the three trees, but a dispute ensued with Ms. Conley. When the contractor advised Ms. Conley that it would need temporary access to her property for no more than two days to safely cut and remove the trees, she informed the contractor it could work only within the right-of-way and could not cross its boundary on to her property. In an attempt to resolve the dispute, on December 8, 2017 the County filed a motion requesting modification of the order denying the preliminary injunction by permitting the contractor temporary access to Ms. Conley's property for removal of the trees. After Ms. Conley filed an answer to the motion, on January 8, 2018 I signed an order permitting the County's contractor to enter Ms. Conley's property for the purpose of removing the trees.

On February 7, 2018 Ms. Conley filed a notice of appeal to the Commonwealth Court of Pennsylvania from my January 8, 2018 order. She thereafter filed a concise statement of matters complained of on appeal ("Concise Statement" hereinafter), which this opinion addresses. *See* Pennsylvania Rule of Appellate Procedure no. 1925(a).

Ms. Conley first contends that I erroneously denied the preliminary injunction because she satisfied each prerequisite. *See* Concise Statement, ¶ 1. Ms. Conley, however, has not appealed from my October 25, 2017 order denying the preliminary injunction. Therefore, she has waived her ability to take issue with the correctness of my decision to deny the preliminary injunction.

Even if there were not a waiver, Ms. Conley failed to establish three of the prerequisites needed for a preliminary injunction to issue. During the preliminary injunction hearing, two professional engineers credibly testified that the trees were a roadside hazard because they are within the "clear zone" that is required to allow errant vehicles to safely return to the roadway and because they impair the sight distance required for vehicles to safely negotiate the curve in the road. Ms. Conley provided no evidence, in the form of an expert opinion or otherwise, that it is safe to allow the trees to remain within the right-of-way. Therefore, she did not establish "the injunction will not substantially harm other interested parties...success on the merits is likely...and an injunction will not adversely affect the public interest." *Summit Town Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 646-647, 828 A.2d 995, 1001 (2003). Hence, my decision to deny the injunction was correct.

Ms. Conley next contends that I made an error by allowing the County to enter her private property under "its police power." Concise Statement, ¶ 2. However, "police power involves the regulation of property to promote health, safety and general welfare...." *Redevelopment Authority of Oil City v. Woodring*, 498 Pa. 180, 186, 445 A.2d 724, 727 (1982). In addition, "police power controls the use of property by the owner, for the public good, its use otherwise being harmful...." *Northeast Outdoor Advertising, Inc. Appeal*, 69 Pa. Commonwealth 609, 612, 452 A.2d 83, 85 (1982). Entering MS. Conley's property promoted safety as it was necessary for removal of the hazardous trees and controlled the use of her property for the public good, with its use otherwise being harmful. Hence, I correctly permitted the County to enter Ms. Conley's private property under its police power.

Ms. Conley next contends that I erroneously denied the preliminary injunction because there was no evidence any vehicle crashed into the trees. *See* Concise Statement, ¶ 3. Even if Ms. Conley has not waived her ability to make this argument by failing to appeal from the denial of the preliminary injunction, there is no requirement for the County to provide evidence a vehicle crashed into the trees. *See* transcript of Preliminary Injunction, October 23, 2017 ("T." hereinafter), pp. 29-31. In addition, Ms. Conley admitted "it's a bad, bad intersection....," and there was un rebutted evidence that a car once ended up in Ms. Conley's front yard, and that there was a pedestrian injury at the intersection T., pp. 13, 41 and 81-82. It would be foolish to wait for an injury

or fatality from a collision with the trees before taking preventive action. Therefore, it was proper for me to deny the preliminary injunction without evidence of a crash into the trees.

Ms. Conley next contends that I made an error by not conducting a hearing when the County filed its motion requesting temporary access to her property. *See* Concise Statement ¶ no. 4. However, Ms. Conley never requested that I conduct a hearing in her formal, written answer to the motion. In addition, since one of the trees is large, approximately four feet in diameter, temporary access to Ms. Conley's adjoining property to safely cut the tree should have been anticipated by her as a consequence of my denial of the preliminary injunction. Therefore, not conducting a hearing on the motion was appropriate.

Ms. Conley next contends I erroneously disregarded Allegheny County's failure to establish the trees "constituted a road hazard requiring removal." Concise Statement, ¶ 5. Since Ms. Conley's motion for a preliminary injunction is premised on the trees not being a danger, by not appealing my order denying the preliminary injunction, Ms. Connelly waived this argument. Even if the argument has not been waived, as I explained above, two professional engineers credibly testified the trees are a roadside hazard. Therefore, my determination that the trees were a roadside hazard was correct.

Ms. Conley next contends I erroneously allowed the County to enter her private property because the "entry constitutes a de facto taking...." Concise Statement, ¶ 6. Ms. Conley, however, is wrong as a de facto taking does not occur when government uses police power to control the use of property to preserve the safety of the people. *See Ristvey v. Com., Dept. of Transp.*, 52 A.3d 425 (Cmwlth. Ct. 2012). Since the County's entry onto Ms. Conley's private property is a proper exercise of police power and not a taking of the property for public use, my decision allowing it was correct.¹

Ms. Conley's final contention is that I erroneously failed to order the County to define, survey and stake its right of way "prior to ruling on Plaintiff's request for preliminary injunction." Concise Statement, ¶ 7. Clearly this argument involves my denial of the preliminary injunction which has been waived by Ms. Conley's failure to appeal from that decision. Even if the argument has not been waived, at the hearing a survey defining the right-of-way was admitted into evidence (*see* survey attached to Exhibit E) and my January 8, 2018 Order requires Allegheny County to stake the boundary line of the right of way before removal of the trees. Hence, there was no error relative to the County defining, surveying and staking the right of way.

BY THE COURT:
/s/Hertzberg, J.

¹ Even if temporary entry to Ms. Conley's property to safely sever the tree from the adjoining right-of-way and remove it from her property is a de facto taking, Ms. Conley's remedy is to file a Petition for Appointment of a Board of Viewers (*see* 26 Pa. C.S. §502(c)) for determination of just compensation.

In Re: Estate of Herman Edward Rawlings

Orphans Court—inter vivos waiver—Dead Man's Act

Wife's execution of an inter vivos waiver to her elective share of deceased husband's estate did not bar wife's claim for the return of unused funds that were invested to be used for living expenses. Wife's testimony regarding her intent not precluded under the Dead Man's Act because Decedent did not have a right or interest in the money at issue.

No. 4373 of 2015. In the Court of Common Pleas of Allegheny County, Pennsylvania, Orphans' Court Division.
O'Toole, A.J.—April 11, 2018.

OPINION

This matter came before the Court on the Claim for \$1,000,000 filed by Mary Belle Rawlings (hereinafter, "Mrs. Rawlings") against the estate of her late husband. As the parties were unable to resolve the matter, a hearing was held on December 13, 2017.

Findings of Fact

Through testimony at the hearing on December 13, 2017, the Court made the following findings of fact:

- (1) The Decedent died on June 23, 2015. (N.T. 12/13/17, p. 11)
- (2) The initial death certificate listed the cause of death as "dementia". At the request of the Decedent's son, Edward Rawlings, Jr., a replacement certificate was issued changing the cause to death to "abdominal aortic aneurysm". (Exhibits 3 and 7) (N.T. 12/13/17, pp. 33, 46)
- (3) The Decedent and Mrs. Rawlings were married for 42 years. Each of them had three children from previous marriages and they had no children together. (N.T. 12/13/17, p. 11)
- (4) When they got married, the Decedent and Mrs. Rawlings agreed "he would stay out of my stuff and I would stay out of his stuff". They had one joint account (the bill paying account) into which they each deposited the same amount of money on the first day of each month. (N.T. 12/13/17, p. 16)
- (5) At the time of his death, the Decedent and Mrs. Rawlings were residing at Longwood at Oakmont, which is a retirement community. (N.T. 12/13/17, p. 10)
- (6) Mrs. Rawlings inherited a sum of money in 2010 when her Stepmother died. (N.T. 12/13/17, p. 18)
- (7) Mrs. Rawlings gave the Decedent a check for \$1,000,000 on or about February 22, 2011. (Exhibit 1) (N.T. 12/13/17, p. 19)
- (8) The check was deposited into the Decedent's PNC Bank Premium Money Market Account on February 22, 2011. (Exhibit 6) (N.T. 12/13/17, p. 42)
- (9) In October, 2014, the Decedent gave each of his children a gift of \$100,000. They had not received any large gifts prior to that date. (N.T. 12/13/17, p. 55)
- (10) In addition to giving the Decedent the check for \$1,000,000, Mrs. Rawlings gave the Decedent \$250,000, which was deposited into his PNC Bank Premium Money Market Account on September 8, 2011. (N.T. 12/13/17, p. 57)

Cross appeals have been filed by the Executor and Mrs. Rawlings.

Issues to be Raised on Appeal by the Executor

The first issue claims that the Court erred in finding that Mrs. Rawlings had filed her claim in a timely fashion.¹ The testimony from Mrs. Rawlings was that she did not realize that the “Longwood Fund” had not been created until she was having a conversation with the Decedent’s son in early 2015. She filed her claim seeking return of the \$1,000,000 on July 28, 2015, which was approximately five (5) weeks after the Decedent’s death. The argument that Mrs. Rawlings should have filed a breach of contract action within four (4) years after she gave the money to the Decedent on February 22, 2011 is without merit. Initially, the Court finds that this is not a breach of contract matter. Mrs. Rawlings trusted her Husband of forty plus years and she assumed that when she gave him the funds, he would use them as they had agreed (i.e., to pay for their living expenses). When she discovered in early 2015 that he had not done so, she confronted him and then filed a timely claim against his estate when the remaining funds were not returned to her.

The second issue claims that Mrs. Rawlings’ testimony should be barred under the Dead Man’s Act, 42 Pa.C.S.A. §5930. The purpose of the Dead Man’s Act is to prevent injustice by unfairly permitting a surviving party to a transaction to testify favorably to himself and adversely to the interest of a Decedent, who is in no position to refute the testimony; however, the Decedent must have an actual right or interest in the matter at issue. *In re Estate of Hall*, 535 A. 2d 47 (a. 1987). In this case, the Decedent did not have a right or interest in the money. Mrs. Rawlings did not gift the money to the Decedent; rather, she entrusted it to him for the sole purpose of paying for their living expenses at Longwood. Mrs. Rawlings was entitled to testify as to her intent when she gave the funds to the Decedent. Such testimony does not violate the Dead Man’s Act.

The third issue claims that the Court erred in permitting Mrs. Rawlings any recovery as she had executed an *inter vivos* waiver to her elective share of the Decedent’s estate. Mrs. Rawlings is not seeking an elective share of the Decedent’s estate; rather, she is seeking return of the unused portion of the funds that were to be invested in the “Longwood Fund”. Thus, this argument fails.

The fourth issue claims that Mrs. Rawlings failed to meet her burden to produce clear and convincing evidence of the validity of her claim. This case turned entirely on the credibility of the witness’s testimony. While the Court did not find any of the witnesses to be completely incredible, it did find certain aspects of the testimony to be more logical and believable and other aspects to be suspect. Specifically, the Court found that Mrs. Rawlings’ testimony regarding the purpose for giving the Decedent a check for \$1,000,000 to be credible. The funds were to be used to pay for the monthly cost at Longwood and for the aides that assisted them and any remaining funds were to be returned to her when her husband died. She did not follow up with her husband to make sure that he opened a separate account, as she trusted her husband and he took care of those matters during their marriage. (N.T. 12/13/17, pp. 19-25) This testimony was sufficient for Mrs. Rawlings to meet her burden of proof.

Issues to be Raised on Appeal by Mrs. Rawlings

The first issue claims that the Court erred in finding that the \$1,000,000 was significantly depleted as of the Decedent’s death. As the testimony regarding the expenses incurred by Mrs. Rawlings and the Decedent to reside at Longwood, along with the testimony regarding the deposits into the joint account was minimal, the Court had no choice but to assume that over the fifty-two (52) month period between February 2011 (when the check was given to the Decedent) and June 2015 (when the Decedent died) the funds had been greatly depleted. It was incumbent upon counsel to provide the Court with details as to the expenses and deposits. Counsel did not do so, which resulted in the Court making its own calculations and concluding that the remaining funds would be \$300,000.

The second issue claims that the Court erred in directing only the estate to pay the claim to Mrs. Rawlings and not granting the Petition requesting that the adult beneficiaries return the funds that were improperly distributed to them, during the Decedent’s lifetime, to the estate. As this specific issue was not addressed to the Court at the time of the hearing, the Court was not aware that the funds in the estate would be insufficient to satisfy the claim. Assuming *arguendo* that such is true, with the Court having no independent knowledge of such, the case should be remanded on this sole issue to permit the Court to amend the Order to direct the adult beneficiaries to return the improperly distributed funds to the estate.

BY THE COURT:
/s/O’Toole, A.J.

¹ Initially, the Court notes that the Motion for Summary Judgment that raised this issue and the second issue regarding the Dead Man’s Act was not filed in a timely manner, as it was filed on November 8, 2017 and the hearing was already scheduled for December 13, 2017.

Zokaite Properties, LP v. Nicholas Nickolich and Nickolich Towing & Salvage

The Tow Act—Unfair Trade Practices—Consumer Protection Law (UTCPL)—Motor Vehicle Code

Alleged violations of the Tow Act by defendant towing company do not constitute violations of the UTCPL where both parties were engaged in commercial operations at the time of incident. Municipal action by way of towing services was justified under the Motor Vehicle Code where a commercial tri-axle truck was overturned with a ruptured and leaking fuel tank.

No. GD 16-018926. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Della Vecchia, J.—April 25, 2018.

OPINION

I. BACKGROUND

This action arises out of a single vehicle accident occurring on September 28, 2016, in which Plaintiff’s 2001 Mack Tri-axle dump truck rolled out of control and into the backyard of a private resident in Jefferson Hills Borough, Allegheny County, Pennsylvania. At the time of this incident, Plaintiff was engaged in performing site related construction activities ancillary to the construction of residential homes at Jefferson Estates, a residential community within Jefferson Hills Borough.

On the above-referenced date, the operator failed to set the parking brake before exiting the truck. The Tri-axle slid approximately two-hundred (200) feet, falling on its side and coming to rest in a weeded area where the terrain flattened just short of a child's playset. At the time of this occurrence the playset and surrounding area was unoccupied. There were no injuries reported as a result of this accident.

The Defendant, Nickolich Towing and Salvage, Inc., is the appointed towing contractor for Jefferson Hills Borough. Zokaite Properties, LP first attempted to upright and remove the vehicle with its own equipment and with its own employees. Following some initial and apparent problems in accomplishing same, the 'up righting' and removal of the vehicle was accomplished by Nickolich Towing and Salvage. Said services generated a bill by Defendant that Plaintiff refuses to pay.

II. PROCEDURAL HISTORY

This litigation was initiated with a replevin action filed by Zokaite Properties, LP, (hereinafter "Plaintiff") following Nickolich Towing and Salvage's refusal to release Plaintiff's truck following the incident of September 28, 2016. At said time, a bill by Nickolich Towing was presented to Plaintiff in the amount of \$19,435, but remained unpaid.

The Plaintiff filed a Complaint on October 4, 2016, immediately followed by an Amended Complaint filed on October 5, 2016; alleging the vehicle was improperly and illegally towed, possessed through an illegal trespass, and that said actions were causing Plaintiff irreparable harm. On October, 11, 2016, Plaintiff appeared before the Allegheny County Motions Court and presented a Writ of Seizure in regards to the Mack Truck, at said time the vehicle was still in the possession of the Nickolich Towing.

On that same date, the Honorable Timothy Patrick O'Reilly issued an Order granting Plaintiff's motion, ordering the Department of Court Records to issue a Writ of Seizure and directing Plaintiff to seize the Mack truck. Plaintiff was further ordered to post a \$20,000 bond; a hearing as to the Motion was scheduled before the Motions Court for November 29, 2016. On October 26, 2016, the Plaintiff filed a Praecipe to Reinstate Complaint.

On November 17, 2016, the Defendant filed Preliminary Objections, Brief and Order of Court objecting to Plaintiff's complaint which names Defendant Nickolas Nickolich, individually, in addition to his towing business, Nickolich Towing and Salvage. The Defendant maintained that all alleged acts were the acts of the corporate Defendant, Nickolich Towing and Salvage.

On November 21, 2016, an Order of Court was issued granting the parties' consented to Motion to Reschedule the Replevin action and further setting a hearing date for January 19, 2017. A motion further postponing the hearing was granted by this writer by Order of Court dated December 27, 2016, rescheduling the matter before the motions judge on February 22, 2017.

On January 13, 2017, the Honorable Michael McCarthy overruled the preliminary objections filed by Defendant and ordered the Defendant to file an answer within the thirty (30) days of the docketing of said Order. Said docket entry was made on January 17, 2017. On February 17, 2017, an Answer, New Matter and Counterclaim was filed by the Defendant, alleging, *inter alia*, that Plaintiff owed the "fair and reasonable charges" associated with the up-righting, recovery, removal, towing and storage of the tri-axle involved in this incident. Again, said claim was for \$19,435.00.

On February 22, 2017, this writer issued an Order placing this matter on the September 2017 trial List, with the bond to remain in effect. A reply to the Defendant's new matter was filed on April 28, 2017, with an answer to the Defendant's counterclaim filed on May 3, 2017. On June 28, 2017, a docket entry was recorded, relisting this matter until the November trial list, with a date certain of November 6, 2017.

Following a non-jury trial on December 4, 2017, this writer found in favor of the Defendant and against Plaintiff on the issue of the counterclaim in the amount of \$17,491.50, plus costs (Order, 12/6/17). The replevin matter was no longer an issue and moot by the time of trial as the tri-axle was by then back in the possession of the Plaintiff (additional Order, 12/6/18).

A Motion for Post-Trial Relief was timely filed by the Plaintiff on December 18, 2017. On receipt of same, this writer scheduled an argument date to address the Plaintiff's Post-Trial Motion for February 14, 2018. By Order dated January 24, 2018, this Court continued the Post-Trial Argument until February 22, 2018, further ordering the parties to file their respective briefs one (1) week prior to said argument date.

On February 27, 2018, Plaintiff's Motion for Post-Trial Relief was denied. On March 2, 2018, Plaintiff appealed this matter to the Pennsylvania Superior Court. In response thereto, this Court directed the appellant 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 March 13, 2018, placing this matter properly before the Superior Court of Pennsylvania.

III. ISSUE RAISED ON APPEAL

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

1. Whether the Court committed errors of law and fact in failing to find that the Defendants violated the Towing and Storage Facility Standards Act, 73 P.S. § 1971.1, et. seq. (the "Tow Act").
2. Whether the Court committed errors of law and fact in failing to find that the Defendants were subject to damages under the Unfair Trade Practices and Consumer Protection Laws as a result of its implication from Section 1971.4 of the Tow Act.
3. Whether the Court committed errors of law and fact in failing to award treble damages and attorney's fees to Zokaite Properties under the Unfair Trade Practices and Consumer Protection Laws.
4. Whether the Court committed errors of law and fact in failing to find that the Defendants violated the Pennsylvania's Rules of the road sections under the Motor Vehicle Code 75 Pa.C.S.A. § 3352 such that the tow of the Plaintiff's Mack Truck was unauthorized.
5. Whether the Court committed errors of law and fact in denying Zokaite Properties' Motion to Strike Defendant's invoice based on Defendant's destruction of evidence.
6. Whether the Court committed errors of law and fact in finding that Defendants' tow bill was fair and reasonable.
7. Whether the Court committed errors of law and fact in making an award to defendants on their tow bill in spite of being instructed by Zokaite Properties to not upright nor tow Zokaite Properties' Mack Truck.
8. The evidence at trial was that after the Jefferson Borough Police said that defendants would perform the tow of the

Mack Truck, that the parties made an uncontroverted agreement in which defendants would return the next morning and use Zokaite's equipment and personnel to upright the Mack Truck and move it to another part of the property owned by Zokaite's.

- a. Defendants breached this Agreement and recovered and towed the Mack Truck in the middle of the night.
- b. Had the Defendants honored the Agreement, the only cost they would have incurred was the time for Mr. Nickolich or one of his employees in appearing and advising the Zokaite's equipment and personnel.
- c. Instead the Court ignored the Agreement and its award it entered in favor of the Defendants included costs for equipment and labor which would not have been incurred had the Defendants honored the Agreement they made with Zokaite's.
- d. Therefore, the issue is whether the Court committed errors of law and fact in failing to find there was an agreement between the parties as detailed above and whether the Court committed further errors of law and fact in its award that awarded Defendants money beyond the cost of Mr. Nickolich or an employee appearing and advising the Zokaite's equipment and personnel.

IV. DISCUSSION

The Plaintiff's first three (3) claims of error allege a failure of the trial court to recognize violations of the 'Tow Act'. Plaintiff believes that said violations should severely reduce Defendant's bill for services, if not serve as a bar from any payment for the services rendered. Plaintiff asserts that this writer's refusal to find so was reversible error. This writer disagrees. The relevant sections of the Tow Act state:

(a) General requisites: A tow truck operator and, where applicable, the operator of a towing storage facility, shall:

- (1) maintain a physical street address;
- (2) properly register the tow truck with the Department of Transportation;
- (3) display the name, address and telephone number of its tow truck business on the tow truck; and
- (4) post the towing fees and the storage and related service fees and hours of operation at the towing storage facility.

(b) Time of notice: At the scene of an accident, a tow truck operator shall provide the owner or operator of the vehicle if the owner or operator is at the scene with a notice containing the name, address and telephone number for a point of contact to be informed where the vehicle is to be stored.

(c) Accident: A tow truck operator shall undertake towing at the scene of a motor vehicle accident only if summoned to the scene by the vehicle owner or vehicle operator, or law enforcement personnel or authorized municipal personnel, and is authorized to perform the towing as follows:

- (1) The owner or operator of the vehicle being towed shall summon to the scene the tow truck operator of the owner's or operator's choice in consultation with law enforcement or authorized municipal personnel and designate the location where the vehicle is to be towed.
- (2) The provisions of paragraph (1) shall not apply when the owner or operator is incapacitated, otherwise unable to summon a tow truck operator or defers to law enforcement or authorized municipal personnel.
- (3) The authority provided to the owner or operator in paragraph (1) may be superseded by the law enforcement officer or authorized municipal personnel if the tow truck operator of choice cannot respond to the scene in a timely fashion and the vehicle is a hazard, impedes the flow of traffic or may not legally remain in its location in the opinion of law enforcement or authorized municipal personnel.

(d) Repair and storage: As a condition of towing a vehicle at the scene of an accident and prior to the towing, a tow truck operator shall not:

- (1) secure the signature of the vehicle owner or vehicle operator on a document that requires authorization to repair the vehicle; or
- (2) secure the signature of the vehicle owner or vehicle operator to authorize storage of the vehicle for more than 24 hours.

(e) Release of towed vehicle: Upon a request from the vehicle owner or a person authorized by the owner to regain possession, a tow truck operator or operator of a towing storage facility shall not refuse during the posted hours of operation to release a towed motor vehicle unless law enforcement has requested that the vehicle be held. Release shall be conditioned on the payment for towing, storage and related services. All charges shall be itemized and in writing. Payment may be made with cash, a credit card from a common issuer or a check from an insurance company or authorized tower or salvor acting on behalf of the insurance company.

(f) Access to vehicle: A tow truck operator or towing storage facility shall provide hours of operation that reasonably allow access to a towed vehicle and shall grant reasonable access to the towed vehicle during its posted hours of operation for the purpose of inspection and retrieval by law enforcement officials or authorized municipal personnel, the vehicle owner or a person authorized by the owner under this act.

(g) Storage fee prohibited: Unless law enforcement has requested that a vehicle be held, a tow truck operator or towing storage facility shall not charge a storage fee for any period during which it has refused reasonable access during posted normal business hours as required in subsection (e) or has refused to allow authorized inspection of the vehicle under inspection rights in 75 Pa.C.S. § 1799.4 (relating to examination of vehicle repairs) or section 11 of the act of December 29, 1972 (P.L. 1713, No. 367), known as the Motor Vehicle Physical Damage Appraiser Act.

73 Pa. Stat. Ann. § 1971.3

Plaintiff asserts that Defendant's perceived or technical violations of the Tow Act constitute violations of the Unfair Trade Practices and Consumer Protection Laws (UTPCPL). This writer strenuously disagrees. The language of the statute clearly states the intended purpose of the Act is to protect a class that Plaintiff simply was not a part:

(a) Any person who purchases or leases goods or services *primarily for personal, family or household purposes* and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 31 of this act, may bring a private action to recover actual damages or one hundred dollars (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars (\$100); and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

73 Pa.S.A. § 201-9.2 (emphasis added).

This writer finds these claims of err misplaced as the testimony at trial was consistent and uncontroverted; at the time of this incident, the tri-axle Mack truck owned and operated by Plaintiff was engaged in a commercial purpose. John Zokaite, the owner's brother and operator of the Mack tri-axle engaged in this accident, testified that on the day in question he was employed by Plaintiff, Zokaite Properties L.P.; that he was engaged in his 'business purpose' on the day in question and "hauling fill from lot 38" (Tr. at 114).

This writer finds the claims alleged by Plaintiff outside the protections afforded by the UTPCPL. At the time of this incident; both parties were engaged in commercial operations, that the parties' transaction was clearly that of a commercial nature and not one "primarily for personal, family or household purposes" as necessitated by the plain language of the statute (*See* 73 P.S. § 201-9.2).

Despite this writer's finding of inapplicability and in the event that the Superior Court finds reason in Plaintiff's first several claims of err; the appropriate standard of review affords the prevailing party (in action for alleged violations of towing ordinance and Unfair Trade Practices and Consumer Protection Law (CPL)) to the benefit of all favorable facts and inferences that could be reasonably drawn from evidence, and all conflicts in evidence have to be resolved in his favor upon review (73 P.S. §§ 201-1 to 201-9.2, *see also, Hammer v. Nikol*, 659 A.2d 617 (Pa. Cmlth. Ct. 1995)).

To be successful in their claim of violations of the UTPCPL, the Plaintiff would have needed to prove fraud to the trial court. In order to prove a claim for common law fraud, Plaintiff needed to prove: (1) a representation; (2) material to the transaction at issue; (3) made falsely, with either knowledge or reckless disregard of its falsity; (4) with the intent of misleading another person or inducing justifiable reliance; and (5) an injury caused by the reliance (*DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 591 (Pa. Super.2013)). Even if the Tow Act and UTPCPL were triggered by the nature of the parties' relationship, this Plaintiff failed to prove the elements necessary to entitle itself to relief. This writer finds these claims meritless and believes the rulings considering same should not be disturbed on appeal.

The Plaintiff next raises err with this writer's failure to recognize the Defendant's violations of Pennsylvania's Rules of the Road, codified by the Motor Vehicle Code at 75 Pa.C.S.A. § 3352. Specifically, the Plaintiff asserts that the vehicle was not categorized as any of the following requirements that would necessitate municipal action by way of tow services:

- a. The truck was not blocking traffic
- b. There was no property damage
- c. There [were] no personal injuries
- d. The truck was not abandoned
- e. The truck was not unattended
- f. The truck was not in any a danger.....

This writer finds that a commercial tri-axle truck, overturned on its side with a ruptured fuel tank, leaking fuel on private property, not owned by the truck owner is worthy of government intervention in regards the safe removal. The owner of Plaintiff's company, Frank Zokaite, testified that the police on scene requested Defendant to remove his vehicle (Tr. at 80). The Defendant's tow service has enjoyed a service contract with Jefferson Hills Borough for generations (Tr. at 12). This writer finds the characterization of the tow as "unauthorized" as contrary to the evidence and testimony elicited at trial (*See* entire Transcript).

The testimony of Zokaite Properties, L.P.'s owner, Frank Zokaite, revealed that Mr. Zokaite failed to tell either the property owner or the police that he wanted the opportunity to tow his own truck, that Plaintiff was not a licensed towing contractor and that he did not own the appropriate equipment (a "wrecker") necessary to safely up-right and tow the truck (*See*, Tr. at 90-91). This writer finds Plaintiff's arguments of an unauthorized trespass by Defendant without merit as it has remained unsupported by the evidence.

The remaining matters are focused on the bills for services rendered and the legitimacy of same, which will all be discussed collectively. Plaintiff testified that he believed the appropriate charge for the services rendered by Defendant should have been approximately four hundred and fifty dollars (\$450), (Tr. at 96). This was following the credible testimony and exhibits proffered without objection showing charges to the Defendant from third party contractors engaged during this recovery, including charges from:

Gill Hall Fire Department in the amount of \$1,050,
Dom Folino Construction in the amount of \$5,640, and
Jefferson Hills Ambulance Association in the amount of \$800.

At trial, Nick Nickolich credibly testified that he was the second generation of Nickolich Towing, and that both he and his father had been personally serving the residents of Jefferson Hills Borough since the 1980s (Tr. at 12). That on the date of this incident, Defendant was requested by the Jefferson Hills Police to effectuate the recovery after concerns arose during the Plaintiff's own recovery efforts. Specifically, onlookers believed, "they had too light of chains" (Tr. at 12-13).

At said time, the tri-axle was laying on its side with a ruptured fuel tank in a residential community on a slight downgrade. Nickolich testified that upon meeting with neighbors and police, “they were scared it could have slid down more. And the way they were recovering the vehicle, it could have ended up either going into the property owner’s house, or it could have bypassed that and gone down the street into another house” (Tr. at 13).

Through Nick Nickolich, the Plaintiff introduced and admitted bills by third parties engaged to assist in this recovery. Exhibit 2, marked and admitted at trial was a bill submitted by Dom Folino Construction in the amount of \$5,640 (Tr. at 31). Nickolich testified that Folino’s services were necessary due to the neighbor’s concerns of further property damage to their yard in the up righting and recovery of the vehicle. Nickolich testified that based on these concerns it was necessary to rent a winch dozer, an excavator and lights from Dom Folino Construction (Tr. at 16). The bill showed that Folino charged for an excavator, a dozer, a light plant, and a service truck (Tr. at 27).

Nickolich testified as to bills received from the Gill Hall Fire Department for services provided. Specifically, a charge of \$1050, for services associated with the incident of September 28, 2016. At said time they were called to the recovery site due to the fact that the Plaintiff’s vehicle was on its side leaking fuel (See Tr. at 19). Additionally, Nickolich testified to a bill for \$800 he had received from the Jefferson Hills Ambulance Association. The situation, diagnosed as a ruptured fuel tank leaking fuel into a residential community, required ambulance service personnel on stand-by during the recovery effort in the event of an emergency (Tr. at 20-21).

In addition to the charges submitted by Don Folino Construction, the Jefferson Hills Ambulance Association and the Gill Hall Fire Department, Nickolich testified to additional costs he expended by way of his own personal and equipment. Nickolich testified that the up righting and recovery required him to engage the services of multiple pieces of equipment and employees. Said costs, as purported by Nickolich, included a charge of \$1000 for ‘Assessment of Recovery by Supervisors’, a Service Truck (also referred to as a “wrecker” in later testimony) at a cost of \$500, with two additional “wreckers” employed at a charge of \$350 per wrecker (See Tr. at 30-33).

Nickolich testified that the call for assistance was received at 4:09 p.m. and that the recovery was not completed until 2:30 a.m., and that his and employs services were engaged for over ten (10) hours on the evening, night, and early morning of September 28th and 29th of 2016. To reach to the total reflected in his bill submitted to the Plaintiff and later admitted at trial as Exhibit A, the Defendant testified that he added an additional 30% to the then accrued costs to reach his bill of \$19,436.00 (Tr. at 22-23). Nickolich further testified that it was his customary procedure to charge a premium of 30% over and above the costs of such services as his profit margin. (*Id.*)

Frank Zokaite testified that he believed the appropriate markup on the services rendered by the Defendant should have been 10% percent for overhead and an additional 10% profit, but that it was his belief that the Defendant failed to expend any resources for overhead associated with the job in question (Tr. at 91).

Despite the fact Plaintiff concedes that the vehicle was towed and stored by the Defendant, that the Defendant did expend time and equipment in his recovery efforts, that the tri-axle’s fuel tank was ruptured, that the incident required time expended by both the fire department and ambulance service, the Plaintiff maintains that the cost of said services should amount to approximately four hundred fifty dollars (\$450). This Court found that \$17,491.50 (less than the amount claimed) was reasonable.

V. CONCLUSION

This writer finds that the services billed by the Defendant were in fact provided to the Plaintiff. That said charges were within reason and absent of fraud. For the aforesaid reasons, this writer respectfully requests the Superior Court of Pennsylvania to affirm this Court’s Order of February 27, 2018.

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

Date: April 25, 2018

Eric Hanchey v. Fancy Fox, LLC, a Pennsylvania Limited Liability Company

Restrictive Covenant—Employment Agreement

The change from subcontractor to salaried employee constituted a new job which was sufficient consideration to make a restrictive covenant enforceable.

No. GD-17-009483. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O’Reilly, J.—December 8, 2017.

OPINION

This matter involves an “Agreement Not to Compete” (the “Agreement”) between Appellant Eric Hanchey and Appellee Fancy Fox, LLC. The Agreement was executed on January 1, 2015. Mr. Hanchey had since July 6, 2013 been an independent contractor with Fancy Fox, LLC first as a salesman and then as Distribution Manager. In that role he oversaw sales, screen-printing and embroidery operations. Mr. Hanchey was originally hired as an independent contractor salesman on July 6, 2013 and paid by Fox’s Pizza Distribution.

Fancy Fox, LLC was formed in August of 2014 to engage in printing materials for use in the pizza business of Fox’s Pizza Den and also for sale to any user in need of print or embroidered items.

James Fox, the managing member of Fancy Fox, LLC testified that Fancy Fox, LLC was incorporated on August 17, 2014. He explained that Mr. Hanchey signed the Agreement on January 1, 2015 although they did not begin operations until March of 2015. Mr. Fox testified that he purchased the new equipment in reliance on Mr. Hanchey becoming an employee under the non-compete Agreement. He explained that had Mr. Hanchey not signed that Agreement, he would not have purchased new equipment and

would not have expanded operations. T.T. 56-57. He explained that the Agreement prohibited Mr. Hanchey from “operating within all of Westmoreland County and Allegheny County, Pennsylvania, and elsewhere to the extent located within a 25-mile radius of 4425 William Penn Highway, Murrysville, Pennsylvania.” Prior to March of 2015, Mr. Hanchey was an independent contractor with Fox Pizza Distribution.

Mr. Fox stated that after termination, Mr. Hanchey started a new business and started soliciting many of Fancy Fox, LLC’s customers in July of 2017 including A&L Motors, Joe Bass, John Denning, Jeffrey Stahl and Conco. T.T. 26-33.

Mr. Hanchey testified that he started managing the business in January of 2014 after the prior manager Rich Grimes left. Mr. Hanchey stated that the machines were already there and new machines were not purchased until July of 2016. T.T. 64- 65. Mr. Hanchey stated that when he signed the non-compete Agreement in January of 2015 nothing changed and he did not get a raise. He testified that he signed it as a subcontractor and not an employee of Fancy Fox, LLC. However, he also stated that in 2015, he received both a 1099 form and a W-2 from Fancy Fox, LLC. T.T. 70. Mr. Hanchey testified that machines were being added all the time. T.T. 82. Mr. Hanchey admitted that he began to solicit Fancy Fox, LLC’s customers after he was fired in May of 2007. T.T. 86. After he was fired, he immediately began violating the Agreement. Fancy Fox, LLC filed a Complaint seeking injunctive relief and damages.

On August 30, 2017, after testimony and argument in open court, I issued an Order granting a Preliminary Injunction against Mr. Hanchey for a period of two years. I also ordered Mr. Hanchey to provide a full and complete accounting of his activities to Fancy Fox, LLC within 30 days of the Order. I ordered Mr. Hanchey to pay Fancy Fox, LLC an amount equal to the sum of the net sales and value of the services. Finally, I ordered Mr. Hanchey to post bond in the amount of \$5,000.

In Pennsylvania, restrictive covenants are enforceable if they are: (1) ancillary to an employment relationship between and employee and an employer; (2) supported by adequate consideration; (3) the restrictions are reasonably limited in duration and geographic extent; and (4) the restrictions are designed to protect the legitimate interests of the employer. *Hess v. Gebhard & Co. Inc.*, 808 A.2d 912, 917 (Pa. 2002).

I find that Mr. Hanchey breached his obligations under the contract with Fancy Fox and Fancy Fox will continue to suffer damages as a result. The non-compete Agreement is valid and enforceable under *Socko v. Mid-Atlantic Systems of CPA, Inc.*, 126 A.3d 1266 (Pa. 2015). In that case, the Court considered whether a non-compete agreement was supported by sufficient consideration. “Without new and valuable consideration, a restrictive covenant is unenforceable.” *Maintenance Specialties Inc. v. Gottus*, 314 A.2d 279, 281 (Pa. 1974). In *Socko*, the court noted that “[i]f a noncompetition clause is executed at the inception of the employment, the consideration to support the covenant may be the award of the position itself.” *Id.* at 1275. I find that Mr. Hanchey’s employment in 2014 was as a subcontractor with Fox Distribution. He became a salaried employee in 2015 when he was hired by a separate and distinct entity to manage Fancy Fox LLC. That new job constitutes sufficient consideration under *Socko* for the non-complete.

I have found that Fancy Fox, LLC was a new and independent entity. Thus, the restrictive covenant applied to new employment and the new job was the valuable consideration. Further, equitable principles, apart from *Socko*, cry out for relief. Here, Hanchey, not even a shareholder, made off with trade secrets – customer lists – which he had acquired as a manager for Fancy Fox. To my mind, a modicum of employee loyalty requires that he not use the insider information to the detriment of Fancy Fox. Hence, the injunction and the accounting.

BY THE COURT:

/s/O’Reilly, J.

Date: December 8, 2017

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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OPINIONS

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**United Union of Roofers Waterproofers and Allied Workers,
Local Union No. 37 v.
North Allegheny School District,
Fox Chapel School District and
Montour School District**

School Code—Criminal Background Checks

School districts not permitted to bar roofers with criminal records from school sites because they would not have direct contact with children.

No. GD-15-014788. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—December 5, 2017.

OPINION

This Motion for Summary Judgment by the Plaintiff, United Union of Roofers, Waterproofers, and Allied Workers, Local Union No. 37, (UNION) re-visits the cases filed by the Union against 3 school districts, North Allegheny School District, Fox Chapel School District, Montour School District (DISTRICTS OR SCHOOL DISTRICTS) with respect to the School Districts implementing or following a practice of barring potential roofer employees from any school site if those employees had criminal records. The Defendants filed cross-motions in opposition and seeking Summary Judgment in their favor.

The critical issue was whether or not those barred employees would have *direct contact with children*. See School Code, 24 P.S. § 1-111 (a.1) and in particular the language that requires background checks on “teachers, substitutes, janitors, cafeteria workers, independent contractors and their employees, *except* those employees and independent contractors who have no direct contact with children”. Based on the testimony I heard in several days of hearing, I granted an injunction against this practice by the School Districts.

The School Districts appealed to the Commonwealth Court, which on April 18, 2017, reversed finding that my grant of the injunction altered the *status quo* which all injunctions are to maintain. However, the Commonwealth Court obviously believed the *status quo* included the practice of barring roofers with criminal records even though they had no direct contact with children.

In my view, this decision by the Commonwealth Court failed to recognize the distinction between 1) requiring a background check and 2) barring roofers if they had a conviction regardless of contact with children. The Commonwealth Court, per Judge Leavitt, correctly articulated the standard for maintaining the *status quo*. Specifically at page 9, the Court said “The *status quo ante* is the “Last Actual, peaceable and lawful uncontested status which preceded the pending controversy citing Commonwealth v. Coward, 414 A.2d 91, 99. (Pa. 1980).

Here the prior conduct was *not* lawful and in fact barred roofers who have no direct contact with children under Section 24-111 (a)(1) cited above. The language of School Code is clear and there is *no* dispute that School Districts are barring roofers who had no contact with children

Secondly, the Motion for Summary Judgment Action by the Union is well taken and I here rule in favor of the Union. Stated another way, the status quo was unlawful and the Commonwealth Court at page 10 missed the point. The School District can conduct background checks and may bar those with convictions who have contact with children. But those who have no such contact cannot be barred even if the background check disclosed a conviction.

The *status quo* included the barring feature which was unlawful and that is what I enjoined. Under the Commonwealth Court ruling, apparently the School Districts can ask for a background check and also bar the worker even if there will be no direct contact with children. That is the *unlawful* part of the *status quo* which warranted the injunction.

Thus Motion for Summary Judgment on the issue of barring roofers from the job site who have no direct contact with children is GRANTED. The counter Motions of Defendants are DENIED.

BY THE COURT:
/s/O'Reilly, S.J.

Dated: December 5, 2017

**Brian W. Jones, Assignee of ARP Associates LLC, Plaintiff v.
John Skaro and Karen A. Skaro, Defendants
Dorothy Donauer, Intervenor
PNC Bank, N.A., Garnishee/Movant**

Dissolution of Garnishment—Waiver

Order granting dissolution of garnishment proper where plaintiff failed to actually appeal the various prior orders mentioned in his Concise Statement of Errors Claimed of on Appeal and thus waived the issues related to those orders.

No. GD-09-007166. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—January 3, 2018.

OPINION

Plaintiff/Assignee, Brian Jones, has appealed from our order dated November 8, 2017 by which we granted the Motion of PNC Bank, Garnishee, for Dissolution of Garnishment Pursuant to Pa.R.C.P 3143 and directed the Department of Court Records, Civil Division (DCR) to mark the judgment in garnishment against PNC as satisfied and to mark the Attachment as dissolved upon receipt of \$25,000 from PNC, with the direction that the sum be released to Dorothy Donauer. An earlier appeal by Mr. Jones was quashed by order of the Superior Court dated May 17, 2017. That appeal involved our order of February 8, 2017, opening the

judgment previously entered in this garnishment proceeding and allowing PNC, the Garnishee, to amend its answers to interrogatories. See 270 WDA 2017. No transcript of the record of the November 8, 2017 proceeding has been ordered although, in accordance with our preferred policy, a court reporter was present and made a record of the argument.

Because of our Central Calendar system, at least two other judges of our Court, sitting in our Motions Court, were involved with the instant garnishment proceedings before the matter came before the undersigned, also then sitting in Motions Court. In his Concise Statement of Errors Complained of on Appeal, Mr. Jones asserts that several prior orders of those other judges of this court were erroneous, but none of those orders are included in his instant Notice of Appeal even though they are no longer interlocutory. We should note that Mr. Jones, who is not a lawyer, is nevertheless fairly well-versed in what may be thought of as run-of-the-mill judgment collection proceedings, including garnishments. The procedural posture of this case, however, is not run-of-the-mill.

On July 28, 2016, the Honorable Paul F. Luty, Jr. had ordered PNC to retain \$25,000 in a bank account in the name of Defendant Karen Skaro and her mother, Dorothy Donauer pending a decision as to whether the monies in that account belonged to Mrs. Skaro, one of the judgment debtors, or to her mother. Judge Luty also re-scheduled the hearing on the matter and the undersigned was assigned to Motions Court at the time set. Mrs. Donauer had been allowed to intervene by the Honorable John T. McVay, Jr. by order dated July 11, 2016, reconsideration denied July 21, 2016.

One of Plaintiff's complaints on appeal is that Judge McVay's order was improper because the intervention was allowed well beyond the applicable time limit. Plaintiff also complains on appeal that the undersigned should have disregarded that order rather than proceeding with the hearing on the issue of whose monies were in the account, Mrs. Skaro's or Mrs. Donauer's. However, Judge McVay's order has not been included in the instant Notice of Appeal even though it is now final. In the event Superior Court decides the objection to his order has nevertheless been preserved for appellate review, we note that we regarded the issue of timeliness to have been in Judge McVay's discretion and felt then (and feel now) that the propriety of his exercise of discretion was for the appellate courts, not the undersigned who has the same jurisdiction as Judge McVay.

Our eventual decision was that Mrs. Donauer was the true owner of the funds and that the account was in her daughter's name for convenience only. The only order now under appeal, dissolving the garnishment, is the natural consequence of that decision.

The basis for our decision that Mrs. Donauer was the true owner of the funds in the account was based on a decision to the same effect made in federal Bankruptcy Court. We correctly applied the principles of *res judicata* and concluded that Mr. Jones, who had been involved as a creditor during the Skaro bankruptcy, had a full and fair opportunity to argue that the funds belonged to Mrs. Skaro, and simply lost his case there. He may not re-litigate the same issue here in state court in an effort to get a different result.

CONCLUSION

By not appealing the various orders mentioned in his Statement, especially that of Judge McVay, along with his appeal of our order of November 8, 2017, Plaintiff has waived the issue of timeliness of the intervention or lack thereof. He also has waived his right to complain of our order of February 2, 2017. He also has not filed a timely appeal of the judgment that was entered against him on August 3, 2017, although he did file a Petition for Review in Superior Court which was denied without comment on October 23, 2017. See 93 WDM 2017.

Our order of November 8, 2017, which flows from our conclusion that Mrs. Donauer is the true owner of the account, was proper and should be affirmed.

BY THE COURT:
/s/Friedman, J.

Dated: January 3, 2018

Commonwealth of Pennsylvania v. Richard Friedman

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—DNA Refusal—DUI

Discussion of whether Burchfield should be applied retroactively to cases on collateral review.

No. CC 2015-2902. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—January 5, 2018.

MEMORANDUM ORDER OF COURT

AND NOW, this 5th day of January, 2018, upon meaningful consideration of the Defendant's Amended Petition under the Post-Conviction Relief Act ("PCRA"), filed on January 10, 2017, the Commonwealth's Motion to Lift Stay, filed on October 3, 2017, and the evidence and argument presented at the PCRA Hearing held on October 19, 2017,

IT IS HEREBY ORDERED that the Defendant's request for PCRA Relief is DENIED.

I. PROCEDURAL BACKGROUND

On November 24, 2015, the Defendant entered a negotiated plea to Counts One (1), Two (2), Four (4) and Five (5) of the information. Counts One (1) and Two (2) charged him with DUI – General Impairment/Incapable of Safe Driving (3rd Offense) under 75 Pa. C.S.A. 3802(a)(1). Count Four (4) charged Use/Possession of Drug Paraphernalia under 35 Pa. C.S.A. § 780-113(a)(32). Count Five (5) charged a Driving on Suspended License – DUI Related with a BAC of .02 or Higher, under 75 Pa. C.S.A. §1543(b)(1).(1)(iii).

On December 11, 2015, the Defendant was sentenced to 18 to 36 months of imprisonment at Count One (1), with a consecutive two (2) year term of probation to commence upon his release from imprisonment. No further penalty was imposed at Count Two (2). A one (1) year term of probation was imposed at Count Four, which was ordered to run consecutively to the term of probation imposed at Count One (1). A six (6) to twelve (12) month term of imprisonment was imposed at Count Five (5). The Defendant was awarded to 308 days of time credit, which was applied to Count 5. All other charges were withdrawn.

A post sentence motion was filed on December 16, 2015. The court scheduled a post sentence motion hearing for January 28, 2016. However, on the day of the hearing, counsel withdrew the motion. No direct appeal was filed. Accordingly, the Defendant's judgment of sentence became final on February 29, 2016, when the 30-day window for filing a direct appeal expired. *Commonwealth v. Miller*, 715 A.2d 1203, 1207 (Pa. Super. 1998). The Defendant, therefore, had until February 28, 2017, to file a timely PCRA petition. 42 Pa. C.S.A. §9545(b)(1) ("Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final . . .").

On October 19, 2016, the Defendant timely filed a pro se PCRA petition. On October 24, 2016, Attorney Chris Rand Eyster, Esq. was appointed to serve as PCRA Counsel. PCRA Counsel was directed to file an Amended Petition, if one was warranted, within 90 days of his appointment. On January 10, 2017, PCRA Counsel timely filed an Amended PCRA Petition, raising claims pursuant to *Birchfield v. North Dakota*, --- U.S. ---, 136 S.Ct. 2160 (2016). (Amended PCRA Petition, filed 1/10/17, pp. 1-5).

Relying on *Birchfield*, PCRA Counsel argued that trial counsel was ineffective for "failing to pursue a pre-trial motion that Petitioner's refusal to submit to a blood test was invalid under the Fourth Amendment of the U.S. Constitution and Article 1, §8 of the Pennsylvania Constitution because the police did not have a search warrant to obtain Petitioner's blood and Petitioner was not properly advised of his rights." (*Id.* at 3). PCRA Counsel claimed that plea counsel was ineffective for failing to raise a *Birchfield* claim through a post-sentence motion or appeal and for failing to challenge the "excessive/illegal sentence." (*Id.* at 3-4). PCRA Counsel also argued that plea counsel was ineffective during the plea bargaining process because he never attempted to negotiate a waiver of the RRR eligibility requirements. (*Id.* at 4).

The Commonwealth was ordered to file its Answer to the Amended PCRA Petition. On January 30, 2017, the Commonwealth filed its original Answer, but then filed an Amended Answer on February 1, 2017. In its First Amended Answer, the Commonwealth noted that the Defendant would have been entitled to relief pursuant to *Birchfield* if "his case was procedurally postured like the defendant" in *Commonwealth v. Giron*, --- A.3d --- (2017 WL 410267) (Pa. Super. 2017). (Commonwealth's Amended Answer to PCRA Petition, filed 2/1/17, p. 2). However, because the Defendant's conviction was final at the time that *Birchfield* was decided, the Commonwealth maintained that the Defendant would only be entitled to relief if *Birchfield* was found to apply retroactively pursuant to *Teague v. Lane*, 489 U.S. 288, 307 (1989). (*Id.* at 2-3). The Commonwealth took no position as to whether *Birchfield* had retroactive effect pursuant to *Teague*, and it deferred that determination to this court. (*Id.* at 3).

Accordingly, the court scheduled a PCRA Hearing in order to hear arguments as to whether *Birchfield* should apply retroactively to the Defendant's case. At the PCRA Hearing held on September 13, 2017, the court decided to stay its PCRA proceedings pending the resolution of *Commonwealth v. Bushaw*, 1083 WDA 2017. In *Bushaw*, the PCRA court determined that *Birchfield* applied retroactively to cases on collateral review, and the Commonwealth had filed a direct appeal challenging that ruling. (See Trial Court Opinion, filed on 9/26/17 by the Honorable Edward J. Borkowski). A status conference was scheduled for March 14, 2018.

On October 3, 2017, the Commonwealth filed a Second Amended Answer to the Amended PCRA Petition notifying the court that the Commonwealth had withdrawn its appeal in *Bushaw* following the issuance of the Trial Court's Opinion in that case. (Second Amended Answer, filed 10/3/17, p. 2). The Commonwealth requested that this court lift the stay and schedule a PCRA Hearing. The Commonwealth also took the position that the ruling in *Birchfield* is not retroactive pursuant to 42 Pa. C.S.A. §§9543 and 9545, or *Teague*. (*Id.* at 3-6).

At the PCRA Hearing held on October 19, 2017, the Commonwealth conceded that *Birchfield* created a new rule of constitutional law, but it maintained that *Birchfield* did not retroactively apply to cases on collateral review where the judgment of sentence is final. Because the Defendant's conviction was final at the time *Birchfield* was decided, the Commonwealth argued that *Birchfield* did not apply to the Defendant's case, especially in light of the fact that neither the U.S. Supreme Court nor the Pennsylvania Supreme Court had ruled that it should be applied retroactively. The Commonwealth further argued that *Birchfield* is not retroactive pursuant to *Teague v. Lane*, 489 U.S. 288, 307 (1989) because it did not announce a new constitutional rule that is substantive in nature, and it did not create a "watershed rule of criminal procedure." The Defendant's position at the hearing was that *Birchfield* should be given retroactive effect pursuant to *Teague* because it announced a new constitutional rule that is substantive in nature.

The Defendant further argued that his counsel was ineffective at the time of sentencing on December 11, 2015 for not knowing that the United States Supreme Court had granted certiorari in *Birchfield* that very same day according to the SCOTUS blog, PCRA Hearing Exhibit C. He argued that post-sentence motions on the basis of *Birchfield* should have been filed after certiorari was granted. The Commonwealth disagreed, arguing that counsel is not ineffective for failing to predict a change in the law. The Commonwealth noted that trial counsel had filed appropriate motions on the case. The pre-trial motion was withdrawn upon the entry of the guilty plea, and the post-sentence motion was withdrawn by defense counsel with no testimony that the Defendant objected to that course of action. The Commonwealth further argued that the Defendant could not prove the prejudice element of the ineffectiveness claim given that *Birchfield* was not decided until after the Defendant's conviction was final.

After carefully considering the evidence and arguments presented at the PCRA Hearing, and after reviewing the relevant law surrounding the issue of retroactivity, this court finds that *Birchfield* does not retroactively apply to cases on collateral review and that trial counsel was not ineffective for failing to anticipate the United States Supreme Court's ruling in *Birchfield*.

II. ANALYSIS OF CLAIM

Pursuant to *Birchfield*, absent exigent circumstances, an officer may not obtain a warrantless blood draw pursuant to the search incident to arrest exception. *Birchfield*, 136 S.Ct. at 2185. *Birchfield* also invalidated the consent for a blood draw when such consent is obtained "on the pain of committing a criminal offense." *Id.* at 2186. As noted by the Commonwealth in its initial Answer to the Amended PCRA Petition, there is evidence in this case that the Defendant's refusal to submit to blood testing was prompted by his fear of needles, and that his refusal was not based on the warnings contained in the DL-26 Form. (See Affidavit of Probable Cause). However, pursuant to *Giron*, *supra*, that issue does not appear to be outcome determinative, and the parties do not dispute that the Defendant received enhanced criminal penalties based on his refusal.

Accordingly, the issue before this court, an issue which remains a matter of first impression following the withdrawal of the appeal in *Bushaw*, is whether *Birchfield* applies retroactively to cases on collateral review. As an initial matter, the court notes that, because the Defendant filed a timely PCRA petition, the retroactivity analysis is not dictated by the retroactivity rule set forth in §9545(b)(1)(iii) (setting forth the statutory time-bar exception for new constitutional rules of law which have been held to apply retroactively to cases on collateral appeal). Rather, the question of *Birchfield*'s retroactivity is governed by the analysis set forth

in the *Teague* and its progeny. Our Supreme Court recently had occasion to discuss the *Teague* framework in *Commonwealth v. Washington*, 142 A.3d 810, 813 (Pa. 2016). The Court explained *Teague*'s retroactivity analysis as follows:

Under the *Teague* line of cases, a new rule of constitutional law is generally retrospectively applicable only to cases pending on direct appellate review. In other cases, retroactive effect is accorded only to rules deemed substantive in character, and to "watershed rules of criminal procedure" which "alter our understanding of the bedrock procedural elements" of the adjudicatory process."

Washington, *supra*, at 813 (citations omitted).

While this court agrees that *Birchfield* announced a new constitutional rule, this court finds that *Birchfield* fails to meet either of the two exceptions set forth in *Teague*. This court is aware that its esteemed colleague found *Birchfield* to be retroactive in *Bushaw*, *supra*. This court, however, respectfully disagrees that *Birchfield* announced a new constitutional rule of law which is substantive in nature. (See *Commonwealth v. Bushaw*, 1083 WDA 2017 Trial Court Opinion, p. 10).

With respect to the question of whether the ruling is substantive or procedural in nature, the court finds that *Birchfield* announced a procedural rather than substantive rule because, at its core, the effect of the *Birchfield* ruling only seeks to regulate the "manner of determining the defendant's culpability" and it does not alter the "range of criminal conduct" or seek to "prohibit punishment for an entire class of offenders." *Washington*, *supra*, at 813, 818. *Birchfield* did not decriminalize conduct so much as it "merely raise[d] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (explaining that "[n]ew rules of procedure . . . do not appl retroactively" because they "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise"). To be sure, after *Birchfield*, an individual who was convicted with the use of blood evidence that was unlawfully obtained either by way of a warrantless search incident to arrest or invalid consent might have been acquitted otherwise depending on what other evidence was lawfully obtained in the case.

Moreover, as noted by the Commonwealth, *Birchfield* "does not automatically invalidate all convictions where a defendant refused a blood draw, only those where a defendant was threatened with an enhanced criminal penalty." (Commonwealth's Second Amended Answer, 10/3/17, p. 5). Therefore, at its core, *Birchfield* is a new rule of criminal procedure because it simply altered the evidence-gathering process for law enforcement in DUI cases and modified the manner in which the exceptions to the warrant requirement could be applied to obtain blood evidence.

Though the *Birchfield* ruling is procedural in nature, the new rule is not one of the "watershed rules of criminal procedure" which would allow it to fall under the second *Teague* exception. The ruling does not "implicate the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, *supra*, at 351-52 (citations omitted). As the United States Supreme Court recognized, the class of procedural rules which are given retroactive effect is "extremely narrow." *Id.* at 351-52. Unlike *Gideon v. Wainwright*, 372 U.S. 355 (1963), which conferred "the right to counsel upon indigent defendants with felonies" and fundamentally changed the procedural landscape for criminal proceedings, *Birchfield* does not qualify as one of the "watershed" cases that must be given retroactive effect. *Washington*, *supra*, at 813.

Accordingly, since the court finds that *Birchfield* does not apply retroactively to cases on collateral review, the Defendant's PCRA claims based on *Birchfield* are without merit. With respect to the Defendant's claim that plea counsel was ineffective during the plea-bargaining process for failing to negotiate a waiver of RRRI eligibility, PCRA Counsel abandoned this claim at the PCRA Hearing. This court further finds that trial counsel was not ineffective for failing to argue *Birchfield* at sentencing or request a stay of the sentencing based on certiorari having been granted in *Birchfield*. To require that counsel be aware of every case for which the United States Supreme Court grants certiorari on the day that certiorari is granted, as well as understand the potential impact that such a case *might* have on a particular client's case, is simply too high a burden to impose on counsel as a requirement for effectiveness. This court likewise finds that counsel was not ineffective for failing to raise *Birchfield* in post-sentencing motions, as again acceptance of the Defendant's argument would require counsel to be cognizant of any and all cases on appeal anywhere which *might* affect his client's rights, an impossibly high burden.

Based on the foregoing, Defendant's PCRA Petition is DISMISSED.

The Defendant is hereby put on notice that he has the right to file, either *pro se* or through privately retained counsel, an appeal to the Pennsylvania Superior Court within thirty (30) days from the date of this Order.

BY THE COURT:

/s/Lazzara, J.

Date: January 5, 2018

Commonwealth of Pennsylvania v. Richard P. Friedman

ORDER OF COURT

AND NOW, this 28th day of February, 2018, it is HEREBY ORDERED that the Clerk of Courts shall transmit the record on this matter to the Superior Court of Pennsylvania forthwith. On February 20, 2018, the Defendant filed his Concise Statement of Matters Complained of on Appeal ("Concise Statement") pursuant to Pa. R.A.P. 1925(b). The Defendant raised two (2) issues for review. The issues raised on appeal have been addressed in this court's Order denying PCRA Relief, issued on January 8, 2018. A copy of this Order is attached hereto.

In its Order denying PCRA relief, this court explained its reasons for denying PCRA relief. This satisfies the requirements of Pa. R. AP 1925(a)(1)¹ that the court set forth its reasons for issuing the Order appealed from.

A copy of this Order has been served upon Counsel for the Defendant by regular mail, and upon the Office of the District Attorney/Appeals Division, by interoffice mail.

BY THE COURT:

/s/Lazzara, J.

¹ Pa. R.A.P. 1925(a)(1) provides in relevant part: "... upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, *if the reasons for the order do not already appear of record*, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or *shall specify in writing the place in the record where such reasons may be found*." (emphasis added).

**Commonwealth of Pennsylvania v.
Tyler Cooper McQuaid**

Criminal Appeal—Suppression—Traffic Stop—“Welfare Check”

Police officer, responding to call re: unconscious man in car, who then stops that car on roadway is mere encounter as a welfare check on driver.

No. CC 2017-02539. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Zottola, J.—April 13, 2018.

OPINION OF COURT

Presently before this court is a Motion to Suppress on behalf of the Defendant, Tyler McQuaid. McQuaid is charged with Count 1-Driving Under the Influence of Alcohol or Controlled Substances. 75 Pa.C.S.A. § 3802 (D)(1)(i). A Suppression Hearing took place before this court on October 13, 2017. For the reasons set forth in this Opinion, the Motion to Suppress is denied.

The Defendant filed a Motion to Suppress on September 28, 2017 from which the following is taken verbatim:

1. Evidence obtained from the stop must be suppressed because the Officer lacked probable cause or reasonable suspicion to initiate a traffic stop.

Motion to Suppress

On October 13, 2017, a Suppression Hearing was held before this court. The Defendant contends that the evidence collected during a traffic stop, which resulted in the Defendant’s arrest, must be suppressed because the police officer did not have probable cause or reasonable suspicion to initiate the traffic stop.

At the Suppression Hearing, the Commonwealth called Officer Joseph Daransky to the stand. Officer Daransky testified that on November 25, 2016 at approximately 3:00 P.M., he responded to a report of an unconscious man behind the steering wheel of a vehicle in a Wendy’s parking lot at the Quaker Valley Village Shopping Center on Ohio River Boulevard. (S.H. pp 5-7)¹ Dispatch told Officer Daransky that the vehicle was a red Toyota Corolla and gave him the license plate number. (S.H. 6, 11) Officer Daransky arrived at the scene two minutes after he received the call, but he did not locate a vehicle matching that description in the Wendy’s parking lot. (S.H. 10-11) As Officer Daransky attempted to locate the vehicle, he observed a red Toyota Corolla with the corresponding license plate number leaving a nearby GetGo Gas Station and making a right-hand turn onto Ohio River Boulevard. (S.H. 11-12) Officer Daransky engaged his emergency lights and initiated the traffic stop on the car at the intersection of Spencer Street and Station Way after receiving backup from Officer Smilek of the Edgeworth Police Department. (S.H. 13-14) Officer Daransky testified that he did not see any motor vehicle violations before he initiated the traffic stop. (S.H. 15) However, he testified that the nature of his stop was check on the driver’s well-being. (S.H. 14) The information subsequent to the initiation of the traffic stop is beyond the scope for purposes of the Defendant’s Motion to Suppress.

During a Motion to Suppress, the Commonwealth has the “burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the Defendant’s rights.” Pa.R.Crim.P. 581(H). Since “police officers have a duty to render aid and assistance to those they believe are in need of help,” some traffic stops are considered “mere encounters” instead of investigatory stops. *Commonwealth v. Kendall*, 976 A.2d 503, 505 (Pa. Super. 2009). During a mere encounter, a police officer believes that the Defendant is in distress, either due to the condition of the Defendant’s car or the Defendant’s physical condition. *Id.* On the other hand, an investigatory stop “subjects a person to a stop and period of detention in order for the law enforcement officer to obtain more information.” *Commonwealth v. Rosas*, 875 A.2d 341, 347 (Pa. Super. 2005). Generally, “an investigatory stop of an automobile must be based on objective facts creating a reasonable suspicion that the motorist is presently involved in criminal activity.” *Commonwealth v. Valenzuela*, 597 A.2d 93, 98 (Pa. Super. 1991). However, simply “triggering the emergency lights or initiating interaction with a driver does not necessarily shift the interaction between an officer and a driver from a mere encounter to an investigatory stop.” *Kendall*, 967 A.2d at 505. See also *Commonwealth v. Johonson*, 844 A.2d 556 (Pa. Super. 2004).

The interaction between Officer Daransky and the Defendant was a mere encounter, meaning that Officer Daransky did not need reasonable suspicion to initiate a traffic stop on the Defendant’s vehicle. *Kendall*, 967 A.2d at 505. Officer Daransky observed a vehicle matching dispatch’s description in an area close to the original scene only a few minutes after he received the call. Officer Daransky then testified that his motive behind initiating the traffic stop was to render aid to the driver since dispatch reported that the driver was recently unconscious. Therefore, this is a mere encounter and Officer Daransky did not need reasonable suspicion to initiate the traffic stop. *Id.* Although Officer Daransky initiated his emergency lights before stepping out of his car, this did not turn the mere encounter into an investigatory stop. *Johonson*, 844 A.2d at 562. It is enough that Officer Daransky observed a car matching the description and license plate number of the car that was called in to dispatch and initiated a traffic stop to check on the driver’s well-being. Therefore, the Commonwealth met its burden to overcome the Defendant’s Motion to Suppress.

Based on the foregoing, the Defendant’s Motion to Suppress is denied.

BY THE COURT:
/s/Zottola, J.

Date: April 13, 2018

¹ S.H. refers to transcript of Suppression Hearing dated October 13, 2017

**Commonwealth of Pennsylvania v.
Robert Blake**

Criminal Appeal—PCRA—DNA TESTING—Actual Innocence

Post-conviction claim for DNA testing of evidence will not be granted if the evidence cannot support a claim of actual innocence.

No. CC 1987 08 910, 1987 09 390. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

Williams, J.—April 26, 2018.

OPINION

In May 1987, Albert Falbo was killed. He was stabbed multiple times in the neck. The investigation began with an interview of Mr. Blake's brother. This led them to a plastic bag dumped near the Allegheny River. Inside was blood stained clothing belonging to Joseph Servich and personal items of the deceased. Servich was eventually tracked down in Florida. His statement to police implicated Mr. Blake.

Blake's homicide trial ended with a guilty verdict for second degree murder. The Superior Court affirmed his life sentence in August, 1991. *See*, 496 Pittsburgh 1990 and 497 Pittsburgh 1990.¹

On January 20, 2016, a *pro se* request for post-conviction DNA testing was docketed. Counsel was appointed. Eventually, an item of evidence was discovered. The defense claims he is entitled to have that empty pack of Marlboro cigarettes tested for the presence of DNA. The government is opposed. Its position is based upon the requirements of the DNA testing statute - Section 9543.1 of Title 42. In particular, the government says the "petitioner has failed to meet his burden of showing that there is a reasonable probability that 'DNA testing of the specific evidence, assuming exculpatory results, would establish ... the applicant's actual innocence of the offense for which the applicant was convicted'." *Commonwealth's Second Answer to Motion for DNA Testing*, pg. 8 (March 6, 2018).

The government goes forward by focusing on two factors which this Court finds to be persuasive. The victim of this stabbing was found in his own apartment. He was not found in a car which is where the empty pack of smokes was found. Conspicuous by its absence is Mr. Blake's failure to explain this analytical gap. Furthermore, the Marlboro man's cigarette pack of choice was found in a car, in a different state and, some three months AFTER the killing. These "facts" lead to one question - when was the pack left there? Mr. Blake simply cannot answer that question. The inability of Mr. Blake to adequately address these factual holes in his claim prevents this Court from concluding that DNA results would establish his actual innocence.

An order will be issued denying his post-conviction claim for DNA testing. *See*, *Commonwealth v. Scarborough*, 64 A.3d 602,609 (Pa. 2013)("Consequently, because the only claim at issue in a motion for post-conviction DNA testing is a convicted individual's eligibility for such testing under the aforementioned provisions of Section 9543.1, when the trial court enters an order either granting or denying the testing, the litigation under this section is at an end: the sole claim between the parties -- the Commonwealth and the movant -- has been addressed by the trial court and finally disposed of. Thus, under the plain language of Rule 341(b), because a trial court order granting or denying the motion for DNA testing disposes of all claims raised by all parties to the litigation, it is, therefore, a final order.").

BY THE COURT:
/s/Williams, J.

¹ The murder case has a docket number ending in 910. The other docket number sets forth other charges like robbery, theft and conspiracy.

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PLJ

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OPINIONS

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**Joseph Baran v.
George Weston Bakeries, Inc., and George Weston Bakeries Distribution, Inc.**

Distribution Agreement—Injunction—Contract Breach—Failure to Cure

Exclusive distribution agreement terminated and earlier preliminary injunction preventing sale of distribution route dissolved where evidence at trial indicated plaintiff failed to cure at least four breaches.

No. GD 08-21117. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—May 10, 2018.

OPINION

In 1962, at the age of five, Plaintiff Joseph Baran began working in the bread industry by delivering bread door to door with his father. By 1985 Mr. Baran owned a delivery truck and was an independent contractor for Bestfoods Baking Distribution Company (“Bestfoods” hereinafter) delivering bread and other similar products to grocery stores in the West Mifflin area. In 1999 Bestfoods and Mr. Baran entered into a written agreement for Mr. Baran to distribute premium products, such as Thomas® english muffins and Brownberry® breads. The agreement made Mr. Baran the exclusive distributor of those products in the West Mifflin and Homestead areas. In approximately 2004 Defendant George Weston Bakeries Distribution, Inc. (“Weston” hereinafter) acquired Bestfoods, including the rights and duties under the 1999 agreement with Mr. Baran.

Around this time, significant changes affecting Mr. Baran’s distribution area were taking place. The large “Waterfront” shopping district along the Monongahela river opened in the Homestead area, and nationwide retailers located in the distribution area, including Walmart, Target and Sam’s Club, increased their sales of foods. To accommodate these changes, Weston believed that Mr. Baran needed to change his delivery methods. Weston suggested that Mr. Baran have a family member or an employee assist him, or that he “split his route” by selling a portion of the distribution area to another independent operator. Mr. Baran, believing these suggestions would reduce his income, declined to implement them or any other change in his delivery methods.

In 2006, 2007 and 2008 Weston sent Mr. Baran eight letters that specified conduct by him that breached the 1999 agreement and allowed him three days to cure the breaches. In July of 2008, after a Walmart serviced by Mr. Baran removed Weston’s shelf space in the deli section of the store and reallocated it to a competitor, Weston notified Mr. Baran the agreement was terminated. Weston instructed Mr. Baran to sell his distribution rights to a qualified purchaser within ninety days, with Weston operating Mr. Baran’s business, for his account, pending the sale.

Mr. Baran commenced this proceeding in October of 2008 by filing a complaint in equity. In December of 2008 Mr. Baran filed a petition for preliminary injunction to prevent the sale of his distribution route and for restoration to his position as operator of the route. In February of 2009, following a hearing on the petition, the Honorable Judge Christine Ward granted the preliminary injunction preventing the sale of the route, but denied Mr. Baran’s request to be restored as the route operator.¹ Judge Ward, in November of 2014, granted Weston’s motion for partial summary judgment by ruling that the language of the 1999 agreement precludes Mr. Baran from claiming lost profits as damages arising from Weston’s alleged breach of the agreement.

On November 1 and 2, 2017 I heard the nonjury trial of Mr. Baran’s claim for a permanent injunction. During the nearly nine years that passed between the entry of the preliminary injunction and the trial, the 1999 agreement required Weston to operate the distribution route for Mr. Baran’s benefit, by charging him the wages it paid relief route operators and remitting the net profits to him. After the trial, I received proposed findings of fact and conclusions of law from the parties. On December 11, 2017 I signed an order that dissolved the preliminary injunction and authorized Weston to sell Mr. Baran’s route to a qualified purchaser. Mr. Baran timely filed a motion for post-trial relief, which I denied. Mr. Baran also filed a supplemental motion for post-trial relief that requested a stay of the sale of his route. I also denied this request for a stay. After judgment was entered in favor of Weston, Mr. Baran filed a timely appeal to the Superior Court of Pennsylvania from both Judge Ward’s summary judgment ruling² and my denial of his motion for post-trial relief. On April 19, 2018 Judge Ward filed an opinion relative to her summary judgment ruling. Pursuant to Pennsylvania Rule of Appellate Procedure no. 1925(a), this opinion addresses the alleged errors Mr. Baran identified in my ruling. The errors that I allegedly made are identified in paragraphs 1, 2 and 3 of Plaintiff’s concise statement of matters complained of on appeal and in paragraph 1 of Plaintiff’s amended concise statement of matters complained of on appeal.

Mr. Baran first contends there is not sufficient evidence for my ruling in favor of Weston, with my ruling being against the weight of the evidence. I disagree with Mr. Baran as there is abundant evidence supporting my ruling in favor of Weston. Termination of the 1999 agreement is permitted if Mr. Baran fails to cure a breach within three days after notice or if Mr. Baran repeatedly violates the agreement. *See* trial exhibit A, p. 13, §8.3. Mr. Baran failed to cure at least four different breaches. After notice, Mr. Baran admitted he did not deliver fresh baked products to Target three days a week and Sam’s Club four days a week. *See* transcript of Nonjury Trial, November 1 and 2, 2017 (“T.” hereinafter), pp. 85 and 118. There also was no dispute that, after notice, Mr. Baran was unable to get Walmart to replace either Weston’s 4-sided sales display in the front of the store or its shelf in the deli section. T., pp. 238-245, 157-160 and 247-252. Under the 1999 agreement, each of these uncured breaches was a sufficient reason for termination. These four breaches, plus additional breaches involving a Giant Eagle and a Shop N Save that may have been cured, also are repeat violations under the 1999 agreement sufficient for termination. Therefore, there was sufficient evidence for my ruling in favor of Weston, and the ruling was not against the weight of the evidence.

Mr. Baran next contends he did not breach the 1999 agreement because a Weston representative testified that any breach was cured. However, I interpret the testimony differently. The testimony referred to by Mr. Baran was given at the trial by Ricky Saxon, a regional sales manager for Weston. I interpret the testimony to mean Mr. Saxon thought the breaches were cured but learned later they were not cured. The testimony from cross examination during the trial, set forth below, is consistent with my interpretation:

Q. Okay. So in your own words, what did you terminate him for?

A. I terminated Joe for repeated violations of the contract. As you had stated, these are curable breaches, but in my eyes I thought they were cured because there was no other complaint. He never changed his service patterns and went on and on repeatedly, even with some conversation with him, and it still occurred.

Q. Okay. So you thought they were all cured; is that correct?

A. Correct.

Q. And, in fact, you said in court they were all cured in front of Judge Ward?

...objection....

Q. But, nonetheless, he was terminated because of multiple curable breaches?

A. That were not cured.

Q. That were not cured, even though you originally said they were cured?

A. Correct.

T., pp. 36-38.

Q. Mr. Saxon, I understand that you went over these six violations again. But you and I can agree that this morning and six years ago at the preliminary injunction hearing, you testified under oath that all of these violations were cured; is that correct?

A. Correct, I did.

Q. Okay. Now, are you saying now they were not cured?

A. I'm saying now that I was mistaken when I thought he cured how many days a week he was giving fresh service.

Q. Okay. So, I mean, why didn't you bring it up then? I mean, why wait six—I mean, you have a violation. It says if you cure it within three days, no harm, no foul. You said you thought they were all cured. And now we keep going back over these same—out of 22 years, we got maybe three valid claims there. I know there's six. Maybe three are valid. Why bring it up again?

MR. GISLESON: Your Honor, object to the editorializing.

MR. TALARICO: Take out the editorializing.

THE COURT: All right. Go ahead. You can answer.

A. I see they're all viable. They're repeated incidences where he wouldn't make the change and give the customer what they requested.

Q. So the fact that you said they were cured—and you're the man that terminated him. If I can't rely on you to say they were cured, who can I rely on?

A. And, again, I took him at his word; and since I didn't hear anything from these customers at that time, that it was cured.

Q. So everything—

A. I did not go out and go to the store and say, "Let me see your tickets. Did you get seven-day-a-week service or five-day-a-week? My point was I certainly was not trying to—whatever you would say—throw Joe under the bus. I wanted him to succeed, so I wasn't going to go out there and pull everything to see, hey, was this totally taken care of? If I didn't hear from them, I took that it was.

T., pp. 380-382. I found Mr. Saxon credible when he indicated he first thought the breaches were cured but later found out he was mistaken as they were "not cured." Because Mr. Saxon credibly testified at the trial that the breaches of the 1999 agreement were not cured, I correctly determined that Mr. Baran breached the agreement.

Mr. Baran next contends there is no evidence of a substantial breach of contract by him. Pursuant to the 1999 agreement, the laws of the State of New York shall be applied when interpreting the agreement. A substantial or material breach occurs under New York law when the breach defeats the object of the parties in making the contract or goes to the root of the agreement. *See Metropolitan Nat Bank v. Adelphi Academy*, 886 N.Y.S. 2d 68, 23 Misc. 3d 1132 (A)(2009). Relative to Mr. Baran's obligations under the 1999 agreement, the object of the parties or root of the agreement is for Mr. Baran "to develop and maximize sales of products...by...promptly removing all stale or off code products; cooperating with [Weston]...in its marketing programs...and providing service on a basis consistent with good industry practice...." Trial exhibit A, p. 6, §4.1. There was extensive credible evidence of Mr. Baran breaching this provision. For example, even though Mr. Baran testified under oath to never being "thrown out of one store" (T., pp. 108-9), Weston's manager of retail accounts, John Gallaher, credibly testified that Mr. Baran, in fact, was "thrown out" or banned from a Target store because he refused to service it three days per week. *See* T., pp. 282-285. This is a breach of Mr. Baran's obligations to maximize sales of products, cooperate with Weston's marketing programs and provide service consistent with good industry practice. Mr. Gallaher also testified that the shelf in the deli section of Walmart was part of a Weston national program and losing it was "an embarrassment to us...." T., p. 252. This is a breach of Mr. Baran's obligations to maximize sales of products, cooperate with marketing programs and provide service consistent with good industry practice. Mr. Saxon testified to one day finding 400 off code products in multiple stores serviced by Mr. Baran, a problem Mr. Saxon never had with any other independent operator (*see* T., pp. 369-370), which patently breached Mr. Baran's obligation to remove off code products. Finally, Mr. Saxon testified he "never had an [independent operator] that had as many breaches or was unwilling to change" and he believed Mr. Baran was not maximizing sales or providing service consistent with good industry practice. T., pp. 353-354³. In summary, because there was extensive evidence of a substantial breach of contract by Mr. Baran, my decision in favor of Weston was correct.

Mr. Baran's final contention, set forth in the amended concise statement of matters complained of on appeal, is that I should have stayed my ruling that dissolved the preliminary injunction until it could be reviewed by the Superior Court. Mr. Baran, however, is not entitled to a stay pending appeal without making a substantial case on the merits, showing irreparable injury will be suffered without the stay, demonstrating a stay will not substantially harm other interested parties and will not adversely affect the public interest. *See Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 524 Pa. 415 at 420, 573 A.2d 1001 at 1003 (1990). Of these four requirements, Mr. Baran fails to make the necessary showing with at least three. As is set forth at length above, I find

all of Mr. Baran's arguments lack merit. Without the stay, Mr. Baran will not be irreparably harmed as he will receive the net proceeds from the sale of the route, estimated to be \$138,167. Finally, a stay will substantially harm Weston because it will continue to incur the additional expenses and lost revenues that began over nine years ago when the preliminary injunction prohibited Weston from obtaining another independent operator. Mr. Baran being unable to make the showing needed for a stay pending appeal, my decision to deny his request was therefore correct.

BY THE COURT:
/s/Hertzberg, J.

¹ Weston appealed this decision to the Superior Court of Pennsylvania, which affirmed. See Superior Court docket number 426 WDA 2009.

² Mr. Baran filed an earlier appeal from Judge Ward's summary judgment ruling, which the Superior Court of Pennsylvania quashed since judgment had not yet been entered. See Superior Court docket no. 70 WDA 2018.

³ Mr. Gallaher also testified that Mr. Baran was the worst distributor he had encountered (T. at p. 298) and that Mr. Baran was not maximizing sales (T. at p. 238).

Steve Mader v. Duquesne Light Company

Personal Injury—Electrocution—Jury Award

Masonry contractor was electrocuted when the top of his ladder contacted a 13,000 volt electrical transmission line owned by the defendant. Jury awarded plaintiff \$500,000 in compensatory damages and no punitive damages. Court granted new trial on damages where Jury verdict slip contained an "irrational and inadequate" itemization of damages, where jury award of \$0 for past of future lost earning was unjust and where jury award of \$0 for non-economic damages "inadequate" in light of evidence of pain and suffering.

No. GD 13-6249. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—July 5, 2018.

OPINION

I. Background

Plaintiff Steven Mader, a fifty-four year old masonry contractor, worked on a two week project involving repairs to the chimney, fireplace and front stoop of an existing home in the North Hills of Pittsburgh. On September 21, 2012, after the project had been completed and Mr. Mader's crew was beginning to clean up, the customer asked Mr. Mader if he could check the gutters to see if any mortar from the chimney repair had been washed into them during a recent rainstorm. Mr. Mader used a sixteen foot aluminum extension ladder to check the gutters and then, carrying the ladder perpendicular to the ground, began walking from the home to place the ladder on his truck. Underground electrical service was provided to every home in the neighborhood, and Mr. Mader had not noticed that there were electrical power lines only eleven feet away from his customer's home.

With only air insulating this 13,000 volt electrical transmission line, the top of the ladder being carried by Mr. Mader made contact with it. The electricity ran down the ladder and through his body, causing him to immediately lose consciousness and fall to the ground. He regained consciousness and was taken to the hospital by ambulance with severe burn injuries to both of his arms (where he had been holding the ladder) and his feet (where the electricity exited his body). Mr. Mader received his last rights from a priest when he arrived at the hospital, but he ultimately survived what could have been a fatal electrocution.

The next day, surgery was performed on Mr. Mader's feet and right arm at the hospital. Both of his feet were burned from the toes to the mid-forefoot with the burn reaching the bone. Dead or dying tissue was excised and then cadaver grafts placed on Mr. Mader's feet. Tissue was excised from his right arm, which also was burned to the bone. To relieve the swelling of Mr. Mader's right arm, the hospital opened the subcutaneous layers of skin (which is known as a fasciotomy) and performed a cadaver graft. On September 29 he had another surgery at the hospital. The fasciotomy of Mr. Mader's right arm was closed and tissue was excised from his left hand and wrist. On October 1 both his feet were amputated in the middle of the arch, which is known as a transmetatarsal amputation. On October 3 Mr. Mader returned to the hospital operating room for irrigation of the amputation wounds. On October 10 he had an additional surgery to excise tissue and place a wound vac in his right forearm. Mr. Mader's final surgery at the hospital was on October 25. Tissue was debrided around his elbow and he also received an autograft, which consisted of removal of healthy skin from Mr. Mader's upper thighs that was used to replace skin he had lost. He then was moved out of the hospital to a skilled nursing facility, where he stayed for the next month and a half.

While in the hospital, Mr. Mader kept his masonry contracting business operating with his two employees able to do the jobs scheduled before September 21 without him on the sites. At the time of the year when Mr. Mader moved to the skilled nursing facility, his past practice was to shift the business primarily to chimney cleaning. Mr. Mader received calls on his cell phone for chimney cleaning, and his two employees came to the nursing facility daily to receive chimney cleaning assignments. While Mr. Mader was confined to a wheelchair when he left the nursing facility, he now is able to walk with his gait altered to accommodate the amputation of the balls of his feet. He did, however, close his business approximately two years after his injury because he could no longer participate in the physical process of bricklaying and his customers would not pay his prices without him doing the work.

In April of 2013, Mr. Mader sued Duquesne Light Company, the owner of the 13,000 volt electric power line he contacted with his ladder. Mr. Mader averred Duquesne Light's negligence, in maintaining the electric lines too close to the ground, caused his injuries. Mr. Mader also averred Duquesne Light acted with reckless indifference to his safety and therefore should pay punitive damages. The dispute was resolved in a jury trial, with me presiding. At the conclusion of the trial, the jury returned a verdict allocating Duquesne Light sixty percent negligent and Mr. Mader forty percent negligent for his injuries. The jury awarded Mr. Mader \$500,000 in compensatory damages and found Duquesne Light's conduct did not warrant punitive damages.

Consistent with the Pennsylvania Suggested Jury Instructions Mr. Mader requested, I instructed the jury that he is entitled

to compensation for past medical expenses, past lost earnings, future lost earning capacity, past and future pain and suffering, embarrassment and humiliation, loss of ability to enjoy the pleasures of life and disfigurement. *See* Exhibit 13 filed 3/20/2018, pp. 68-74. However, the written December 8, 2017 “Jury Verdict” provides this irrational and inadequate itemization of Mr. Mader’s damages:

(a)	Past medical expenses	\$ 444,525.56
(b)	Future medical expenses	\$ 55,474.44
(c)	Past lost earnings	\$
(d)	Future lost earning capacity	\$
(e)	Past, present, and future pain and suffering, embarrassment and humiliation and loss of enjoyment of life	\$
(f)	Disfigurement	\$
	Total	\$ 500,000.00

Mr. Mader timely filed a motion for post-trial relief that requested a new trial limited to the issue of damages. Duquesne Light’s responsive brief acknowledges that Mr. Mader is entitled to a new trial on damages for past pain and suffering. But, it denies that Mr. Mader is entitled to a new trial on damages for future pain and suffering or for either past or future lost earnings. I granted Mr. Mader’s request for a new trial as to all damages submitted to the jury (i.e., past medical expenses, future medical expenses, past lost earnings, future lost earning capacity, past, present and future pain and suffering, embarrassment and humiliation, loss of enjoyment of life and disfigurement).

Duquesne Light timely appealed from my order granting a new trial to the Superior Court of Pennsylvania. Duquesne Light also timely filed a concise statement of errors complained of on appeal, which, pursuant to Pennsylvania Rule of Appellate Procedure no. 1925(a), I address in this opinion.

II. Past Medical Expenses

Duquesne Light contends my grant of a new trial on the issue of past medical expenses is erroneous because Mr. Mader did not request it. Duquesne Light is incorrect as Mr. Mader’s motion for post-trial relief and his supporting memorandum request “a new trial limited to damages” or “a new trial on damages” without any request to exclude past medical expenses. Then, after Duquesne Light filed its brief denying Mr. Mader’s entitlement to a new trial on past medical expenses (or anything other than past pain and suffering), Mr. Mader filed a reply that specifically requested “a new trial on all damages” because the jury “did not fairly adjudicate Mr. Mader’s claims of damages and none of its damages’ award should be permitted to stand.”

Duquesne Light contends my grant of a new trial on the issue of past medical expenses also was erroneous because the \$444,525.56 awarded was the stipulated amount of past medical expenses I instructed the jury to award if it found Duquesne Light liable. However, with Mr. Mader likely to incur additional medical expenses during the pendency of the new trial, past medical expenses will likely be greater than \$444,525.56 at the new trial. Having a new trial on medical expenses also avoids the unnecessary confusion that is likely if the new jury hears extensive evidence of Mr. Mader’s pain and suffering during tissue debridement, amputation and other medical procedures but is denied the ability to award past medical expenses.

Therefore, I was correct to order a new trial on the issue of past medical expenses.

III. Future Medical Expenses

Duquesne Light next contends my grant of a new trial on the issue of future medical expenses is erroneous. The first reason Duquesne Light provides is that Mr. Mader did not request a new trial on future medical expenses. Duquesne Light, however, is incorrect because Mr. Mader made this request in the same manner that he did for past medical expenses that is described above. Other reasons Duquesne Light provides are the award is between the amounts projected by the parties’ life care planners, the award of \$55,474.44 is close to the \$42,636.65 to \$50,483.67 projected by Duquesne Light’s life care planner, Mr. Mader’s life care planner exaggerated his future medical expenses, Mr. Mader did not follow all doctor’s orders and there was evidence supporting the \$55,474.44 future medical expense verdict. Even if this all were true, it is still impossible to know how the jury arrived at \$55,474.44 for future medical expenses. It is most likely that the jury arrived at that amount because, when it is added to the stipulated past medical expenses, the total is a nice round number, \$500,000. Duquesne Light mistakenly presumes a jury that irrationally determines Mr. Mader is not entitled to any compensation for his excruciating pain or disfiguring amputations and burns rationally calculated future medical expenses. Additionally, similar to the situation with past medical expenses, the life care plans at the new trial will have to project different amounts because medical expenses incurred during the pendency of the new trial no longer can be classified as future medical expenses.

Therefore, I was correct to order a new trial on the issue of future medical expenses.

IV. Lost Earnings

Duquesne Light next contends my grant of a new trial on the issue of past and future lost earnings is erroneous. The first five reasons provided by Duquesne Light are that Mr. Mader closed his business for reasons unrelated to his injuries, he was able to run his business from the nursing home, the business was making money when Mr. Mader voluntarily shut it down, Mr. Mader did not look for another job and Duquesne Light’s vocational expert identified multiple jobs where he can work. Even if this all were true, Duquesne Light’s expert physical medicine and rehabilitation doctor acknowledged Mr. Mader is physically unable to perform the duties of a bricklayer (*see* Exhibit 10 filed 3/20/2018, pp. 126-127), Duquesne Light’s expert forensic accountant acknowledged the business earned less in 2012, 2013 and 2014 than its average in 2009, 2010 and 2011 (*see* Exhibit 7 filed 3/20/2018, pp. 116-117) and all the other jobs identified by Duquesne Light’s vocational expert paid significantly less than Mr. Mader’s business earned before his injuries (*see* Exhibit 11 filed 3/20/2018, pp. 31-36). Hence, Duquesne Light’s expert forensic accountant, Karl Jarek, CPA, concluded Mr. Mader had past lost earnings of at least \$56,910 and future lost earnings of at least \$90,510 (*see* Exhibit 7 filed 3/20/2018, pp. 116-118). “A jury...may not withhold lost wages when the evidence in the case uncontradictedly establishes the loss of wages as the result of the negligence which they, the jury, have adjudicated against the responsible defendant.” *Todd v. Bercini*, 371 Pa. 605, 92 A.2d 538, 539 (1952). Since the jury award to Mr. Mader of nothing for either past or future lost earnings is therefore unjust, I was correct to order a new trial on those issues.

Duquesne Light also contends the evidence generally supported the jury’s conclusion that Mr. Mader was not entitled to any lost earnings. However, as described above, the evidence provided by Duquesne Light was that Mr. Mader was entitled to damages of at least \$56,910 for past earnings and \$90,510 for future earnings. Therefore, I correctly ordered a new trial on those issues.

V. Future Noneconomic Losses

Duquesne Light's final contention is that my grant of a new trial on the issue of future pain and suffering, embarrassment, humiliation and loss of enjoyment of life is erroneous. The first six reasons provided by Duquesne Light are that Mr. Mader was able to walk independently within months of the accident, his wounds healed within a year, he is able to walk for extended periods of time, he works out regularly at a gym and took trips to Europe after the accident, he has not followed his doctor's orders and recent medical records show him doing well. In making these arguments, Duquesne Light ignores testimony from its expert life care planner that Mr. Mader will have future medical expenses for treatment by a physiatrist four times a year for management of his future pain. *See* Exhibit 11 filed 3/20/2018, p. 9. Also ignored by Duquesne Light is the "phantom" pain and other pain related to the amputation of Mr. Mader's feet that he will suffer in the future. *See* Exhibit 5 filed 3/20/2018, pp. 230-231 and Exhibit 14, pp. 4, 40-41 and 44. Finally, Duquesne Light ignores the embarrassment, humiliation and loss of enjoyment of life Mr. Mader undoubtedly will experience in the future from the difficulty of walking with half of his feet amputated.

Duquesne Light also contends the evidence generally supported the jury's conclusion that Mr. Mader was not entitled to the future noneconomic damages described above. However, because the jury ignored the undisputed evidence that Mr. Mader will have pain, embarrassment, humiliation and loss of enjoyment of life in the future, the jury verdict with no compensation for these future damages clearly is inadequate.

There simply was no reasonable basis for the jury to believe Mr. Mader would not experience pain and suffering in the future or that Mr. Mader's injury was not caused by the negligence of Duquesne Light. *See Davis v. Mullen*, 565 Pa. 386 at 397, 773 A.2d 764 at 770 (2001). Therefore, I was correct to order a new trial on the issues of future pain and suffering, embarrassment, humiliation and loss of enjoyment of life.

BY THE COURT:
/s/Hertzberg, J.

Marjorie Stein v. Richard F. Grabowski and Sally L. Grabowski, husband and wife

Quiet Title—Doctrine of Consentable Lines

Pine trees and mailbox location established consentable line that the adjacent landowners recognized and acquiesced to for 50 plus years by maintaining their property up to that line.

No. GD-15-08110. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
McVay, J.—September 2018.

OPINION

The Defendants, Richard F. Grabowski and Sally L. Grabowski ("Grabowskis"), appeals this court's March 19, 2018 order denying their motion for post-trial relief and affirming its January 17, 2018 Non-jury Verdict granting a judgement of quiet title in favor of Plaintiff, Marjorie Stein ("Stein").

SUMMARY OF FACTS

This case primarily concerns a disputed area of land located between two adjacent properties and the conduct of their predecessors in title with respect to that disputed land. Stein is the current owner of the property at 2521 Old Washington Road, Pittsburgh, Pennsylvania 15241 (the "Stein Property"). (T.T. at 49)¹. The Grabowskis are the current owners of the property at 2511 Old Washington Road, Pittsburgh, Pennsylvania 15241 (the "Grabowski Property"). (T.T. at 201). These properties are adjacent to one another with the Grabowski Property situated north of the Stein Property. (P.E. 1.2)²

Stein's parents, Frank and Florence Dolanch, purchased the Stein Property and constructed a house on it in 1951. (T.T. at 50-51). Stein was raised on the Stein Property and left briefly when she was married in 1967. (P.C. at ¶7). Stein's mother conveyed the property to her in 1995. (T.T. at 50-52; P.C. ¶ 8)³. In 2000, Stein's daughter occupied the Stein Property when Stein's mother went into a nursing home. (T.T. at 103; P.C. at ¶9). Stein's daughter lived in and maintained the property until 2003, at which time Stein moved back onto the property. (T.T. at 1-3; P.C. ¶10). Throughout the time that Stein did not occupy the Stein Property as her home, she lived within a few miles of the property (except for a four month period in 1967) and she stayed in contact with her parents and visited regularly. (T. T. at 112-114).

Prior to 2001, when the Grabowski's purchased the property, it was owned by William and Martha Stevenson, Stein's uncle and aunt. The Stevensons had purchased the property in 1950 and subsequently build their house. (T.T. at 16-19). Mr. and Mrs. Stevensons are deceased but their son, Walter Stevenson, did testify regarding the recognized boundary lines prior to the Grabowski's ownership of the property. *Id.* Since their purchase of the property in 2001, the Grabowskis have never lived there. However, their son Scott Grabowski has resided on the property since 2001. (T.T. at 229-230). Because their interest only began in 2001, the Grabowskis have no knowledge or information about the use or possession of the area of the bank and driveway from 1951-2001. *Thus, the Stein's and their witnesses' testimony as to the use of the disputed area for 50 years is uncontradicted and uncontradictable.* (T.T. at 231). Stein's testimony about the use of the disputed area from the time the Grabowskis purchased the property in 2001 through the present was also not contradicted by the Grabowskis or any other evidence presented at trial.

On the Stein Property, there is a driveway leading to Stein's residence which has existed at that location since approximately 1951. (T.T. at 31, 52-53; P.E. 1.2). Immediately north and adjacent to the Stein's driveway is a slope or bank which rises northward and levels out approximately at the top of the ostensible front yard of the Grabowski Property. (P.E. 1.3, 1H (1), 1H (2)). The east-west trajectory of the top of the slope of this bank extends from the west at Old Washington Road, in the area of Stein's mailbox, to the east where there is a stand of evergreen trees planted on Stein's side-yard (hereinafter referred to as the "bank"). Stein claims this to be the observed boundary line, which is different from the survey or title. Stein asserts that an observed boundary line has been established by the doctrine of consentable lines, and is hereafter sometimes referred to as the "consentable" or "observed" boundary line. (P.E. 1.2, 1.3, and 4.B.1 (please refer to the "proposed property line"). The Grabowskis rely exclusively upon the deed description and surveys, but not on the conduct of the predecessors to the respective properties, and claim that a

triangular section of the bank and entire front part of Stein's driveway are their property (hereinafter referred to as the "Disputed Property"). (See P.E. 4.B.1).

During the trial the Court was presented evidence regarding the adjoining property owner's use, maintenance, and control of the disputed property over the past 64 years. The court heard testimony and reviewed numerous exhibits that demonstrated various examples of use and control by the adjoining property owners. These included standard yard and lawn maintenance (e.g. mowing, mulching, fertilizing, weeding and leaf removal); tree removal and planting; grading and installation and use of a driveway and mailbox.

Standard Lawn and Yard Maintenance

Stevenson testified that he began mowing the level portion of the lawn of the Grabowski Property around 1954, and that he did not mow the bank at any time. Thus, the bank was never mowed or maintained in any way by or on behalf of the Stevenson's for about 46 or 47 years. (T.T. at 26-29). Stevenson testified that the Dolanches, Stein's parents, mowed and maintained the bank from approximately 1953 onward. (T.T. at 29).

Stein testified that her brother and her father began mowing the bank in approximately 1953, and that they stopped mowing "where the bank came up and leveled off." (T.T. at 54-55). Stein testified that multiple other people either in her family or engaged by her family, mowed the bank since that time and up to the present day-for 64 years. (T.T. at 54-56, 67). There is no contradictory evidence that from 1953 through 2001 both sets of property owners consistently recognized and observed mowing the line at the top of the bank.

Scott Grabowski testified that when the Stein house was unoccupied they hired someone from Peters Township public works to come intermittently to cut the grass. During this time period Scott Grabowski mowed a portion of the bank south of the top of the slope in 2001, he did so because, in his opinion, the lawn was not being maintained (evidencing his presumption that it should be maintained by the Steins), and he mowed the bank because he "did not want to look at it." (T.T. at 186-187, 196-197). However, Stein resumed her occupancy of the residence in 2003 and her husband resumed mowing the bank before and has continued to do so ever since. *Scott has not mown the bank at any other time.* (T.T. at 189-190).

Stein testified that over the past 64 years, she and her family have used different lawn treatments on the bank throughout the years. (T.T. at 57-58). They also rake leaves on the bank, and when Scott blew the leaves off the Grabowski Property he specifically made sure to blow the leaves right up to the top of the slope of the bank, the observed boundary, in an acknowledgement of his understanding of the location of the boundary line. (T.T. at 57-58, 88; P.E. 1H (1), 1H (2)).

Stein testified that when her parents first purchased the property there were locust trees that ran parallel along Old Washington Road the width of the Grabowski Property, then owned by the Stevenson's and along the front of the Stein's Property, then owned by her parents, the Dolanchs. (T.T. at 58-59). However, the locust trees were removed from the Stein Property at about the same time that the Stein Driveway was installed, approximately 1951. *Id.* As a result, the end of this stand of locust trees running along Old Washington Road at the front of the Grabowski Property and ending at the top of the slope of the bank and the Stein's mailbox, further delineated the observed boundary.

Walter Stevenson testified that there was a cluster of locust trees and shrubbery that existed on his parent's property that extended along Old Washington Road at the front portion of his parent's property and continued up "to the Dolanch property." (T.T. at 34-35; P.E. 1A). A photograph admitted from 1967 which shows the end of the cluster of locust trees and shrubbery in the same location as another photograph from 1997. (P.E. 1A, 1F). Another photograph which is approximately from 1960 or 1961 shows the same location of these trees and shrubs ending at the observed boundary line. (T.T. at 76; P.E. 1B).

Scott Grabowski testified that there were tree "stumps and brush" in 2001 when his parents purchased the property. (T.T. at 183-184, 194-195). Scott admitted that the stumps and brush on the Grabowski Property were in the same location as the photograph from 1997, and that the area was "more overgrown with weeds" in 2001, (T.T. at 195).

The Stein's mailbox has been in its present location, at the end of the trajectory of the top of the bank, marking the observed boundary line, for 55 or 56 years or since approximately 1961 or 1962. (T.T. at 69; P.E. 1.3, 1F, 2K). Richard Grabowski admitted that the mailbox was plainly visible when he purchased his property. (T.T. at 226).

There was an old line of evergreen trees and a new line of evergreen trees in the same location, at the east end of the top of the slope of the bank which has marked the east end of the consentable line and the trajectory of the consentable line along the top of the slope of the bank to the mailbox and locusts for 45 years. (T.T. at 62-63, 119-120; P.E. 1.2, 1.3, 1F, 2A, 2B, 2E, 2H, 2J). The original line of evergreen trees was planted in about 1972. (T.T. at 62; *see* P.E. 1F (Showing the original evergreen trees in the background of this 1997 Photograph; the trees are clearly mature as they are more than twice the height of the house)). The original evergreens were removed in approximately 2010 or 2011, a decade after the Grabowskis purchased the Grabowski property, because they looked spindly and thin." (T.T. at 62, 118-120, 190-191). Stein planted the new evergreens in the same general location as the old evergreens soon after the old trees were removed. (T.T. at 118-120, 190-191; P.E. 1.2, 1.3, 1F, 2A, 2B, 2E, 2F, 2H, 2J),

In approximately 2004, three years after the Grabowskis purchased the Grabowski Property, Stein had one pear tree and one blue spruce evergreen tree planted on the bank. (T.T. at 70, 126-127; P.E. 1.2, 1.3, 2E, 2G, 2H, 2I, 2J, 1H(1), 1H(2), 2K). Stein did so with the understanding that the trees were being planted on her property. (T.T. at 116)

As the occupant of the Grabowski property, Scott Grabowski maintained the lawn north of the consentable line. In approximately 2004 or 2005, he removed the locust trees and shrubs along Old Washington Road. (T.T. at 59-61, 184; P.E. 1A, 1B, 2A, 1F, 1.2). He also "leveled out", or reduced the slope along Old Washington Road, the area where he removed the locust trees on the Grabowski Property. (T.T. at 184). He did so to make his lawn easier to mow with his riding mower; however in doing so, he did not go beyond the top of the slope of the bank with his grading or in doing any lawn maintenance. (T.T. at 59-61, 184; P.E. 1A, 1B, 2A, 1F, 1.2).

Fifteen year after purchasing the property, non-resident Richard Grabowski informed Stein that he believed he owned the now disputed property. (T.T. at 66-67). Richard Grabowski admitted that he did not have a survey completed prior to his purchase of the property which may have resolved this dispute. (T.T. at 233)

DISCUSSION

Plaintiff Provided Sufficient Evidence to Establish a Consentable Line Which deviated From the Survey and Deed Descriptions

Stein asserts that from 1951 to 2001, the Grabowski's predecessor in title, the Stevenson's, had acknowledged the Disputed Property including a portion of the driveway as the Dolanches' and Steins' land and both parties recognized it as their boundary line

through their course of conduct during that time. The doctrine of consentable lines as applied by Pennsylvania courts is a rule of repose for the purpose of quieting title and discouraging confusing and vexatious litigation *Corbin v Cowan*, 716 A.2d 614,617 (Pa. Super. 1998), app. denied, 559 Pa 704, 740 A.2d 233(1999).⁴

“Based upon a rule of repose sometimes known as the doctrine of consentable line, the existence of such a boundary may be proved either by dispute and compromise between the parties or recognition and acquiescence by one party of the right and title of the other” *Moore v. Moore*, 921 A.2d 1, 4 (2007) Since there is no evidence that there was a dispute between the Stevensons and Stein or her parents (the Dolanachs) this court viewed this as a case of acquiescence.

“Acquiescence,” in the context of a dispute over real property, “denotes passive conduct on the part of the lawful owner consisting of failure on his part to assert his paramount rights or interests against the hostile claims of the adverse user.” *Zeglin*, 812 A.2d 558, 562 (2002). A determination of consentable line by acquiescence requires a finding 1) that each party has claimed the land on his side of the line as his own and 2) that he or she has occupied the land on his side of the line for a continuous period of 21 years. *Moore v. Moore*, 921 A.2d 1, 5 (2007). When a consentable line is established, the land behind such a line becomes the property of each neighbor regardless of what the deed specifies. In essence, each neighbor gains marketable title to that land behind the line, some of which may not have been theirs under their deeds.” *Id.* (quoting *Soderberg v. Weisel*, 455 Pa.Super. 158, 687 A.2d 839, 843 (1997) (internal citation omitted).

If adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for the period of time prescribed by the statute of limitations, they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one. *Plauchak v. Boling*, 439 Pa. Super. 156, 165, 653 A.2d 671, 675 (1995) (quoting *Plott v Cole* 593 A.2d 1216,1221(1988))

In such a situation, the parties need not have specifically consented to the location of the line. *Inn Le'Daerda, Inc. v. Davis*, 241 Pa.Super. 150, 163, 360 A.2d 209, 215 (1976). “It must nevertheless appear that for the requisite twenty-one years a line was recognized and acquiesced in as a boundary by adjoining landowners.” *Id.* at 163, 360 A.2d at 215–16 (citing *Miles v. Pennsylvania Coal Co.*, 245 Pa. 94, 91 A. 211 (1914); *Reiter v. McJunkin*, 173 Pa. 82, 33 A. 1012 (1896)).

The evidence is clear that the prior owners of the two adjacent properties (the Stevensons and Dolanachs) had observed a consentable boundary that deviated from the their deed descriptions and surveys for approximately fifty (50) years prior to the Grabowski purchasing their property from the Stevensons.

Stein presented clear and convincing evidence that her parents the Dolanachs constructed a house and installed a driveway in 1951 which encroached the boundary line found in the deed descriptions and later surveys. The Court also found sufficient evidence that when the Dolanachs installed their driveway they also took control and maintained the strip of land that abutted their driveway which ran from Washington Road up the hill to a stand of pine trees that they planted. The court found significant uncontroverted evidence that when both properties were transferred in 1951, a stand of locust trees ran along Washington Road fronting both properties. When the Dolanachs installed their driveway they removed not only the locust trees fronting their deeded property but also trees on the Stevenson's adjacent property to install their driveway and provide a setback that abuts the entrance of driveway. This set back provided a clear view of Washington Road for vehicles exiting the Dolanch's driveway. Stein provided sufficient evidence that her parents continued to control and maintain the strip of property since approximately 1951 including the area at the entrance to the driveway which would have been necessary to ensure that vegetation did not grow back and obstruct the view of Washington Road for vehicles exiting the driveway. The court gave great weight to photographs (Exhibits 1A and 1B) from the 1960s clearly depicting the set back that the Dolanachs maintained from the Stevensons' locust trees at the entrance of their driveway.

The Court also found clear and convincing evidence that Stein's parents maintained the strip of property abutting their driveway which ran from Washington Road up the hill to a stand of pine trees that they had planted. The Dolanachs and Stein cut the grass, weeded, fertilized and planted trees on the strip of property for nearly 50 years before the Grabowskis purchased their property. The Court found credible the testimony of Walter Stevenson (the son of the prior owners of the Grabowski property) who testified that his family never maintained the disputed strip of property and that his aunt and uncle the Dolanachs and his cousin Stein always maintained and exercised control of the strip of property abutting the driveway. Stein and Stevenson testified that both families treated the crest of the bank that ran from Washington Road up the hill to the stand of pine trees as the line of demarcation for maintaining their respective properties. The Court found the placement of the Dolanachs' mailbox on the disputed strip of property in 1962 as further evidence of their control and the Stevensons acquiescence to the consentable boundary line.

The Court Did Not Abuse Its Discretion When It Disregarded The Property Descriptions In The 1995 Deed From Florence Dolanch To Stein.

Grabowski contends that this Court abused its discretion in finding that the evidence presented was sufficient to prove a consentable line when the deed from Steins mother Florence Dolanch dated September 4, 1995 and recorded June 29, 2001 did not include or mention the portion of the real estate claimed as the consentable line. The establishment of a consentable line is not a conveyance of land within the meaning of the Statute of Frauds because no estate is thereby created. *Hagey v. Detweiler*, 35 Pa. 409, 412 (1860). Therefore such a line may be initiated by oral agreement and proved by parol evidence. *Beals v. Allison*, 161 Pa.Super. 125, 128, 54 A.2d 84, 85 (1947) *Plauchak v. Boling*, 439 Pa. Super. 156, 165, 653 A.2d 671, 675 (1995). Pennsylvania law does not require that a consentable line be reduced to writing and again is a rule of repose.

The Court Considered the Two Surveys and Building Permits but Gave Them Limited Weight

First and foremost this court found that Grabowskis' predecessor in title (the Stevensons) had recognized and acquiesced to the consentable line for at least 50 years prior to their purchase of their property. In addition the Court found that the Grabowskis' had continued to acquiesce to the consentable line from 2001 to 2015. The Court found credible Stein's testimony that until 2003 she was not even aware of any discrepancy with the boundary lines and that she and her family had always believed the correct boundary was the consentable line which the adjoining property owners had always observed. (H.T. at pg. 116)⁵ Stein also testified that she believed that the survey was incorrect and that they continued to plant trees and maintain the property within the boundary line that had been observed for the past 50 plus years (H.T. at pg. 125-26). This Court thus gave little weight to the surveys and building permits as they, like the deed description, are essentially irrelevant to an acquiescence and consentable line determination.

The Courts Admission of Hearsay Testimony of Stein Regarding Statements by her Deceased Mother With Regard to Her Understanding of the Location of the Property Lines Was Not an Error of Law.

In response to a question on cross examination regarding her understanding as to the location of the boundary line the Court admitted Stein's testimony that her understanding was derived from what her mother had always told her about the location of the boundary line over the objection of Grabowski. This Court ruled that it was not being offered for the truth of the matter asserted but in response to defense counsel's cross examination question about the survey and her understanding about the boundary line and why she believed the survey to be incorrect. This admission was not a deciding factor in the Court's finding of a consentable line in favor of Stein and was not considered for the truth of the matter asserted.

The Court Correctly Determined the Consentable Boundary Line, as a Matter of Law.

The court correctly concluded, as a matter of law, the pine trees at the top of the hill and the mailbox at the bottom established the consentable line that the adjacent landowner's recognized and acquiesced to for 50 plus years by maintaining their property up to that line. The court could not find any case law which states that regular maintenance of land is insufficient to establish recognition and acquiescence. But this Court did find two non-precedential Superior Court cases *Durdach v Revta* 2011 WL 7272290 and *Dennis v Palman* WL 347609 that had similar facts as the case sub judice regarding regular yard maintenance. . In the *Durdach* case, Revta installed a drive way that encroached the boundary line and maintained a strip of property abutting the driveway; the Superior Court found that yard maintenance along with the use of the driveway for more than 21 years was sufficient to prove the existence of a consentable line by recognition and acquiescence. In the *Dennis* case the boundary line was marked by two pine trees planted 193 feet away from each other in which the adjoining property owners maintained their respective yards up to that line for 37 years. The maintenance in *Dennis* was primarily mowing, weeding and mulching up to the property line which the Superior Court found to be sufficient to establish recognition and acquiescence. In this case, the Court has found that the maintenance of the disputed property by Stein to include mowing the grass, applying fertilizer, blowing leaves, weeding, planting trees, removing trees, mulching and grading the property. This evidence, along with other evidence such as the removal and planting of trees along the disputed property line and the location of the Steins mailbox and driveway, is sufficient to prove recognition and acquiescence by the parties. The court found clear and convincing evidence that the adjoining property owners had maintained their respective yards up to the consentable line for over 50 years which continued for another 14 years after Grabowski purchased their property and before they made a claim to the disputed property.

CONCLUSION

In conclusion, no reversible error occurred and this Court's findings should be affirmed and Grabowskis' appeal should be dismissed with prejudice.

BY THE COURT:
/McVay, J.

¹ "T.T." refers to the Trial Transcript

² "P.E." refers to the Plaintiff's Exhibits

³ "P.C." refers to Plaintiffs Complaint

⁴ See, *Consentable Lines in Pennsylvania*, 54 Dick. L. Rev. 96 (1949) for a historical review of this unique Pennsylvania common law doctrine.

⁵ H.T. refers to the Hearing transcript

Commonwealth of Pennsylvania v. Edward McDonald

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—Insanity Defense

PCRA petitioner claiming ineffectiveness for failing to raise an insanity defense must present some evidence to support the claim before a hearing is warranted.

No. CC 201513138. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—May 8, 2018.

OPINION

This is an appeal of the denial of the petition filed by Petitioner pursuant to the Post-Conviction Relief Act. On September 15, 2016, the defendant pled *nolo contendere* to two counts of Aggravated Arson, twelve counts of Arson and one count of Causing A Catastrophe. At the first Aggravated Arson count, he received a sentence of imprisonment of not less than 48 months nor more than 96 months followed by a term of probation of five years. He received a sentence of time served (20 months) relative to the second Aggravated Arson count. He received no further penalty at the remaining counts. He was also ordered to pay restitution in the amount of \$115,000. Petitioner only raised one issue in his PCRA petition. He claims that his trial counsel "failed to mount an insanity defense" on behalf of the defendant.¹

It is well established that counsel is presumed effective and the petitioner bears the burden of proving ineffectiveness. *Commonwealth v. Cooper*, 596 Pa. 119, 941 A.2d 655, 664 (Pa. 2007). To obtain relief on a claim of ineffective assistance of counsel, a petitioner must rebut that presumption and demonstrate that counsel's performance was deficient, and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As set forth in *Commonwealth v. Dennis*, 17 A.2d 297, 301 (Pa.Super. 2011),

[i]n our Commonwealth, we have rearticulated the *Strickland* Court's performance and prejudice inquiry as a three-prong test. Specifically, a petitioner must show: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001).

The standard remains the same for claims under Pennsylvania and federal law. A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any of these prongs. *Id.* at 221-222. Moreover, the credibility determinations of a trial court hearing a PCRA petition are binding on higher courts where the record supports such credibility assessments. *Commonwealth v. R. Johnson*, 600 Pa. 329, 356-57, 966 A.2d 523, 539 (2009).

The threshold inquiry in a claim of ineffective assistance of counsel is whether the issue/argument/tactic which counsel has forgone and which forms the basis for the assertion of ineffectiveness is of arguable merit. *Commonwealth v. Ingram*, 404 Pa. Super. 560, 591 A.2d 734 (Pa.Super. 1991). Counsel cannot be considered ineffective for failing to assert a meritless claim. *Commonwealth v. Tanner*, 600 A.2d 201 (Pa.Super. 1991).

The record does not establish that trial counsel rendered ineffective assistance of counsel. Petitioner's main claim is that trial counsel did not pursue an insanity defense in the trial court. Legal insanity is established if, "[a]t the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong." 18 Pa.C.S. § 314(c)(2). Petitioner's claim must fail because there has been absolutely no evidence provided to this Court that the petitioner was legally insane at the time he committed the crimes to which he pled *nolo contendere*. Trial counsel could not have rendered ineffective assistance of counsel for failing to raise an insanity defense for which no factual or legal support existed. PCRA counsel has similarly offered no factual or legal support for such a claim.² Accordingly, the PCRA petition was properly denied.

BY THE COURT:

/s/Mariani, J.

Date: May 8, 2018

¹ In his 1925(b) statement, Petitioner raised three issues: (1) Trial counsel was ineffective for never discussing a not guilty by reason of mental disease defense with defendant, and for failing to file notice of intent to plead not guilty on such grounds thereby shifting the burden of proof to the Commonwealth; (2) Trial counsel was ineffective for failing to introduce any mitigating evidence or testimony; and (3) Trial Counsel was ineffective for failing to object to the trial court's improper use, as an aggravating factor, of defendant's failure to obtain mental health treatment in sentencing. Moreover, defendant counsel should have used defendant's mental illness to support mitigation. Issues (2) and (3) were not raised in Petitioner's PCRA petition and are being raised for the first time on appeal. They are clearly waived. See *Commonwealth v. Coleman*, 19 A.3d 1111, 1118 (Pa.Super. 2011) (issues raised for the first time in a 1925(b) statement are waived). Issue (1), as stated in the 1925(b) statement, differs from the issue specifically raised in the PCRA petition. Because, however, issue (1) does purport to raise an issue related to an insanity defense, this Court will address the claim that was raised in the PCRA petition in this opinion.

² PCRA counsel states in the 1925(b) statement that this Court should have granted a hearing on the PCRA petition because the Commonwealth would have had the burden at the hearing to disprove the existence of an insanity defense. That statement is simply incorrect. A defendant pleading an insanity defense bears the burden of proving by a preponderance of the evidence that he did not know either the nature and quality of the act he committed, or that what he was doing was wrong. *Commonwealth v. Sohmer*, 546 A.2d 601, 604 (Pa. 1988). Petitioner has provided absolutely no evidence to support such a contention.

Commonwealth of Pennsylvania v. Treazure Toney

Criminal Appeal—Guilty Plea—Decertification—Robbery

Defendant who shows lack of respect for authority and is extremely uncooperative and defiant is not amenable to juvenile supervision.

No. CC 2017-00591. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—May 16, 2018.

OPINION

This is a direct appeal wherein the defendant, Treazure Toney, appeals from the judgment of sentence of February 16, 2018, after he pled guilty to one count of Robbery, in violation of 18 Pa.C.S.A. 3701(a)(1)(i). Pursuant to a negotiated guilty plea, the defendant was sentenced to a term of imprisonment of not less than ten months nor more than 20 months. This timely appeal followed. The defendant claims that this Court erred in denying the defendant's request to decertify his case to juvenile court.

The evidence admitted at the decertification hearing established that during the offense to which the defendant pled guilty, the defendant (who was then 16 years old) and another unidentified person committed an armed robbery on a 14 year-old male on January 9, 2017. The defendant contacted the victim to meet him via a Facebook message. While the victim was waiting for the defendant, the defendant and another person arrived. Both the defendant and his coconspirator were armed with handguns. The defendant stuck a handgun into the right side of the victim and then to the victim's head and went through his pockets and took his belongings. The defendant threatened the victim by telling him he would come back and shoot up his house if the victim notified the police. The defendant stole \$180 and an iPhone. The defendant fled the scene after the robbery and police officers were able to track him by following his footprints in the snow. The defendant was found hiding on a roof of a shed. He was ordered to come down from the roof. The defendant refused to present his hands at the time of the arrest. The defendant was forcibly arrested. While back at the police station, in the presence of his mother, the defendant unzipped his pants and asked the arresting officer if he had "ever seen a black dick before?" The defendant then purposefully urinated on the police station floor.

The defendant was charged in adult court with using a firearm in connection with a robbery, a specific offense excluded from the definition of a "delinquent act". The law requires that this case proceed in adult court unless the defendant can demonstrate, by a preponderance of the evidence, that proceeding in juvenile court serves the public interest. See 42 Pa.C.S. §6322(a). As set forth in that statute "[i]n determining whether the child has so established that the transfer will serve the public interest, the court shall consider the factors contained in section 6355(a)(4)(iii) (relating to transfer to criminal proceedings)."

In determining whether the public interest can be served by transferring a case to juvenile court, section 6355(a)(4)(iii) of the Juvenile Act mandates courts to consider the following factors:

- (A) the impact of the offense on the victim or victims;
- (B) the impact of the offense on the community;
- (C) the threat to the safety of the public or any individual posed by the child;
- (D) the nature and circumstances of the offense allegedly committed by the child;
- (E) the degree of the child's culpability;
- (F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
- (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:
 - (I) age;
 - (II) mental capacity;
 - (III) maturity;
 - (IV) the degree of criminal sophistication exhibited by the child;
 - (V) previous records, if any;
 - (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;
 - (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
 - (VIII) probation or institutional reports, if any;
 - (IX) any other relevant factors . . .

42 Pa.C.S. § 6355(a)(4)(iii).

During the transfer hearing, the report and testimony of psychologist, Alice Applegate, was presented by defendant.¹ Dr. Applegate concluded that the defendant is amenable to treatment in the juvenile justice system. This Court considered all of the evidence offered at the transfer hearing, including the report and testimony of Dr. Applegate. This Court's decision not to transfer the defendant's case to juvenile court was based on the the serious impact of the armed robbery on the victim; the impact of the offense on the community; the serious threat to the safety of the public or any individual posed by the defendant; the nature and circumstances of the offense allegedly committed by the defendant and the degree of the defendant's culpability. While there was evidence presented that the defendant was amenable to treatment in the juvenile system, this Court believes that the factors cited above outweighed the evidence of amenability to treatment.

There is no question that the circumstances of the instant offense were serious. Its impact on the victim and the community cannot be overstated. In this Court's view, the defendant contacted the victim to meet him. As this Court noted during the hearing, the meeting was actually a set-up. The defendant pulled a gun, held it to the victim's head and forcibly robbed the victim of money and a cell phone. The defendant then threatened the victim and his family with physical harm if the victim contacted the police. This Court views this offense as gravely serious and the defendant played the central role in the robbery.

In addition to the circumstances of the offense of conviction, this Court also considered the defendant's history of being uncooperative, defiant and disrespectful to authorities in settings where other juveniles are present (at school). Although Dr. Applegate opined that the defendant is amenable to treatment in the juvenile justice system, Dr. Applegate's report contained 13 pages of notations concerning the defendant's defiant conduct toward authorities when he was in school. The defendant persistently engaged in fighting behavior with male and female students and he was constantly disruptive in class. The behavior continued between ages 5 and 16. On December 14, 2016, at age 16, the defendant was found in possession of marijuana at Carrick High School.

This Court also considered the defendant's absolute disregard for the authority of police officers. In addition to the incident at the police station in which the defendant urinated on the floor of the police station, the defendant also had prior interactions with the law that demonstrated his lack of respect for authority. On November 12, 2016, the defendant stole a vehicle and led police on a chase that resulted in the defendant's fleeing the police at a speed of approximately 75 miles per hour. The defendant lost control of the vehicle and wrecked the vehicle.

This Court also considered that, at the time of the decertification hearing, the defendant was four days shy of his 17th birthday.

Moreover, the threat to the safety of the individual who was robbed in this case, in particular, and the public in general, was not inconsequential. The robbery in this case was pre-planned and the defendant used social media to lure the victim to the location of the robbery, thereby demonstrating substantial criminal sophistication. Though the defendant does not have a lengthy criminal record, it appears as though his criminal conduct has escalated in the year surrounding the offense of conviction. The record demonstrates that the defendant is a threat to the community.

Considering all of the relevant factors, this Court believes that the public interest would not be served by transferring this case to juvenile court. Accordingly, the judgment of the Court should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: May 16, 2018

¹ The Commonwealth stipulated to Dr. Applegate's qualifications to testify as an expert witness in this case. This Court also recognized Dr. Applegate's expertise in this case as it has in numerous other cases.

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PLJ

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**Commonwealth of Pennsylvania v.
Allen Wade**

Criminal Appeal—Homicide—Evidence—Constitutional Issue (Due Process)—Frye Hearing—Relevance—Expert PowerPoint Out with the Jury—Polygraph

Multiple evidentiary issues related to lengthy double homicide case.

No. CC 201404799. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Borkowski, J.—May 9, 2018.

OPINION

PROCEDURAL HISTORY

Appellant, Allen Wade, was charged by criminal information (201404799) with two counts of criminal homicide;¹ two counts of robbery;² one count each of burglary;³ person not to possess a firearm;⁴ and access device fraud;⁵ and three counts each of theft by unlawful taking;⁶ and receiving stolen property.⁷

On May 7, 2014, the Commonwealth filed its notice of intention to seek the death penalty.

Following multiple pretrial motions, hearings, and status conferences, Appellant proceeded to a jury trial on May 2, 2016. At the conclusion of the jury trial, the jury found Appellant guilty of two counts of first degree murder, two counts of robbery, one count of burglary, three counts of theft by unlawful taking, and one count of access device fraud. The count of receiving stolen property was withdrawn by the Commonwealth. Additionally, the firearms count was severed and assigned a separate case number, CC 201604975, which was subsequently *nolle prossed* on July 22, 2016.

On May 24, 2016, Appellant proceeded to his penalty phase hearing, at the conclusion of which the jury was declared hopelessly deadlocked, and on May 26, 2016, Appellant was sentenced by the Trial Court as follows:

Count one: first degree murder – life imprisonment;

Count two: first degree murder – life imprisonment to be served consecutive to the period of incarceration imposed at count one;

Count three: robbery – a period of incarceration of ten to twenty years to be served consecutive to the period of incarceration imposed at count two;

Count four: robbery – a period of incarceration of ten to twenty years to be served consecutive to the period of incarceration imposed at count three;

Count five: burglary – a period of incarceration of ten to twenty years to be served consecutive to the period of incarceration imposed at count four.

On June 6, 2016, Appellant filed a post sentence motion, which was denied by the Trial Court on October 3, 2016.

This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

On November 18, 2016, Appellant was ordered to file his Concise Statement of Errors within 21 days of receipt of all requested transcripts. Following receipt of 33 transcripts, Appellant filed his Concise Statement of Errors on October 16, 2017. Appellant raises the following issues on appeal, and they are presented below exactly as Appellant stated them:

I. The trial court abused its discretion by admitting any evidence regarding a hat that was allegedly involved in a prior burglary of the victims' home. First, the evidence regarding this hat was not sufficient to prove that Mr. Wade was involved in this prior bad act. Second, the evidence regarding the hat was not relevant to prove his involvement in subsequent homicides. Third, any comments made by the sisters to other people who testified at trial regarding the hat and its connection to the prior burglary were impermissible hearsay that did not fall into a hearsay objection.

II. The trial court abused its discretion during trial by permitting the PowerPoint slides used during Dr. Lorenz's direct testimony to go back to the jury. This was prejudicial and an abuse of discretion for the following reasons:

a. The trial court abused its discretion by permitting the PowerPoint slides used during Dr. Lorenz's direct testimony, emphasizing his expert findings and opinions, to go back to the jury since these slides are akin to a transcript of Dr. Lorenz's direct examination on his complicated findings and expert opinions. This would be prohibited under Pennsylvania Rule of Criminal Procedure.

b. These slides summarized Dr. Lorenz's direct examination testimony. The trial court allowed the PowerPoint slides of Dr. Lorenz in the jury room during deliberations, which placed undue emphasis on his opinions and findings. As such, the importance of Dr. Lorenz's direct testimony and his findings were skewed and overemphasized, which violated due process. Also, allowing these slides to be used during deliberations placed undue emphasis on the contents of the slides and gave the jury the opportunity to abandon its duty to rely on its collective recollection of the evidence presented at trial.

III. The edited video excerpts of the surveillance videos and/or full surveillance videos should not have been admitted during trial. They were not properly authenticated, lacked a proper foundation, and they were irrelevant for the following reasons:

a. The witnesses who testified about the excerpts and/or full videos, such as Detective Wade Sarver and William Popovic, were not competent, able, or qualified to state that the excerpts and/or full videos shown to the jury were a fair and accurate depiction of the suspect and his activities at the times and places the recordings were made.

b. No one involved in security operations with any of the businesses or with sufficient knowledge of the recording procedures presented demonstrative knowledge that the matters presented in the video excerpts and/or full videos were what the Commonwealth claimed them to be.

c. Further, no one associated with the business' security operations and surveillance reviewed the excerpts and/or videos to testify if they were accurate.

d. Also, no one involved in security operations with Midas or Sunoco testified regarding the time and date discrepancies in the Midas and Sunoco surveillance videos. Wade Sarver and William Popovic were not competent or qualified to state that the videos were a fair and accurate depiction of the suspect and his activities at the times and places of these recordings from Midas or Sunoco.

e. Finally, no one involved in security operations from Sunoco testified about surveillance recordings, security operations or procedures with the company, or the accuracy of the videos.

IV. The trial court abused its discretion by admitting evidence during trial that Mr. Wade refused to cooperate with police by agreeing to provide them with a DNA sample. This evidence was irrelevant for any purpose other than showing that Mr. Wade did not cooperate with police, which prejudiced him before the jury. Introduction of this irrelevant evidence warrants a new trial.

V. The trial court abused its discretion by not granting a mistrial after the Commonwealth elicited testimony from a witness, Matthew Buchholz, that he took a polygraph examination relating to the double murder. This reference to the polygraph, which the jury would assume that Mr. Buchholz passed, prejudiced Mr. Wade to the point that it deprived him of a fair trial. Mr. Buchholz's reference to the polygraph implied that Mr. Buchholz was not involved in the double murder even though the defense presented a theory that Mr. Buchholz was more likely the killer. The curative instruction could not remedy the prejudice suffered by Mr. Wade.

VI. The Commonwealth's failure to provide all data and information relating to the process and findings of TrueAllele software and the findings and opinions of Dr. Mark Perlin violated Mr. Wade's rights under the Sixth and Fourteenth Amendments of the United States Constitution and under Article I, Section 9 of the Pennsylvania Constitution. Specifically, his due process rights were violated for the following reasons:

a. Dr. Mark Perlin, a Commonwealth expert who tied Mr. Wade's DNA to the crime, did not provide the Commonwealth or Mr. Wade with impeachment evidence and exculpatory evidence showing that some of the test results generated from Dr. Perlin's computer software might not have connected Mr. Wade to the murders. Dr. Perlin chose the runs he felt were most germane and conducted analysis of those runs, while ignoring the rest that he decided were not germane. The data pertaining to these other runs was not provided to defense and the defense was not provided with any way for an expert to analyze the data on these other runs that Dr. Perlin decided were not germane. That date might have raised a reasonable doubt as to guilt.

b. Dr. Mark Perlin failed to provide the process his software system used to analyze and generate data connecting Mr. Wade to the crimes, and he failed to sufficiently describe the grounds for his opinions. It is unclear the process and basis Dr. Perlin and his software system used to arrive at their findings and opinions. The process he and his software used could not be reviewed by the defense, the software source code was not provided for the defense to ascertain whether the program functioned without bugs or that the findings were accurate, and all of the data was not provided for the defense to ascertain the process used or the accuracy of the findings. The defense had to accept the conclusions of Dr. Perlin and his software with no way to review or challenge his findings. This violated Mr. Wade's confrontation rights, and it violated his rights to due process and a fair trial.

VII. The trial court abused its discretion by granting the motion to quash the subpoena filed by the defense that requested Dr. Perlin supply the TrueAllele source code. First, the Commonwealth lacked standing to object to a subpoena *duces tecum* issued to a non-party witness in a criminal case when that witness did not object to the subpoena and the Commonwealth lacked possession of the information sought by the defense. Also, even if the Commonwealth had standing, a quash order was improper given the vital importance of the information sought by the defense, the severity of the penalty to be imposed in the event of a conviction, and the absence of harm to the witness since a protective order would have ensured that any trade secrets would be protected.

VIII. The trial court abused its discretion by failing to grant a *Frye* hearing regarding whether Dr. Perlin's methodology and opinions and the methodology and conclusions of his computer software, TrueAllele, were novel and generally accepted in the relevant scientific community or the field of criminal law.

a. The trial court relied on the ruling in *Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012); however, the ruling in *Foley* was distinguishable from Mr. Wade's case. The holding in *Foley* is very limited and the fact in Mr. Wade's case are markedly different from the facts in *Foley*.

b. In the alternative, if *Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012), is applicable, and a *Frye* hearing is foreclosed by that ruling, Mr. Wade presents this issue that a *Frye* hearing is warranted regarding Dr. Perlin's opinions and his TrueAllele computer software so Mr. Wade can seek relief from a nine-judge *en banc* panel of this Court and/or from the Pennsylvania Supreme Court. A *Frye* hearing is warranted since Dr. Perlin's scientific testimony regarding probabilistic genotyping and his TrueAllele computer software is novel, there is a legitimate dispute regarding the reliability of Dr. Perlin's conclusions, his theories, and his technique, and the reliability of the conclusions generated by TrueAllele, and Dr. Perlin's methodology and the methodology of TrueAllele do not have general acceptance in the relevant scientific community or the field of criminal law. Additionally, the *Foley* Court never discussed the science behind TrueAllele or determined how TrueAllele methodology and conclusions were not novel scientific evidence. Contrary to the holding in *Foley*, there are major concerns about the validity and reliability of TrueAllele. No one other than Dr. Perlin understands how TrueAllele works. There are serious due process problems with TrueAllele source code being utilized to convict people and TrueAllele inferences leading to matches of the defendant based on the genotype of the defendant.

FINDINGS OF FACT

In February 2014, sisters Sarah and Susan Wolfe resided together at 701 Chislett Street in the East Liberty section of the City of Pittsburgh. Appellant resided next door at 703 Chislett Street with his girlfriend, LaShawn Rue. (T.T.(II) 915, 931-932); T.T.(V) 2110).⁸

On February 7, 2014, at approximately 1:00 P.M., Matthew Buchholz, Sarah's boyfriend, received a Facebook message from Garrett Sparks, a physician who worked with Sarah at UPMC. Sparks asked Buchholz to check on Sarah because she was late for work that morning and nobody had heard from her. (T.T.(I) 101, 111). At approximately the same time, Pittsburgh Police Officer Frank Walker received a "well check" request for Susan from her co-worker because Susan also had not yet arrived at work that morning. (T.T.(I) 156).

Buchholz immediately drove to the Wolfe residence, and knocked on the door but did not receive a response. Officer Walker arrived shortly thereafter and spoke with Buchholz. (T.T.(I) 112, 156-159). Buchholz and Officer Walker surveyed the perimeter of the home and noticed that Sarah's vehicle, a lime green Ford Fiesta, was not parked on the street. Buchholz left to retrieve a spare key to the Wolfe residence from his nearby residence and returned within ten minutes to open the door for Officer Walker. (T.T.(I) 112-113, 159-160).

Officer Walker and Buchholz entered the residence together. The alarm had been disarmed, and the two proceeded further into the residence to look for Sarah and Susan. (T.T.(I) 113-114). Buchholz called out for Sarah, but there was no response. He noticed that the basement door, which was usually only cracked open, was wide open. He looked through the doorway and observed a pair of bare legs on the floor of the basement. He immediately pulled back and called for Officer Walker. Buchholz then noticed that the entryway table was broken, and that blood, which was later matched to Susan, was spattered on the walls in the entryway. He ran outside onto the porch and collapsed. He remained seated on the porch until he was taken to police headquarters for questioning. (T.T.(I) 114-117, 160; T.T.(III) 1447-1448).

Officer Walker proceeded to the basement door. He looked down into the basement and observed Susan face down, nude, with an apparent gunshot wound to the back of her head. A short distance away, he observed Sarah with a blanket over her face and blood coming out from underneath the blanket and her left arm was "up in the air." (T.T.(I) 160-161). Officer Walker called for a medic, backup officers, supervisors, and ordered Buchholz to remain on the porch. (T.T.(I) 161). Backup officers arrived and secured the scene. Several homicide detectives, the mobile crime unit, and the medical examiner arrived shortly thereafter and began processing the scene. (T.T.(I) 179, 185, 192, 202, 345).

Susan was lying face-down in the basement, nude, on top of a pile of clothing, and was pronounced dead on scene. Upon autopsy the cause of death was determined to be a penetrating gunshot wound to the head. Susan suffered skull fractures and hemorrhages as a result of the gunshot wound. Susan also suffered blunt force trauma to the head, multiple lacerations of the skull, and seven full thickness lacerations (a laceration where the bone is exposed) to the back hemisphere of her head. The full thickness lacerations indicated that she was struck with a hard blunt instrument. She additionally suffered blunt force trauma to the trunk, and abrasive injuries and faint contusions on her back and chest, as well as abraded contusions on her face. There was vomit on the ground beneath her face, and feces exiting her rectum. Toilet paper was attached to the feces. The presence of vomit indicated that she was alive at some point while she was in the basement. A spent .38/.357 bullet was recovered from between the two cerebral hemispheres near the front of the brain during her autopsy. The bullet was damaged, but the crime lab was able to identify its rifling characteristics as six lands and grooves and a right hand twist. (T.T.(I) 204-205, 222, 225-230, 233, 239-243, 246-248; T.T.(III) 1251, 1259).

Sarah also was lying on the floor of the basement, with a comforter over her head, and she was also pronounced dead on scene. Upon autopsy the cause of death was determined to be a penetrating gunshot wound to the head. Sarah suffered multiple contusions and abrasions on her face and neck due to some form of blunt force trauma. She also suffered numerous contusions and abrasions on all four extremities, consistent with being dragged down the basement steps. Sarah's clothes exhibited bleach marks and a purple sticky, slippery liquid was found on her purse and her pants. The basement smelled of bleach, and there was fabric softener/detergent, consistent with the liquid on the purse, on the steps leading to the basement. During autopsy, a spent .38/.357 caliber bullet was recovered from inside her right eye socket. The bullet was heavily damaged, but had a rifling classification of six lands and grooves with a right hand twist, and could have been discharged from the same firearm that discharged the bullet recovered during Susan's autopsy. (T.T.(I) 253-254, 257-258, 267, 278-279, 370, 372, 377-378; T.T.(II) 520; T.T.(III) 1247-1249, 1262).

No car keys, cell phones, or bank cards were found near the sisters or in Susan's purse which was found near the bodies. (T.T.(I) 397; T.T.(II) 559; T.T.(III) 1365-1366). A search warrant was obtained for the bank records of the two sisters. The search revealed that an individual attempted to use both of their debit cards at the East Liberty Citizens' Bank branch ATM early that morning. Specifically, the following transactions were attempted or completed: (1) at 12:44 A.M. a withdrawal was denied using Sarah's card; (2) at 12:45 A.M. a withdrawal was denied using Sarah's card; (3) at 12:46 A.M. a withdrawal was successfully made using Sarah's card; (4) at 12:52 A.M. a withdrawal was denied using Sarah's card; and (5) at 12:53 A.M. a withdrawal was denied using Susan's card. (T.T.(II) 675, 689-692).

A "BOLO" was issued for Sarah's Ford Fiesta, and in the early morning hours of February 8th the vehicle was located in the business district of East Liberty on South Whitfield Street. This location was approximately three blocks from the ATM machine where the withdrawals were attempted or completed. The vehicle was secured and subsequently towed for processing. (T.T.(II) 601-604).

Uniformed Police Officer Gregory McGee started his shift on February 8, 2014, at 7:00 a.m. Officer McGee, after finishing up some initial calls, went to Whitfield Street where the Wolfe vehicle was found. Officer McGee walked on Whitfield Street away from that area toward Station Street and soon discovered what he described as a "pattern" of discarded clothing, including a winter black knit hat and a pair of grey sweatpants. (T.T.(II) 618). The black knit hat was laying just off the sidewalk on top of snow and leaves in a pile of mulch. The sweatpants were discovered approximately sixty feet ahead and were "arranged" on the sidewalk, as if the person who had worn them had been standing up and just pulled their pants down and stepped out of them like a "fireman's pants." (T.T.(II) 617). The sweatpants looked as though they had not been disturbed and had been there for only a short period of time. Officer McGee also observed a University of Pittsburgh Medical Center (UPMC) business card approximately one foot away from the sweatpants. The card was that of Cameron Mager, who was a social worker at UPMC. The number "4991" was handwritten on the back. Officer McGee advised his supervisor as to what he had found and was directed to call the homicide detectives who met him at the scene shortly thereafter. After the detectives arrived, Officer McGee continued to canvass the area and observed some black knit items, later identified as a balled up pair of socks, in a garbage can in the rear of the Midas Muffler Shop further on Whitfield Street. (T.T.(II) 611-612, 615-624, 650-651, 673).

The mobile crime unit arrived, documented and collected the items discovered on Whitfield Street: the sweatpants, the business card, the knit hat, and the socks found in the garbage can outside the Midas Muffler Shop. All items were submitted to the crime lab for testing. (T.T.(II) 642-657). Additionally, the vehicle was inventoried after being towed, and several items were tested

for DNA and/or fingerprints. (T.T.(III) 1128-1136). In total, over 100 items of evidence were collected from the Wolfe residence, Sarah's vehicle, Whitfield Street, and the bodies of Susan and Sarah Wolfe. All of the items were submitted for forensic testing. (T.T.(III) 1278-1351).

The items from Whitfield Street were submitted for DNA testing.' The crime lab found that: (1) the waistband of the sweatpants contained a mixture of at least three persons, of which Appellant and Rue, Appellant's girlfriend, could not be excluded as possible contributors; (2) a possible bloodstain on the sweatpants contained a mixture of two individuals, with Appellant as the major contributor; and, (3) the sock contained a mixture of at least three persons, from which Appellant could not be excluded. The probability of selecting another person in the African-American population with the same DNA profile as Appellant is 1 in 3.95 quintillion. (T.T.(III) 1459-1468).

During the autopsy, red/brown staining was found on the leading edge of three of Susan's right hand fingernails. These were clipped and submitted to the Allegheny County Crime Lab. The crime lab determined that the fingernails contained a mixture of at least three individuals, and that Appellant, Rue, and Susan could not be excluded. Due to restrictions in the county crime lab math models regarding determining major and minor contributors in mixtures of this small size, the crime lab sent the data to Dr. Mark Perlin of Cybergenetics for additional testing using probabilistic genotyping (TrueAllele). Using TrueAllele, it was determined that the DNA found on Susan's fingernails matched Appellant, and that it was 6.06 trillion times more probable than a coincidental match to an unrelated African American individual. (T.T.(III) 1322, 1476-1477; T.T.(IV) 1599-1601, 1678, 1803).

The UPMC business card found on Whitfield Street next to the sweatpants was identified by Cameron Mager as a business card that he gave to his clients in his capacity as a social worker at UPMC. He provided one such card to Susan Wolfe on an initial meeting in September 2013. He never met with Appellant. The number "4991" found on the back of the business card was not written by Mager or the crime lab. The number "4991" was the last four digits of the Wolfes' childhood family telephone number in the state of Iowa where the sisters grew up and their parents still lived. (T.T.(II) 660, 662-664, 669-670, 672-673, 925-926).

Police canvassed the East Liberty area for surveillance videos to track the whereabouts of the individual who had abandoned Sarah's vehicle and the person who had attempted to use the sisters' debit cards. They sought videos from several area businesses, and recovered videos from Citizens Bank, Target, Carnegie Library, Monet Capital at Walnut and Highland, Midas Muffler Shop, and the Sunoco Gas/Convenience Store at East Liberty Boulevard and Highland Avenue. (T.T.(II) 682-684, 703, 724-726, 728-730, 739, 742, 745, 757, 765-766, 777-778, 790-792, 794, 830-831).

A compilation of the videos was played at trial, which spanned the timeframe of February 7, 2014 at 12:32 a.m. to approximately 1:12 a.m., showed Appellant dressed in a red jacket, grey sweatpants, and white shoes. The videos further established that Appellant drove Sarah's Lime Green Ford Fiesta past the Carnegie Library around 12:32 a.m. and parked the vehicle on Whitfield Street. He exited Sarah's vehicle and walked toward Centre Avenue. Appellant then walked through the East Liberty area, made a left onto Penn Avenue, and walked past a Citizen's Bank ATM and Target Store. Appellant then crossed Penn Avenue toward Centre Avenue and made a left onto Kirkwood Street. Minutes later he crossed back over Penn Avenue and walked toward the area he had originally come from eventually stopping at the Citizens' Bank where he attempted to make a withdrawal from the ATM there. While at the ATM, he held two PNC Bank ATM cards in front of the ATM camera and attempted to cover his face with the light-colored shirt he was wearing. (T.T. (I) 35). At the ATM he used the sisters' PNC Bank ATM cards ultimately getting \$600 from the machine using Sarah's ATM card. After successfully making the ATM withdrawal, Appellant walked across Penn Circle toward Whitfield Street near where he had parked Sarah's vehicle earlier. Appellant thereafter discarded the grey sweatpants he was wearing outside of the Midas Muffler Shop on Whitefield Street and continued walking toward Highland Avenue. (T.T. (I) 32-35; T.T.(II) 609, 689-692, 800-843, 883-886; T.T.(V) 2322-2325, 2328-2329, 2332).

Additionally, Appellant was observed in one of the videos emptying his pockets and throwing something into the trash can at the front entrance of the Sunoco store on Highland Avenue before entering. (T.T.(II) 896-897). The police conducted a garbage pull on the dumpsters at the Sunoco store on February 13, 2014, and located six bags that were from the outside of the Sunoco store.¹⁰ In one of the bags, they found an "Iowa Prison Industries" pen. (T.T.(II) 898-900, 903). Iowa Prison Industries does not conduct business in Pittsburgh. Susan and Sarah's sister, Mary Wolfe, who was an elected member of the Iowa General Assembly, worked with Iowa Prison Industries. As part of this relationship, Mary received pens from Iowa Prison Industries during facility tours that she would keep at her home office in Iowa. Prior to moving to Pittsburgh, Susan worked in the reception area of her sister's home office and often used those pens. (T.T.(II) 913, 915-917, 920-921; T.T.(III) 1084).

Still photographs of Appellant were created from the Sunoco video and distributed to uniform and patrol officers. (T.T.(III) 1230-1231). On February 19, 2014, Pittsburgh Police Officer Wade Sarver was on patrol in the area, attempting to locate the individual from the Sunoco store video. He observed fellow Officer John Svitek talking to Appellant on his porch at 703 Chislett Street, and immediately recognized Appellant as the individual in the Sunoco video. Officer Svitek concluded his brief conversation with Appellant, left Appellant's porch, and spoke with Sarver in the street. Officer Svitek had been in the area talking to the Appellant because he believed he fit the description of the actor based upon a picture he had been given earlier in the investigation by Zone Five command staff. The two officers conferred about their perception that Appellant matched the actor in the Sunoco video, and they returned to 703 Chislett to maintain contact with Appellant as well as contact their superiors and homicide detectives. (T.T. (III) 1171-1172, 1175-1178). Appellant answered the door and invited the officers inside. Sarver contacted the homicide office to actually conduct an interview with Appellant, and he waited with Appellant until they arrived, approximately fifteen minutes later. (T.T.(III) 1178-1180).

Homicide Detectives interviewed Appellant at his home and showed him the Sunoco still photo. Upon viewing the photo, Appellant replied, "that sure looks like me." (T.T.(V) 2021-2022). Appellant was subsequently transported to the homicide office and formally interviewed there. When asked if he had ever been inside 701 Chislett Street, Appellant told detectives that he had never been in that residence. Without any mention of DNA or semen, Appellant gratuitously remarked that they would never find his DNA or semen inside the house. (T.T.(V) 2022, 2035-2036). Appellant also told the detectives that he previously owned a .380 caliber firearm, but he had since sold it. (T.T.(V) 2037).

In investigating Appellant's statement that he had never been in the Wolfe residence before, the detectives discovered that Susan and Sarah had been the victims of a burglary on December 30, 2013, wherein two televisions and two cable boxes were stolen. (T.T.(III) 1197-1198). In that incident the means of entry was toward the back of the house, on the same side as Appellant's residence, through a small ground level window that had been pried out, a maneuver that would have taken a lot of time and tools. (T.T. (III) 1198-1200). The sisters had reported the burglary to authorities, and the police advised the sisters to get a security system. (T.T.(III) 1203). The following day, Officer Yolanda Roberts visited the home and collected a knit hat from the kitchen

counter, which the sisters told police did not belong to them. (T.T.(III) 1215, 1217). The hat had not been subject to further testing at that juncture but was retained in the police evidence room.

That knit hat was submitted to the crime lab for DNA testing as part of the homicide investigation. The crime lab determined that Sarah and Susan were excluded, but could not draw any conclusions regarding Appellant's DNA profile. The crime lab recommended that the data be sent to Dr. Perlin for probabilistic genotyping. Using TrueAllele, it was determined that Susan and Sarah were excluded, and Appellant's DNA matched the DNA found on the hat, with a finding that it was 65.3 thousand times more probable than a coincidence. (T.T.(IV) 1725, 1805).

Appellant was arrested and charged in the above-captioned matter with two counts of Criminal Homicide, two counts of Robbery, one count of Burglary, three counts of Theft by Unlawful Taking, one count of Access Device Fraud, and one count of Person Not to Possess a Firearm.

DISCUSSION

I.

Appellant alleges in his first claim that the Trial Court abused its discretion by admitting evidence of a hat that was allegedly involved in a prior burglary of the victims' home on December 30, 2013. This claim is without merit.

Appellant alleges that: (A) the evidence regarding the hat was insufficient to prove that Appellant was involved in this prior bad act; (B) the evidence regarding the hat was irrelevant to his involvement in the homicides; and (C) the comments made by the sisters to the officers regarding the hat were impermissible hearsay that did not fall into any hearsay objection.

The applicable standard for an abuse of discretion is as follows:

An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Jackson, 785 A.2d 117, 118 (Pa.Super. 2001)(citations and quotations omitted).

A.

Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character; however, this evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Pa.R.E. 404(b).

At trial the Commonwealth introduced evidence of a hat which was left at Sarah and Susan's residence from a burglary on December 30, 2013, five weeks prior to the murders. (T.T. (III) 1215). Additionally, the Commonwealth introduced Dr. Perlin's probabilistic genotyping evidence, which concluded Appellant's DNA matched the DNA found on the hat and was 65.3 thousand times more probable than a coincidence. (T.T. (IV) 1725, 1805). The Trial Court correctly admitted the evidence related to the hat as it was not introduced to prove Appellant's propensity to commit crimes, but was introduced to show "potential identity, motive and opportunity" pursuant to Pa.R.E. 404(b)(2). (T.T. (I) 405). See *Commonwealth v. Baez*, 720 A.2d 711, 721-722 (Pa. 1998) (holding that testimony concerning blood, hair, and fingerprint samples collected from defendant during investigation of unrelated rape charge was admissible to prove identity in a rape/murder trial).

Additionally, it should be noted that the Trial Court offered to give a cautionary instruction to the jury at the conclusion of the direct testimony of Detective Roberts; however, the defense declined the Trial Court's offer. (T.T. (III) 1218). As such, the Trial Court did not abuse its discretion by permitting the introduction of the evidence related to the hat.

B.

Evidence is relevant if it tends to make the existence or non-existence of a material fact more or less probable and is admissible if the probative value outweighs: the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative evidence. See Pa.R.E. 401, Pa.R.E. 402, and Pa.R.E. 403. The Superior Court has long held that, "Generally, evidence of prior bad acts is not admissible for the sole purpose of demonstrating a criminal defendant's propensity to commit crimes. However, 'prior bad acts' evidence may be admissible in certain circumstances where it is relevant for some other legitimate purpose and not utilized solely to blacken the defendant's character." *Commonwealth v. Russell*, 938 A.2d 1082, 1092 (Pa.Super.2007)(see also *Commonwealth v. Melendez-Rodriguez*, 856 A.2d 1278, 1283 (Pa.Super.2004).

Further, "It is well-established that reference to prior criminal activity of the accused may be introduced where the evidence is relevant to some purpose other than demonstrating defendant's general criminal propensity, such as to demonstrate the following: (1) motive; (2) opportunity; (3) intent; (4) preparation; (5) plan; (6) knowledge; (7) identity; or (8) absence of mistake or accident." *Id.* at 1092; see also Pa.R.E. 404(b)(2). If the evidence is being offered to establish these factual questions in a criminal case, then the evidence is admissible only if the probative value outweighs the danger of unfair prejudice to the defendant. *Id.* at 1092; see also Pa.R.E. 404(b)(3).

The Trial Court determined the statement in question was relevant and probative, determining that the evidence tended to establish that Appellant had been inside the sisters' residence previously more probable. As such, the statement went to establish identity, opportunity, and/or motive in the present case. (Motions Transcript, Oct. 29, 2015, p. 42)(T.T.(I) 404). The probative value of showing that Appellant had been in the sisters' residence previously outweighed the potential of unfair prejudice to Appellant. See Pa.R.E. 404(b)(3).

Therefore, the evidence was relevant and properly admitted. As such, the Trial Court did not abuse its discretion by permitting the introduction of the evidence related to the hat.

C.

Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing, and a party offers the statement into evidence to prove the truth of the matter asserted in the statement. Pa.R.E. 801.

At trial Detective Yolanda Roberts testified that on December 30, 2013, she and her partner responded to a burglary at 701 Chislett Street. (T.T. (III) 1209-1210). Detective Roberts further explained the procedure taken in investigating the burglary, which included asking the homeowners, Susan and Sarah, if anything was out of place or was there anything the police could collect that may help in the investigation. (T.T. (III) 1214-1215). To explain the response of Susan, Detective Roberts testified "she pointed out

there was a hat, and the hat was on the counter next to the ceramic bowl. And she said that the hat did not belong to anyone in the home, and the hat did not belong to her.” (T.T. (III) 1215). As a result, Detective Roberts secured the hat, and it was thus available as evidence in the present case.

This statement does not constitute hearsay as Susan’s statement to Detective Roberts was not being offered for the truth of the matter asserted. Rather, Susan’s statement was being offered as the reason why the hat was collected by Detective Roberts and thus to explain the Detective’s course of conduct. As such, the statement is not hearsay. *See Commonwealth v. Johnson*, 42 A.3d 1017, 1035 (Pa. 2012) (holding that the statement in question was properly admitted and did not constitute hearsay because it went to explain the officer’s course of conduct in seizing a particular piece of evidence).¹¹

As such, the statement was properly admitted. Therefore, the Appellant’s claim that the trial court abused its discretion by admitting the evidence of the hat is without merit.

II.

Appellant alleges in his second claim that the Trial Court abused its discretion by permitting the PowerPoint slides used during Mr. Lorenz’s direct testimony to go back to the jury. This claim is without merit.

Appellant argues that: (A) the Trial Court abused its discretion by permitting the PowerPoint slides to go back to the jury because the slides were “akin to a transcript” of his testimony, which would be prohibited under the Pennsylvania Rules of Criminal Procedure; and (B) allowing the slides to be used during deliberations placed undue emphasis on Mr. Lorenz’s opinions and findings, which violated Appellant’s due process rights as using the slides during deliberations “gave the jury the opportunity to abandon its duty to rely on its collective recollection of the evidence presented at trial.” *See supra* at 5.

Forensic Biologist, Walter Lorenz, of the Allegheny County Medical Examiner’s Office, testified as an expert for the Commonwealth in the area of forensic biology and DNA analysis. Scientist Lorenz utilized PowerPoint slides to explain his findings during trial as an aide to assist the jury in understanding his testimony. DNA evidence was obtained from the pair of sweatpants and sock found on Whitfield Street shortly after the murders. DNA analysis performed on the items found: (1) the waistband of the sweatpants contained a mixture of at least three persons, of which Appellant and Rue, Appellant’s girlfriend, could not be excluded as possible contributors; (2) a possible bloodstain on the sweatpants contained a mixture of two individuals, with Appellant as the major contributor; and, (3) the sock contained a mixture of at least three persons, from which Appellant could not be excluded. The probability of selecting another person in the African-American population with the same DNA profile is 1 in 3.95 quintillion. (T.T. (III) 1140-1480).

A.

Appellant first claims that the Trial Court abused its discretion by permitting PowerPoint slides used by Mr. Lorenz during his direct testimony to go back to the jury because the slides were akin to a transcript of his testimony.

The Superior Court has long held that the applicable standard for abuse of discretion is as follows:

An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Jackson, 785 A.2d 117, 118 (Pa.Super. 2001).

Upon retiring, a jury may take with it such exhibits as the trial judge deems proper except, in relevant part, a transcript of any trial testimony. Pa.R.Crim.P. 646. Whether an exhibit should be allowed to go out with the jury during its deliberation is within the sound discretion of the trial judge, and will not be reversed absent abuse of discretion. *Commonwealth v. Merbah*, 411 A.2d 244, 247 (Pa. Super. 1979) (holding the trial court did not abuse its discretion by allowing prosecution witness’ written statement to go out with the jury since appellant himself placed the evidence in question before the jury).

In general, a jury should be permitted to review materials during deliberations where those materials inform the jury and aid it in the determination of the facts. *Commonwealth v. Lilloock*, 740 A.2d 237, 243 (Pa.Super. 1999) (holding that the trial court did not abuse its discretion by permitting jurors to utilize a magnifying glass to examine photographs that were admitted into evidence as it assisted the jury in its truth-determining process).

Upon receiving the jury’s request for the Lorenz slides, the Trial Court undertook a painstaking review of the slides and heard extensive argument from counsel regarding the issue. (T.T. (VI) 2617-2626, 2637-2645, and 2649). Thereafter, the Trial Court concluded that the jury should have in its possession “case specific” slides which were utilized by Mr. Lorenz during his testimony. (T.T. (VI) 2637). The material covered in the slides was highly complex and technical evidence, and no one juror or group of jurors could be expected, even with the ability to take notes, to comprehend and digest such technical evidence. Consequently, consistent with the provisions of the Pennsylvania Rules of Criminal Procedure and applicable caselaw, the Trial Court allowed certain slides to be in the possession of the jury to aid them in reaching a fair determination in the matter. *See* Pa.R.Crim. P. 646. *See also Commonwealth v. Rucci*, 670 A.2d 1129, 1141 (Pa.Super.1996) (no abuse of discretion where the trial court permitted color photographs of crime scene to go back with the jury as the trial court determined the photographs would aid the jury during deliberations).

Appellant’s claim is without merit.

B.

Appellant next alleges that the Trial Court abused its discretion by allowing the slides to be used during deliberations, which placed undue emphasis on Mr. Lorenz’s opinions and findings, thus violating Appellant’s due process rights. The Pennsylvania Supreme Court has stated, “A question regarding whether a due process violation occurred is a question of law for which the standard of review is *de novo* and the scope of review is plenary.” *Commonwealth v. Smith*, 131 A.3d 467, 472 (Pa. 2015) (citation omitted).

Appellant alleges by permitting the slides to go back with the jury during deliberation the jury had the opportunity to abandon its duty to rely on its collective recollection of the evidence presented at trial. Our Supreme Court has held:

The underlying reason for excluding certain items from the jury’s deliberation is to prevent placing undue emphasis or credibility on the material, and de-emphasizing or discrediting other items not in the room with the jury. If there is a likelihood the importance of the evidence will be skewed, prejudice may be found; if not, there is no prejudice *per se* and the error is harmless.

Commonwealth v. Strong, 836 A.2d 884, 888 (Pa. 2003).

The Trial Court properly determined that the risk of overemphasis on Mr. Lorenz's opinions and findings by permitting the slides to be used during deliberations was mitigated by the fact that Mr. Lorenz's PowerPoint case specific slides were not the only exhibits in possession of the jurors concerning DNA evidence. Additionally, the Trial Court gave a cautionary instruction informing the jury that they were to consider the entirety of Mr. Lorenz's testimony, including the cross-examination by the defense. (T.T. (VI) 2656-2657). As such, there was no likelihood that the importance of the PowerPoint slides would be skewed. *Commonwealth v. Baker*, 614 A.2d 663, 672 (Pa.1992)(jury presumed to follow trial court's instructions). As such, Appellant was not prejudiced nor were his due process rights violated.

Therefore, Appellant's claim that the Trial Court abused its discretion by permitting PowerPoint slides used during Mr. Lorenz's testimony to go back to the jury is without merit.

III.

Appellant alleges in his third claim that the Trial Court erred in admitting full surveillance videos and/or edited excerpts of video surveillance as they were not properly authenticated, lacked a proper foundation, and were irrelevant. This claim has been waived, and in any event is without merit.

Appellant has waived this claim for failure to properly preserve the claim at trial. It has long been held that, "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a); *see also* Pa.R.E. 103 (requiring a contemporaneous objection). Defense counsel failed to object to the admission of the videos at trial, and in fact, argued that the whole videos should be played for the jury. (T.T. (II) 693, 704, 753, 798, and 801). While general objections were lodged by defense that Detective Sarver could not testify in narration form as to what he was seeing in the respective videos, the defense conceded that he could testify as to what buildings and/or streets were depicted in the video. The Trial Court subsequently sustained the defense's objection and limited the testimony consistent with the cautionary instruction it had given the jury regarding the videos. (T.T. (II) 801). Further, the defense failed to lodge an objection to the admission of the compilation video prepared by Mr. Popovic, *infra* at 35. (T.T. (II) 886).

Additionally, Appellant also failed to properly preserve this issue in his Post-Sentence Motion filed June 6, 2016. *See Commonwealth v. P.L.S.*, 894 A.2d 120, 132 (Pa. Super. 2006), appeal denied, 906 A.2d 542 (Pa. 2006)(appellant waived his Fifth Amendment claim when he failed to raise the claim before the trial court in any proceeding or in his post-sentence motions). As such, this claim has been waived.

Even if the claim had not been waived, it is still meritless. Appellant alleges that, "(a) The witness who testified about the excerpts and/or the full videos, such as Detective Wade Sarver and William Popovic, were not competent, able, or qualified to state that the excerpts and/or full videos shown to the jury were a fair and accurate depiction of the suspect and his activities at the times and places the recordings were made. (b) No one involved in security operations with any of the businesses or with sufficient knowledge of the recording procedures presented demonstrative knowledge that the matters presented in the video excerpts and/or full videos were what the Commonwealth claimed them to be. (c) Further, no one associated with the business' security operations and surveillance reviewed the excerpts and/or videos to testify if they were accurate. (d) Also, no one involved in security operations with Midas or Sunoco testified regarding the time and date discrepancies in the Midas and Sunoco surveillance videos. Wade Sarver and William Popovic were not competent or qualified to state that the videos were a fair and accurate depiction of the suspect and his activities at the times and places of these recordings from Midas or Sunoco. (e) Finally, no one involved in security operations from Sunoco testified about surveillance recordings, security operations, or procedures with the company, or the accuracy of the videos." *See supra* at 5-6.

The admission of videotaped evidence is always within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Commonwealth v. Stark*, 565 A.3d 383 (Pa.Super.1987).

A.

First, the video surveillance footage was properly authenticated. To authenticate evidence, "The proponent must produce evidence sufficient to support a finding that the item was what the proponent claims it is." Pa.R.E. 901(a). Our Supreme Court addressed proper authentication of demonstrative evidence, such as video surveillance footage as follows:

As in the admission of any other evidence, a trial court may admit demonstrative evidence whose relevance outweighs any potential prejudicial effect. The offering party must authenticate such evidence. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Demonstrative evidence may be authenticated by testimony from a witness who has knowledge that a matter is what it is claimed to be. Demonstrative evidence such as photographs, motion pictures, diagrams, and models have long been permitted to be entered into evidence provided that the demonstrative evidence fairly and accurately represent that which it purports to depict.

Commonwealth v. Serge, 896 A.2d 1170, 1177 (Pa. 2006) (citations omitted). Testimony of a witness with knowledge is among the approved means of authenticating evidence. Pa.R.E. 901(b)(1); *See Commonwealth v. McKellick*, 24 A.3d 982, 986 (Pa.Super. 2011)(videotape of traffic stop was sufficiently authenticated by police officer's testimony at trial as the testimony demonstrated he was a person with knowledge of what the evidence was proclaimed to be, and the finder of fact was free to believe or disbelieve the police officer's depiction of the events therein and whether the videotape accurately and fairly represented the officer's contact with the defendant).

In authenticating the video surveillance, the Commonwealth presented testimony of multiple individuals, including: (1) Justin Hanna, Investigator for Citizen's Bank; (2) Thomas Pekrol, Security Manager for Target – East Liberty; (3) Christian Gmitter, Branch Manager for Carnegie Library – East Liberty; (4) Dennis Howsare II, General Site Maintenance for Monet Capital at Walnut and Highland; (5) Dale Kwisnek, Store Manager for Midas – East Liberty; and (6) Detective Wade Sarver, Detective with the Computer Crime Unit. (T.T.(II) 681-714, 738-879, 894-910; T.T. (III) 1171-1190). Additionally, the Commonwealth presented the testimony of William Popovic, Technical Equipment Supervisor for Mid Atlantic Great Lakes Organized Crime Law Enforcement Network, as an expert in the field of video technology. (T.T.(II) 879-892).

At trial none of these witnesses testified that the individual in the video was the Appellant. Rather, Mr. Hanna testified he was familiar with the security camera system of the East Liberty branch of Citizens Bank and identified the USB drive containing the

surveillance video he provided to the Pittsburgh Police in relation to the times of the attempted ATM transactions. (T.T. (II) 693). Mr. Pekrol testified that he reviewed the video, and it was a fair and accurate depiction of what he had provided to the police. (T.T.(II) 704). Mr. Gmiter testified that as the East Liberty branch manager of the Carnegie Library, he works with security and granted access to the security cameras to the Pittsburgh Police in the course of their investigation. He was able to detail the location and number of security cameras at the branch as well as the street names and directions of the cameras. (T.T. (II) 739-742). Mr. Howsare, of Monet Capital, testified that the police requested to see the security cameras, so he pulled up the requested footage and noted that it seemed the police were watching an individual he observed in the footage. (T.T.(II) 753). Mr. Kwisnek testified that he was the district manager of seven Midas stores in February 2014, had installed the original security cameras at the East Liberty location in 2009, was able to testify to the location of a video camera capturing Whitfield Street, and permitted Pittsburgh police full access to the video surveillance equipment they requested in February 2014. (T.T. (II) 756-757). Detective Sarver testified that he recovered and examined the relevant video surveillance, eventually compiling the videos chronologically on a USB drive. He further testified as to the various locations he recovered the videos as well as the different camera angles, buildings depicted, street names, timing discrepancies of the videos, and dates of the videos. Detective Sarver testified he reviewed all the videos he compiled on the USB drive, and they were a fair and accurate depiction of what he observed. (T.T. (II) 762-797). Finally, Mr. Popovich testified he was contacted by the Allegheny County District Attorney's Office and asked to combine several videos into one video, and that he did not manipulate or change any of the core structure of the videos received for the compilation. (T.T. (II) 879-886).

The previously mentioned witnesses all possessed the requisite knowledge that the surveillance videos were what the Commonwealth claimed them to be. Further, each of the videos were played for the jury as well as the video compilation with a cautionary instruction provided by the Trial Court to the jury with respect to the testimony of Detective Sarver and his perceptions of the contents of the videos. (T.T. (II) 801). *See also Commonwealth v. Impellizzeri*, 661 A.2d 422,428 (Pa. Super. 1995)(holding that it is not necessary that the maker of the videotape testify regarding the tape's accuracy as any witness familiar with the subject matter can testify that the tape was an accurate and fair depiction of the events sought to be shown). As such, Appellant's claim that the surveillance footage was not properly authenticated is without merit.

B.

Second, the Trial Court determined there was a proper foundation for the admission of the video surveillance. To lay a proper foundation, the Commonwealth must present testimony from a witness that the evidence accurately portrays the substantive information in question. *See Commonwealth v. Sinwell*, 457 A.2d 957, 959 (Pa.Super.1983).

In laying a foundation, the Commonwealth presented testimony of multiple individuals, including (1) Justin Hanna, Investigator for Citizen's Bank; (2) Thomas Pekrol, Security Manager for Target – East Liberty; (3) Christian Gmiter, Branch Manager for Carnegie Library – East Liberty; (4) Dennis Howsare II, General Site Maintenance for Moet Capital at Walnut and Highland; (5) Dale Kwisnek, Store Manager for Midas – East Liberty; and (6) Detective Wade Sarver, Detective with the Computer Crime Unit. (T.T.(II) 681-714, 738-879, 894-910, 1171-1190). Additionally, the Commonwealth presented the testimony of William Popovic, Technical Equipment Supervisor for Mid Atlantic Great Lakes Organized Crime Law Enforcement Network, an expert in the field of video technology. (T.T.(II) 879-892).

The Trial Court properly determined that the testimony of these witnesses' regarding the various surveillance videos were able to establish the accuracy of the particular videos' portrayal of the substantive information contained therein. *See Id.* at 959(holding that a proper foundation was laid for the admission of photographic evidence by the testimony of three Commonwealth witnesses who testified that the photographs were a fair and accurate depiction of the scene on the night in question). Therefore, Appellant's claim that the surveillance footage lacked a proper foundation is without merit.

C.

Third, the video surveillance footage was relevant and not unfairly prejudicial. Relevant evidence is evidence "having 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. Hawk*, 709 A.2d 373, 376 (Pa.1998). Our Supreme Court has held that the trial court must determine first if the evidence is relevant, and if so, whether its probative value outweighs its prejudicial effect. *Serge*, at 1178. However, "Relevant 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.'" *Id.* at 1177; *see also* Pa.R.E. 403.

The video surveillance footage depicted Appellant travelling throughout East Liberty in the early morning hours following the murder of Sarah and Susan Wolfe. The individual was observed wearing a red jacket, grey sweatpants, white shoes, and a hat. Additionally, the video footage depicted the individual discarding the sweatpants he was wearing outside of a Midas Muffler Shop and pulling on a light-colored shirt which he later used in an attempt to conceal his face at the Citizen's Bank ATM. (T.T.(V) 2322, 2328-2329, and 2332).

The video surveillance was relevant and not unfairly prejudicial as it aided the jury in understanding Appellant's movements following the crime and to show the person who discarded the clothing on Whitfield Street. The clothing was subsequently tested by the Allegheny County Medical Examiner's Office and Appellant's DNA could not be excluded or was found to be the major contributor on numerous items. The videos also showed the person who was at the Citizen's Bank ATM at the corresponding times that Sarah and Susan's debit cards were being used for withdrawals or attempted withdrawals. (T.T.(II) 642-657, 675, 689-692; T.T.(III) 1459-1468). *See Commonwealth v. Talbert*, 129 A.3d 536, 542 (Pa. Super. 2015) (holding that the trial court's admission of a rap video was relevant to show defendant's involvement in the murder, and there was no evidence that the admission of the video suggested prejudice which "so inflamed the jury as to create a risk that the jury would convict on other factors"). Therefore, the video surveillance footage was clearly relevant and not unfairly prejudicial. As such, Appellant's claim is without merit.

IV.

Appellant alleges in his fourth claim that the Trial Court abused its discretion by admitting evidence during trial that Appellant refused to provide the police with a DNA sample at the conclusion of his interview. Appellant further alleges the introduction of said evidence warrants a new trial. Specifically, Appellant alleges this evidence was irrelevant for any purpose other than showing that Appellant did not cooperate with police which prejudiced him before the jury. This claim has been waived, and in any event is without merit.

Appellant has waived this claim for failure to properly preserve the claim at trial. It has long been held that, “Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a); *see also* Pa.R.E. 103 (requiring a contemporaneous objection). Defense counsel failed to object to the trial testimony of Detective Jim McGee, which referenced Appellant’s refusal to submit a DNA sample after his interview. (T.T. (V) 2041). *See Commonwealth v. May*, 887 A.2d 750, 758 (Pa. 2005)(the absence of a contemporaneous objection waives appellate review of claim).

Further, defense counsel never requested a mistrial for the reference made by the detective even if they had lodged an objection. The Superior Court has stated, “[E]ven where a defendant objects to specific conduct, the failure to request a remedy such as a mistrial or curative instruction is sufficient to constitute waiver.” *Commonwealth v. Sandusky*, 77 A.3d 663, 667 (Pa. Super. 2013)(citing *Commonwealth v. Manley*, 985 A.2d 256, 267 n. 8 (Pa.Super.2009)).

In addition to failing to raise an objection at trial or request a mistrial, Appellant also failed to properly preserve this issue in his Post-Sentence Motion filed June 6, 2016. *See Commonwealth v. P.L.S.*, 894 A.2d 120, 132 (Pa. Super. 2006)(appellant waived his Fifth Amendment claim when he failed to raise the claim in post-sentence motions). As such, this claim has been waived.

Even if the claim had not been waived, it is still meritless. It is well settled that, “Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion.” *Commonwealth v. Lilliock*, 740 A.2d 237, 244 (Pa. Super. 1999)(citing *Commonwealth v. Bardo*, 709A.2d395, 402 (Pa.1994). Furthermore, “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. Dillon*, 925 A.2d 131, 136 (Pa. 2007)(citing *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1046 (Pa. 2003)).

Evidence is relevant if it tends to make the existence or non-existence of a material fact more or less probable, and is admissible if the probative value outweighs: the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative evidence. *See* Pa.R.E. 401, Pa.R.E. 402, and Pa.R.E. 403.

Here, Appellant had been properly *Mirandized* prior to the interview, had waived his Fifth Amendment right to remain silent, and had provided the statements voluntarily. (T.T. (V) 2047). As such, the admission of such evidence was relevant to show Appellant’s consciousness of guilt, and the Court determined that the probative value of such evidence outweighed the danger of unfair prejudice. *See Commonwealth v. Monahan*, 549 A.2d 231, 237 (Pa.Super. 1988)(holding that Appellant’s refusal to submit to a neutron activation test to determine whether he had recently fired a gun may be admitted as it raised a legitimate inference of Appellant’s consciousness of guilt which “arises not from the results such a test could actually have produced, but from the suspect’s fear of what the test *might* have detected”)(emphasis in original).¹² As such, the Trial Court did not abuse its discretion by admitting such evidence during trial nor does the introduction of said evidence warrant a new trial.

Appellant’s claim is without merit even if not deemed waived.

V.

Appellant alleges in his fifth claim that the Trial Court abused its discretion in not granting a mistrial following Matthew Buchholz’s reference to a polygraph examination. This claim is without merit.

The Pennsylvania Supreme Court has stated the standard of review regarding a trial court’s denial of a motion for a mistrial is as follows:

A motion for a mistrial is within the discretion of the trial court. [A] mistrial [upon motion of one of the parties] is required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial trial. It is within the trial court’s discretion to determine whether a defendant was prejudiced by the incident that is the basis of a motion for a mistrial. On appeal, our standard of review is whether the trial court abused that discretion. An abuse of discretion is more than an error in judgment. On appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised by the trial court was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Tejeda, 834 A.2d 619, 623 (Pa. Super. 2003)(citations and quotations omitted).

When determining whether the testimonial reference to a polygraph test warrants a mistrial, the following three factors are taken into consideration:

- (1) whether the Commonwealth prompted the reference to the polygraph test; (2) whether the reference suggested the results of the polygraph; and (3) whether the trial court issued prompt and adequate instructions regarding the unreliability and inadmissibility of polygraph tests.

Commonwealth v. Fortenbaugh, 69 A.3d 191, 193 (Pa. 2013) (quotations and citations omitted). After considering these three factors the court, “must assess the resulting prejudice to the defendant, an evaluation which turns on whether such reference, considered in light of the circumstances of the case, causes an inference to arise as to the defendant’s guilt or innocence.” *Id.* at 193.

In the present case, the Commonwealth did not deliberately introduce the remark. Rather the Commonwealth asked, “Without asking any specific questions as to what was done at the police station, did you meet with them? Did you speak with them?” (T.T.(I) 118). This question clearly cannot be construed as attempting to elicit a response concerning a polygraph examination. In fact the Commonwealth, in an effort to prevent the witness from making a statement regarding the polygraph, spoke with the witness prior to trial and instructed the witness not to reference the polygraph. (T.T.(I) 119). Further, the Commonwealth purposefully crafted the question so as to avoid eliciting such a reference. (T.T.(I) 119). Although it was a two-prong question posed to the witness, both prongs called for a simple “yes” or “no” response. The fact that the witness went beyond the question(s) posed and made a gratuitous remark regarding the polygraph test cannot be visited upon the Commonwealth. *Commonwealth v. Miller*, 439 A.2d 1167 (Pa. 1982).

In light of the caution the Commonwealth took in advising the witness not to reference the polygraph examination, and the narrow focus of the actual question posed, the Trial Court determined that the motion for mistrial should be denied. The Trial Court also asked Appellant’s counsel if she wanted a cautionary instruction given to the jury to disregard the answer. (T.T.(I) 119). Counsel for Appellant declined the Trial Court’s offer for a cautionary instruction to the jury. (T.T.(I) 119).

Generally, references to polygraphs with respect to a defendant are inadmissible, with this principle equally applicable to references of polygraphs taken by a witness, adverse to the defense, whose testimony is improperly bolstered by the reference. *Id.* at 1170-1171 (citing *Commonwealth v. Johnson*, 272 A.2d 467 (Pa. 1971)). In *Miller*, the Pennsylvania Supreme Court held that although the reference made by the witness regarding being asked to take a polygraph examination by law enforcement was improper, it was not prompted by the Commonwealth, did not suggest a result, and the trial court gave an adequate instruction to the jury. *Id.* at 1171.

Here, the Trial Court determined that the remark from the witness regarding the polygraph did not deprive Appellant of a fair and impartial trial as it was not intentionally elicited by the Commonwealth. Additionally, the reference made by the witness did not suggest the results of the polygraph, only that one was taken. Further, the Trial Court provided the defense with the option for a cautionary instruction, which was declined. (T.T.(I) 119). As such, the Trial Court did not abuse its discretion in denying the motion for mistrial.

Appellant's claim is without merit.

VI.

Appellant alleges in his sixth claim that his rights were violated under the Sixth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 9 of the Pennsylvania Constitution when the Commonwealth failed to provide all data and information relating to the process and findings of TrueAllele Software. This claim is without merit.

Appellant alleges, in characteristic run-on fashion, that: "(a) Dr. Mark Perlin, a Commonwealth expert who tied Mr. Wade's DNA to the crime, did not provide the Commonwealth or Mr. Wade with impeachment evidence and exculpatory evidence showing that some of the test results generated from Dr. Perlin's computer software might not have connected Mr. Wade to the murders. Dr. Perlin chose the runs he felt were most germane and conducted analysis of those runs, while ignoring the rest that he decided were not germane. The data pertaining to these other runs was not provided to defense and the defense was not provided with any way for an expert to analyze the data on these other runs that Dr. Perlin decided were not germane. That data might have raised a reasonable doubt as to guilt. (b) Dr. Mark Perlin failed to provide the process of his software system used to analyze and generate data connecting Mr. Wade to the crimes, and he failed to sufficiently describe the grounds of his opinions. It is unclear the process and basis Dr. Perlin and his software system used to arrive at their finding and opinions. The process he and his software used could not be reviewed by the defense, the software source code was not provided for the defense to ascertain whether the program functioned without bugs or that the finding were accurate, and all of the data was not provided for the defense to ascertain the process used or the accuracy of the finding. The defense had to accept the conclusions of Dr. Perlin and his software with no way to review the conclusions of Dr. Perlin and his software with no way to review or challenge his findings. This violated Mr. Wade's confrontation rights, and it violated his rights to due process and a fair trial." *See supra* at 7.

A.

Appellant first claims that Dr. Perlin, a Commonwealth expert, failed to provide both the Commonwealth and Appellant with impeachment and exculpatory evidence showing that some of the test results generated by his computer software may have not connected him to the murders, further claiming that Dr. Perlin chose only the runs he believed were most germane to analyze while ignoring the runs he determined were not germane, thus preventing the defense from obtaining an expert to analyze the runs Dr. Perlin determined were not germane, which could have raised a reasonable doubt as to his guilt.

Although Appellant does not specifically reference a *Brady* violation, it is clear from the language used that is what is being asserted. Appellant alleges the Commonwealth and Dr. Perlin failed to provide all data and information relating to the process and findings of TrueAllele Software, which may have included exculpatory or impeachment evidence.

In *Brady v. Maryland*, the United States Supreme Court held as follows, "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of good or bad faith of the prosecution." 373 U.S. 83, 87 (1976). "*Brady* does not require disclosure of information 'that is not exculpatory but might merely form the groundwork for possible arguments or defenses,' nor does *Brady* require the prosecution to disclose 'every fruitless lead' considered during a criminal investigation". *Commonwealth v. Roney*, 79 A.3d 595, 608 (Pa. 2013) (quoting *Commonwealth v. Paddy*, 15 A.3d 431, 450 (Pa. 2011)).

Pennsylvania Courts have closely followed and integrated *Brady*, stating that:

For a defendant to establish a *Brady* violation, he or she must show that (1) the evidence was suppressed by the State, either willfully or inadvertently; (2) the evidence at issue is favorable to the defendant; and (3) the evidence was material, meaning that prejudice must have ensued.

Commonwealth v. Chambers, 807 A.2d 872, 997 (Pa. 2002) (citations and quotations omitted).

Appellant maintains that the Commonwealth did not provide the information, but thereafter also maintains that Dr. Perlin did not provide the Commonwealth or Appellant with impeachment and exculpatory evidence showing that some of the test results generated from the software might not have connected Appellant to the murders. Appellant fails to meet the first prong set forth in establishing a *Brady* violation as the Commonwealth cannot "willfully" or "inadvertently suppress" evidence not within its possession. Appellant is unable to meet the second prong because he has failed to assert how the evidence at issue would have been favorable to him. Lastly, Appellant cannot meet the third prong as he has merely asserted that the evidence had the potential to be material, not that it was, in fact, material thus establishing prejudice. *Commonwealth v. Roney*, 79 A.3d 595, 610 (Pa. 2013) (holding that Appellant's claim was without merit as his claim was based upon "purely speculative assertions," and *Brady* obligations do not extend to evidence not in the possession of the Commonwealth).

Therefore, Appellant's claim that his constitutional rights were violated due to the failure of the Commonwealth and Dr. Perlin to provide all data and information relating to the process and findings of TrueAllele software is without merit.

B.

Appellant alleges in his second claim that Dr. Perlin failed to provide the process of his software system used to analyze and generate data connecting Appellant to the crimes as well as failing to sufficiently describe the grounds of his opinions, thus preventing the defense from reviewing the process both Dr. Perlin and his software system utilized. Appellant further alleges that Dr. Perlin's failure to provide the defense with the software source code prevented them from ascertaining

whether the program functioned properly and produced accurate findings which forced the defense to accept the conclusions of Dr. Perlin and his software with no opportunity to challenge his findings in violation of his constitutional rights to confrontation, due process, and a fair trial.

The Pennsylvania Supreme Court has stated that, “A question regarding whether a due process violation occurred is a question of law for which the standard of review is *de novo* and the scope of review is plenary.” *Commonwealth v. Smith*, 131 A.3d 467, 472 (Pa. 2015).

The Sixth Amendment of the United States Constitution guarantees, in relevant part, the rights of criminal defendants to confront the witnesses against them and know the nature of the evidence against them. *U.S. Const. VI*. The confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent, that the defense might wish. As such, the right to confront a witness is satisfied if the defense received “wide latitude at trial to question witnesses.” *Commonwealth v. Wilson*, 602 A.2d 1290, 1296 (Pa. 1992) (citing *Delaware v. Fensterer*, 106 S. Ct. 294 (1985)).

In *Commonwealth v. Foley*, the Superior Court held with respect to the TrueAllele source code that, “Scientists can validate the reliability of a computerized process even if the source code underlying the process is not available to the public.” 38 A.3d 882, 889-890 (Pa.Super. 2012). The Superior Court has also held, specifically with respect to the source code of Dr. Perlin, that TrueAllele is not a “novel science” and that reliability could be established without the source code. *Id.* at 890. As such, “The source code [was] not material to defendant’s ability to pursue a defense.” *Id.* Further, the Superior Court stated that, “[T]he source code itself was not material to the credibility of Dr. Perlin and the reliability of TrueAllele, and that those are matters properly addressed by cross-examination.” *Id.*

Additionally, it should be noted that the Trial Court held a pre-trial hearing on this precise issue wherein the Court stated that, “Contrary to the defendant’s assertion[,] *Foley* specifically found that the appella[nt] failed to establish a legitimate dispute regarding reliability of the conclusions drawn using the system. [They] failed to show that the methodology underlying the TrueAllele is novel.” (Motions Hearing, October 29, 2015, 10).

Dr. Perlin was not required to provide the Appellant with the source code as it was immaterial, and Appellant’s trial counsel subjected Dr. Perlin to an extensive cross-examination regarding the process and software system. As such, Appellant received a fair trial as he had a full and fair opportunity to cross-examine Dr. Perlin. The TrueAllele source code was simply not material to his defense, thus any allegation that Dr. Perlin failed to provide such information in violation of Appellant’s rights under the Sixth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 9 of the Pennsylvania Constitution is meritless.

VII.

Appellant alleges in his seventh claim that the Trial Court abused its discretion by granting the Commonwealth’s motion to quash Appellant’s subpoena *duces tecum* to Dr. Perlin for TrueAllele’s source code. This claim is without merit.

Specifically, Appellant alleges that: (A) the Commonwealth lacked standing to object to the subpoena; and (B) a quash order was inappropriate given the importance of the information sought, the severity of Appellant’s potential sentence, and the absence of harm to Dr. Perlin since a protective order would have ensured the protection of any trade secrets in the source code.

In response to Appellant’s December 7, 2015 subpoena *duces tecum* to Dr. Perlin seeking the True Allele source code, the Commonwealth filed a Motion to Quash the subpoena on January 11, 2016, and filed a Revised Motion to Quash on January 14, 2016. On January 14, 2016, the Trial Court properly granted the Commonwealth’s motion.

The Superior Court has long held that the applicable standard for abuse of discretion is as follows:

An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Jackson, 785 A.2d 117, 118 (Pa.Super. 2001). With respect to subpoenas the Superior Court has held that, “[S]ubpoenas are not to be used to compel production of documents merely for inspection or for a fishing expedition.” *Commonwealth v. Cook*, 865 A.2d 869, 877 (Pa.Super. 2004) (quoting *Commonwealth v. McEnany*, 667 A.2d 1143, 1149 (Pa.Super. 1995)). Whether a subpoena shall be enforced is solely the discretion to the trial court. The Superior Court has stated, “We will not disturb a discretionary ruling of a [trial] court unless the record demonstrates an abuse of the court’s discretion. So long as there is evidence which supports the [trial] court’s decision, it will be affirmed. We may not substitute our judgment of the evidence for that of the [trial] court.” *Commonwealth v. Mucci*, 143 A.3d 399, 411-412 (Pa.Super. 2016).

Specifically, with respect to a trial court’s decision whether to grant or deny a motion to quash a subpoena, the Superior Court has held that, “[W]e grant great deference to the factual findings of the trial court. We will affirm the court’s decision unless we find that the court abused its discretion or committed an error of law.” *Cook*, at 876 (quoting *Commonwealth v. Simmons*, 719 A.2d 336, 340 (Pa.Super.1998)).

Here the Commonwealth, represented by the Allegheny District Attorney’s Office, clearly had standing to challenge the defense’s subpoena *duces tecum* served on one of its experts requiring him to produce proprietary information. The Superior Court has stated, “It is a well-settled principle of law that a crime is an offense against the sovereignty, a wrong which the government deems injurious not only to the victim but to the public at large, and which it punishes through a judicial proceeding in the Commonwealth’s name.” *Commonwealth v. Malloy*, 450 A.2d 689, 691 (Pa.Super. 1982) (citing 21 Am.Jur.2d 61, pp. 115-116). The Commonwealth is responsible for not only the investigation but also the prosecution of criminal cases filed in the Commonwealth of Pennsylvania. As such, they have the requisite standing to challenge subpoenas served upon one of its trial witnesses seeking production of proprietary information that would have compromised the expert’s willingness to produce said information and willingness to appear at trial, which would have posed a significant hindrance to the prosecution of the case without the testimony of the expert. *Id.* at 691-692 (citing *In re Petition of Piscanio*, 344 A.2d 658 (Pa.Super. 1975)).

Further, the Trial Court’s order granting the Commonwealth’s Motion to Quash was appropriate. The fact that Appellant was facing a potentially severe sentence is of no consequence when making a determination regarding discovery requests. Rule 573 of the Pennsylvania Rules of Criminal Procedure, Pretrial Discovery and Inspection, allows a trial court to permit discovery of items that are deemed material, reasonable, and in the interests of justice. Here, the Trial Court concluded the subject of the subpoena *duces tecum* to be irrelevant to the defense of the present matter. Additionally, the request for the True Allele source code amounted

to nothing more than an impermissible “fishing expedition,” which only would have resulted in the disclosure of proprietary information. Even a protective order could not have ensured the non-disclosure of any trade secrets regarding the source code.

Appellant failed to articulate a reasonable basis for seeking the disclosure of the source code. *See Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012) (*en banc*). As such, the Trial Court did not abuse its discretion by granting the Commonwealth’s Motion to Quash Appellant’s subpoena to Dr. Perlin for the TrueAllele’s source code.

Therefore, Appellant’s claim is without merit.

VIII.

Appellant alleges in his eighth and final claim that the Trial Court abused its discretion by failing to grant a *Frye* hearing regarding whether Dr. Perlin’s methodology and opinions and the methodology and conclusions of his computer software, TrueAllele, were novel and generally accepted in the relevant scientific community or the field of criminal law.

Appellant alleges, in characteristic run-on fashion, that, “(a) The Trial Court relied on the ruling in *Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012); however, the ruling in *Foley* was distinguishable from Mr. Wade’s case. The holding in *Foley* is very limited and the facts in Mr. Wade’s case are markedly different from the facts in *Foley*. (b) In the alternative, if *Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012), is applicable, and a *Frye* hearing is foreclosed by that ruling, Mr. Wade presents this issue that a *Frye* hearing is warranted regarding Dr. Perlin’s opinions and his TrueAllele computer software so Mr. Wade can seek relief from a nine-judge *en banc* panel of the Superior Court of Pennsylvania and/or from the Pennsylvania Supreme Court. A *Frye* hearing is warranted since Dr. Perlin’s scientific testimony regarding probabilistic genotyping and his TrueAllele computer software is novel, there is a legitimate dispute regarding the reliability of Dr. Perlin’s conclusions, his theories, and his technique, and the reliability of the conclusions generated by TrueAllele, and Dr. Perlin’s methodology and the methodology of TrueAllele do not have general acceptance in the relevant scientific community or the field of criminal law. Additionally, the *Foley* Court never discussed the science behind TrueAllele or determined how TrueAllele methodology and conclusions were not novel scientific evidence. Contrary to the holding in *Foley*, there are major concerns about the validity and reliability of TrueAllele. No one other than Dr. Perlin understands how TrueAllele works. There are serious due process problems with TrueAllele source code being utilized to convict people and TrueAllele inferences leading to matches of the defendant based on the genotype of the defendant.” *See supra* at 8-9. This claim has been waived, and even if not deemed waived, it is meritless.

Appellant has waived this claim for failure to comply with the requirements of Pa.R.A.P. 1925(b). The Superior Court has long held that a Rule 1925(b) Statement “must be ‘concise’ and coherent [so] as to permit the trial court to understand the specific issues being raised on appeal.” *Jiricko v. Geico Insurance Company*, 947 A.2d 206, 211 (Pa. Super. 2008) (quoting *Kanter v. Epstein*, 866 A.2d 394, 401 (Pa. Super. 2004), *alloc. denied*, 584 Pa. 678, 880 A.2d 1239 (2005)). Where the Statement is “so incoherent, confusing, or redundant that it impairs appellate review, issues in the Statement are deemed waived.” *Id.* at 213.

In the present matter, Appellant filed an eleven page Statement of Errors Complained of on Appeal setting forth eight main issues, many of which contained several sub-issues, thus totaling fifteen issues for the Trial Court to address. The Superior Court has stated that, “The purpose of Rule 1925 is to narrow the focus of an appeal to those issues which the appellant wishes to raise on appeal.” *Mahonski v. Engel*, 145 A.3d 175, 180 (Pa. Super. 2016). Pa.R.A.P. 1925(b) specifically states in relevant part:

- (i) The Statement shall set forth only those rulings or errors that the appellant intends to challenge.
- (ii) The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge....

- (iv) The Statement should not be redundant or provide lengthy explanations as to any error. Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of issues raised will not alone be grounds for finding waiver.

- (vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

Pa.R.A.P. 1925(b)(4)(i), (ii), (iv), and (vii).

As such, the rule sets forth clear requirements to avoid waiver of issues. If the Rule 1925(b) Statement fails to be “concise” and “coherent,” the Trial Court is stripped of its ability to prepare a thorough legal analysis of the issue(s). Failure of an Appellant to submit “concise” and “coherent” issue(s) divests the Trial Court of a meaningful review which is “pertinent to those issues” and is a “crucial component of the appellate process.” *Commonwealth v. Ray*, 134 A.3d 1109, 1114 (Pa. Super. 2016); *see also Commonwealth v. Dowling*, 778 A.2d 683, 686–87 (Pa. Super. 2001).

Here, Appellant has submitted a voluminous eleven page Statement of Errors Complained of on Appeal, and the Trial Court has exercised great patience in attempting to cogently organize and decipher those issues. However, the present issue Appellant has set forth required a page and a half of this Opinion just to restate the issue in its entirety. Appellant has blatantly ignored its duty in setting forth this issue for appeal in its 1925(b) Statement in any “concise” and/or “coherent” manner as required by the rule. *See Jiricko*, at 211-212. As such, this claim is waived.

However, even if this claim is not deemed waived, the substance of the issue was adequately addressed by the Trial Court in issues VI and VII and is also meritless. Nonetheless, in order to lay to rest Appellant’s final claim, the Trial Court will comprehensively address it.

The applicable standard for an abuse of discretion is as follows:

An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Jackson, 785 A.2d 117, 118 (Pa. Super. 2001) (citations and quotations omitted).

A.

Appellant first claims that the Trial Court abused its discretion by relying on the ruling in *Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012), arguing that the ruling in *Foley* was factually distinguishable from the present case. In *Commonwealth v. Foley*,

the Superior Court of Pennsylvania analyzed whether TrueAllele software was a novel science and whether a Frye hearing was warranted if the defendant failed to establish a legitimate dispute regarding the reliability of the conclusions of Dr. Perlin's software. 38 A.3d 882 (Pa. Super. 2012). The Superior Court ultimately held that the trial court did not err in admitting the testimony of Dr. Perlin as there was no legitimate dispute regarding the reliability of the conclusions of Dr. Perlin's software, further holding that it was not a novel science, and defendant had failed to establish a legitimate dispute regarding reliability of the software conclusions. Thus, no *Frye* hearing was warranted.

In the instant case, Appellant also failed to establish that the methodology underlying the TrueAllele was novel. (Motion Transcript, October 29, 2015, pp. 13-14). Much like *Foley*, Dr. Perlin analyzed a mixed DNA sample which had been tested by a crime lab in addition to Dr. Perlin's testing. *Id.* at 5. Therefore, the Trial Court found that *Foley* was not distinguishable from Appellant's case and is, in fact, controlling law.

B.

Appellant next contends that if *Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012) is applicable, thus foreclosing a *Frye* hearing, Appellant continues to present the issue arguing the necessity of a *Frye* hearing as to Dr. Perlin's opinions and his TrueAllele computer software in an effort to seek relief from an *en banc* panel of the Superior Court and/or from the Pennsylvania Supreme Court.

In determining whether scientific evidence is admissible Pennsylvania applies the *Frye* test, which provides that "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003) (citations omitted). The *Frye* test consists of a two-step analytical process:

First, the party opposing the evidence must show that the scientific evidence is "novel" by demonstrating that there is a legitimate dispute regarding the reliability of the expert's conclusions. If the moving party has identified novel scientific evidence, then the proponent of the scientific evidence must show that the expert's methodology has general acceptance in the relevant scientific community despite the legitimate dispute.

Commonwealth v. Safka, 95 A.3d 304, 307 (Pa. Super. 2014) (citing *Commonwealth v. Foley*, 38 A.3d 882, 888 (Pa. Super. 2012) (citations and internal quotation marks omitted).

A *Frye* hearing on the admissibility of scientific evidence is warranted when a trial judge has articulable grounds to believe that an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions. *Commonwealth v. Freeman*, 128 A.3d 1231, 1246 (Pa. Super. 2015).

In the instant case, the Trial Court found that Appellant failed to demonstrate a legitimate dispute regarding the reliability of Dr. Perlin's methodology. Appellant alleged Dr. Perlin's methodology was not generally accepted in the relevant scientific community; however, his work has seven peer reviewed validation studies. Additionally, there are seven states that have allowed testimony regarding his TrueAllele technology. (Motion Transcript, October 29, 2015, p. 3). Thus, Dr. Perlin's science is not novel and is generally accepted in the relevant scientific community. (Motion Transcript, October 29, 2015, p. 10 and 14). Therefore, the Trial Court did not abuse its discretion in denying the *Frye* hearing and no such hearing was warranted.

CONCLUSION

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

BY THE COURT:
/s/Borkowski, J.

Date: May 9, 2018

¹ 18 Pa. C.S. § 2501(a).

² 18 Pa. C.S. § 3701(a)(1)(i).

³ 18 Pa. C.S. § 3502(a)(1).

⁴ 18 Pa. C.S. § 6105(a)(1). On May 29, 2016, the Trial Court granted Appellant's motion to sever this charge.

⁵ 18 Pa. C.S. § 4106(a)(1).

⁶ 18 Pa. C.S. § 3921(a).

⁷ 18 Pa. C.S. § 3925(a). These counts were withdrawn at the agreement of all parties following the Commonwealth's case in chief, on May 16, 2016.

⁸ The guilt phase of Appellant's jury trial spanned several weeks from May 2 – May 23, 2016. The transcript of the proceeding comprises 2666 pages and is divided into six volumes: Jury Trial Transcript Volume I, May 2-3, 2016 ("T.T.(I)"); Jury Trial Transcript Volume II, May 4-8, 2016 ("T.T.(II)"); Jury Trial Transcript Volume III, May 9-10, 2016 ("T.T.(III)"); Jury Trial Transcript Volume IV, May 11-12, 2016 ("T.T.(IV)"); Jury Trial Transcript Volume V, May 13-17, 2016 ("T.T.(V)"); and Jury Trial Transcript Volume VI, May 18-23, 2016 ("T.T.(VI)").

⁹ Appellant had provided a DNA sample at an earlier date, on an unrelated case, and his DNA profile was stored in the CODIS System. (T.T.(V) 2041).

¹⁰ The Detectives were able to determine the difference between "inside" and "outside" bags by their contents. (T.T. (II) 907).

¹¹ The statement could also be admissible under the exception to the hearsay rule pursuant to Pa.R.E. 804(b)(6), Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability (Forfeiture by Wrongdoing). (T.T. (I) 404-405). See *Commonwealth v. King*, 959 A.2d 405, 412-413 (Pa. Super. 2008).

¹² The record simply fails to establish that Appellant was prejudiced by the admission of the testimony, which the defense highlighted on cross-examination when counsel asked, "You asked him to give you a buccal swab; is that right?" In response the detective stated "Yes", and defense counsel moved on without further pursuing the issue on cross-examination. (T.T.(V) 2047).

**Commonwealth of Pennsylvania v.
Michael McMillan**

Criminal Appeal—Homicide—Sentencing (Discretionary Aspects)—Juvenile Lifer—Failure to Appoint Mitigation Expert

Former juvenile, sentenced to 30 years to life for 2nd degree murder, challenges imposition of life sentence and failure to provide funds for mitigation expert.

No. CP-02-CR-0006930-2007. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—May 16, 2018.

OPINION

This is a direct appeal wherein the defendant, Michael McMillan, appeals from the judgment of sentence of October 26, 2017. In this case, the defendant was charged with criminal homicide, criminal attempted homicide, aggravated assault, possession of a firearm by a minor and robbery for crimes that occurred when he was 17 years old. After a jury trial, the defendant was acquitted of criminal attempted homicide and convicted of all of the other charges. The jury returned a verdict of second degree murder relative to the charge of criminal homicide. At the second degree murder conviction, the defendant was sentenced to a mandatory term of life in prison without parole. This Court imposed a sentence of not less than 10 years nor more than 20 years' imprisonment at the aggravated assault conviction and at the robbery conviction. Relative to the conviction for possession of a firearm by a minor, this Court imposed a sentence of not less than 2 ½ nor more than 5 years' imprisonment.

Mr. McMillan filed a timely Notice of Appeal claiming the evidence was insufficient to convict. The Superior Court affirmed the judgment of sentence at No. 141 WDA 2009. Mr. McMillan filed a timely petition pursuant to the Post Conviction Relief Act claiming that his mandatory term of life imprisonment was an unconstitutional sentence imposed on a juvenile offender. This court denied that petition and the defendant appealed that decision. While the appeal was pending, the United States Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2455 (2012) At 1365 WDA 2011. The Superior Court affirmed the sentence because, at that time, the holding of *Miller* was not retroactive in Pennsylvania. Defendant filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. While the appeal was pending in that Court, the United States Supreme Court decided *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) and ruled that the holding of *Miller* was retroactive to cases such as the defendant's case. Based on that authority, the Pennsylvania Supreme Court remanded this case to the Superior Court for further proceedings. The Superior Court, at 456 WDA 2015, remanded to this Court for resentencing.

The defendant was resentenced on October 26, 2017. This Court imposed a sentence of imprisonment of not less than 30 years nor more than life imprisonment at the second degree murder conviction. He was sentenced to a consecutive term of imprisonment of not less than 10 years nor more than 20 years at the robbery conviction. Relative to the conviction for possession of a firearm by a minor, this Court imposed a consecutive sentence of not less than 2½ nor more than 5 years' imprisonment. No further penalty was imposed relative to the aggravated assault conviction. This appeal followed and it is limited to a challenge of the sentence imposed relative to the second degree murder conviction.

As set forth in this Court's previous opinion, the following facts were adduced at trial:

Rachel Larue testified that she was present in her residence on April 17, 2007. At that time, she became aware that the defendant was also in her residence on an upstairs floor playing video games with her son, Will Smoot, and another person identified as "Reese". Upon learning that the defendant was in the house, Ms. Larue went upstairs and advised the defendant he had to leave.² Ms. Larue escorted the defendant partly out of her house and she then went into her bedroom. Shortly after she entered her bedroom, she heard four or five gunshots and the sound of scuffling. She was also able to smell what she termed "gun smoke". As she quickly moved toward the upstairs room she observed the defendant running down her stairway, jumping between landings, carrying what appeared to be a gray 9 millimeter handgun. Ms. Larue observed Will lying on the ground suffering from an apparent gunshot. She ran from the house and began to chase the defendant. She was not able to catch him.

Jessica Stewart Logan, the boyfriend of Ms. Larue's son, testified. She testified that she was in the residence at the time of the shooting. She testified that just prior to the shooting, she heard what sounded like a bunch of chairs being moved around upstairs. She then heard what she believed to be five or six gun shots coming from the direction of Will's room. She then observed the defendant run down the stairs with a gun in his hand. She, along with Ms. Larue ran to the attic room and tended to Will, who was bleeding from his nose and mouth. She observed Reese in the corner of the room apparently suffering from a gunshot wound. Ms. Logan then called 911. Will was pronounced dead at the scene, a victim of homicide. He suffered a gunshot wound to his head. Reese also suffered gunshot wounds.

Krystal Hall also testified that just after the shooting, she observed the defendant running down McClure Street "like he was scared". She observed him enter a residence on McClure Street. She then entered her residence. She remained in her residence with her friend, Belinda. A short time later, the defendant came to her residence and asked if he could stay there for a short time. He had a cigarette there. He was wearing different clothes than he was wearing when she observed him running. According to Ms. Hall, the defendant appeared very nervous. She asked him why he was nervous and he responded that he had tried to "come up off of some niggas". Upon questioning from defense counsel, Ms. Hall testified that the phrase was street slang for trying to rob somebody. The defendant then told Ms. Hall that he shot Will in the head and shot "Reese" in the arm. The defendant then locked Ms. Hall out of her house for some time while police helicopters were hovering over the residence.

Officer Jeffrey Snyder of the Homestead PD testified in this case that he was the first officer to respond to the scene of the shooting. He testified that he observed the room where the shooting occurred. A substantial amount of money, approximately \$1,400, was scattered all over the room. Shell casings were about the floor. The furniture in the room was scattered.

Allegheny County Detectives also responded to the scene. After being advised that the defendant had entered a residence on McClure Street just after the shooting, the detectives searched that residence. There they found boots with blood stains, blue jeans, cell phones and a hair brush. Forensic DNA testing was performed on some of this evidence and Will Smoot's DNA was found on the boots and pants belonging to the defendant.

The defendant testified in his own defense. He testified that on the date in question, he was at Will's house playing computer games with Will and "Reese". He testified that he had been a customer of Will's and had purchased crack cocaine from Will in the past. The defendant testified that on April 17, 2007, after being at Will's residence for approximately 3 hours, he began to have a conversation with Reese about "Alexandra", Reese's girlfriend. According to the defendant, in the past, there had been an incident in which Reese and the defendant exchanged words over the defendant's attempted contact with Alexandra while she and Reese were dating. Some time after the telephone conversation, the defendant testified he met Reese on the streets. According to the defendant, at the time of the meeting neither the defendant nor Reese apparently recalled the prior conversation about Alexandra. They became social acquaintances. On the date of the shooting, the defendant testified that he and Reese met on the street. Reese advised the defendant that he was going to Will's house to buy some "weed". The two then went to Will's house together.

The defendant then testified that he went to Will's residence where he smoked marijuana with Reese. The defendant and Reese then went up to Will's room in the attic where they hung out and played computer games. At some point, Ms. Larue came home and, after determining that the defendant was in the residence, she asked him to leave. He testified that he started to walk down the stairs to leave but that he realized he forgot his cell phone. He then went back upstairs. While upstairs, Will addressed the defendant about concerns that the defendant has disrespected Will's mother. According to the defendant, Reese then began to ask the defendant about Alexandra. The defendant testified that he told Reese that he got Alexandra pregnant. The defendant testified that as he began to walk away he heard a chair move and then he was punched in the back of the head by Reese. When he fell, a gun he had in his sweatshirt fell out of the sweatshirt and slid across the floor. The defendant testified Reese moved toward the gun. The defendant then recalled that Reese was the person he had the discussion with earlier about Alexandra. According to the defendant, Reese grabbed the gun. Will told Reese to "chill". Reese then cocked the gun and pointed it at the defendant. The defendant testified that he attempted to grab Reese's arm to move the gun from being pointed at him. According to the defendant, the gun accidentally discharged and delivered the fatal shot to Will. The defendant claimed that gun powder filled his eyes and his eyes were burning but he was able to grab his gun. Reese then took off running toward the entertainment center. The defendant believed Reese was trying to retrieve a gun. The defendant then fired his gun at Reese, hitting him in his left lower back. Reese shot his gun but missed the defendant. The defendant shot again, this time grazing Reese across the chest and arm. The defendant was able to grab Reese's gun. He checked on Will and fled the scene with both guns. He admitted that he fled the scene, hid the guns, went to a residence to change his clothes. He also admitted that he made telephone calls to person in an effort to help him flee.

The defendant first claims that this Court erred in determining that it was obligated to impose a sentence that included a term of life imprisonment, rather than imposing a minimum and maximum sentence for a term of years. This claim is patently frivolous as it is foreclosed by Pennsylvania law and defendant's counsel specifically acknowledged, on the record at sentencing, that this Court was required to impose a maximum sentence of life imprisonment.

In *Commonwealth v. Batts*, 163 A.3d 410, 421 (Pa. 2016), ("Batts II"), the Pennsylvania Supreme Court held that a mandatory maximum sentence of life imprisonment shall be imposed on juvenile offenders convicted of first or second degree murder. The Superior Court, in *Commonwealth v. Seskey*, 170 A.3d 1105, 1106 (Pa.Super. 2017), recently held "that our Supreme Court's recent decision in *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) ("*Batts II*") requires that an individual convicted of first or second-degree murder¹ for a crime committed as a minor be sentenced to a maximum term of life imprisonment." See also *Commonwealth v. Machicote*, 172 A.3d 595 (Pa. Super. 2017) ("a trial court, in resentencing a juvenile offender convicted [of second-degree murder] prior to *Miller*, was constitutionally permitted to impose a minimum term-of-years sentence and a maximum sentence of life imprisonment); *Commonwealth v. Melvin*, 172 A.3d 14, 21 (Pa. Super. 2017) (affirmed the appellant's resentence of 30 years to life imprisonment after his sentence of life without parole for second-degree murder was vacated). This case law is clear and this Court was without authority to impose any sentence in this case that did not contain a maximum sentence of life imprisonment for the second degree murder conviction.

Furthermore, the defendant's claim belies his counsel's comments at sentencing. In responding to this Court's questioning at sentencing, defense counsel specifically stated that:

I agree with that. I agree the life tail is a mandatory sentence that you must give. We've had this argument in another case. And since *Seskey* came out, I believe that the Court is clear that the life tail is appropriate in this case.

Accordingly, the defendant's challenge to the maximum portion of his sentence fails.

Defendant next claims that this Court erred in denying his request for funding to prepare a sentencing mitigation report for use at sentencing. As set forth in *Commonwealth v. Konias*, 136 A.3d 1014, 1019-1020 (Pa.Super. 2016):

It is well-established that indigent defendants have a right to access the same resources as non-indigent defendants in criminal proceedings. *Commonwealth v. Curnutte*, 871 A.2d 839, 842 (Pa.Super.2005). The state has an "affirmative duty to furnish indigent defendants the same protections accorded those financially able to obtain them." *Commonwealth v. Sweeney*, 368 Pa.Super. 33, 533 A.2d 473, 480 (1987). Procedural due process guarantees that a defendant has the right to present competent evidence in his defense, and the state must ensure that an indigent defendant has fair opportunity to present his defense. *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

However, "[t]he provision of public funds to hire experts to assist in the defense against criminal charges is a decision vested in the sound discretion of the court and a denial thereof will not be reversed absent an abuse of that discretion." *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa.Super.2008) (citations omitted).

Defendant filed a motion seeking authorization to spend up to \$6,000 to hire an expert witness. Specifically, as noted in the brief he filed in support of his request, the defendant asked for a mitigation specialist "for purposes of ensuring effective representation for Defendant facing a life sentence stemming from juvenile charges". This Court denied the request to appropriate \$6,000 for retention of a mitigation expert because the defendant did not provide even a *prima facie* basis that he suffered from any conditions that required further investigation. This Court was concerned that the defendant was now 28 years old, not 17 years old which

he was at the time of the homicide. The Court was not informed about what sort of functions such an expert would serve or what type of information such an expert would investigate specific to the defendant. Importantly, this Court was not informed of the financial terms required by such an expert. Defense counsel spoke in terms of “what ifs” during the argument on whether a mitigation expert should be appointed. This Court was not going to authorize \$6,000 without a more concrete basis upon which to determine whether such an expert was necessary.

Defendant next claims that this Court impermissibly thwarted the defendant’s right of allocution by interrupting and directing that counsel should have directed the defendant’s statements to the Court. The right to allocution requires the court to inform a defendant that he has the right to address the court prior to sentencing. *Commonwealth v. Hague*, 840 A.2d 1018 (Pa.Super. 2003) citing *Commonwealth v. Thomas*, 520 Pa. 206, 553 A.2d 918 (1989); *Commonwealth v. Melvin*, 392 Pa.Super. 224, 572 A.2d 773 (1990). The failure to afford a criminal defendant the right to address the court prior to sentencing is reversible error. *Id.*

The defendant was clearly provided an opportunity to allocate at sentencing. While the defendant was allocating, in this Court’s view, he seemed to stray from providing the Court with relevant mitigating information and he seemed to ramble a bit. During the allocution, this Court suggested that defense counsel should perhaps ask the defendant relevant questions to focus the defendant to provide pertinent information for the Court’s consideration. With the Court’s guidance, the defendant and defense counsel presented credible information to the Court. This Court permitted the defendant to allocute on two separate instances at sentencing.

This defendant’s allocution was not limited nor was the defendant prejudiced whatsoever by this Court’s comments during the allocution. At sentencing, this Court stated:

Mr. McMillan was cut off a couple times by me today because he was straying from perhaps what I thought was the purpose of his discussion. I didn’t find that to be negative for him. He was trying in his way to make his apologies and accept his responsibility for what happened without being too specific about it. Not an easy thing for someone that’s very skilled in presentation in a courtroom and certainly a very difficult thing for one who sits where Mr. McMillan sits.

So although I leaned on you a little bit, Mr. McMillan, it was only to try to keep you focused. It wasn’t that I regarded anything you said as wrong or negative or disrespectful or anything like that.

The sentencing record amply demonstrates that the defendant had many opportunities to allocute and he made the best of those opportunities. This Court did not thwart his right to allocute and this claim, therefore, fails.

The defendant finally claims that this Court “failed to consider and to verbalize his analysis of the relevant factors prior to imposing a life sentence.” Contrary to this allegation, this Court did not impose a life sentence. However, this Court did provide reasons for the sentence it ultimately imposed. In *Batts II*, the Pennsylvania Supreme Court explained that a sentencing court should consider the factors set forth in *Miller* and 18 Pa.C.S.A. §1102.1(d) in determining a sentence. Title 18 Pa.C.S.A. §1102.1(d) sets forth the following factors:

- (1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim’s family. A victim impact statement may include comment on the sentence of the defendant.
- (2) The impact of the offense on the community.
- (3) The threat to the safety of the public or any individual posed by the defendant.
- (4) The nature and circumstances of the offense committed by the defendant.
- (5) The degree of the defendant’s culpability.
- (6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.
- (7) Age-related characteristics of the defendant, including:
 - (i) Age.
 - (ii) Mental capacity.
 - (iii) Maturity.
 - (iv) The degree of criminal sophistication exhibited by the defendant.
 - (v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.
 - (vi) Probation or institutional reports.
 - (vii) Other relevant factors.

As noted in *Batts, II*, *Miller* requires that sentencing for juveniles must be individualized. This requires consideration of the defendant’s age at the time of the offense, as well as “its hallmark features,” including:

immaturity, impetuosity, and failure to appreciate risks and consequences [;] ... the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional [;] ... the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him[;] ... that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys[;] ... [and] the possibility of rehabilitation ... when the circumstances [i.e. (the youthfulness of the offender)] most suggest it.

Batts II, at 431.

Moreover, 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).

The record in this case establishes that this Court considered the relevant factors in imposing sentence. This Court initially notes that the sentence imposed in this case is consistent with the current legislative requirements that a juvenile convicted of second-degree murder be sentenced to a term of imprisonment of not less than 30 years nor more than life imprisonment. See 18 Pa.C.S.A. §1102.1(c). This Court noted on the record that it had considered the rehabilitation of the defendant, the protection of the public, the specific deterrence of the defendant, general deterrence of the public and victim impact evidence. This victim impact evidence was compelling. The defendant went into a home carrying a firearm. He was told to leave the residence by the victim's mother. After he was escorted from the house, he immediately went right back into the house and senselessly shot and killed the victim during the course of a robbery. This Court also considered the defendant's age. He was 24 days shy of his 18th birthday at the time he committed the crimes of conviction. The Court noted that the defendant steadfastly denied that the murder in this case occurred during the commission of a robbery, a crime for which a jury had convicted him and a crime for which the Superior Court had determined there was sufficient evidence to convict. His reluctance to accept responsibility for his actions was considered by this Court in fashioning the appropriate sentence. This Court concluded that the defendant presents a grave danger to the community. Notably, the sentence imposed by this Court will offer the defendant a chance at parole. In sum, this Court concluded the relevant factors and it believes the sentence imposed on the offense of second-degree murder was appropriate.

For the foregoing reasons, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: May 16, 2018

¹ “Reese” has been identified as James Maurice Jones.

² Ms. Larue testified that due to a prior incident when the defendant showed Ms. Larue a gun while in her residence, she decided that the defendant was no longer permitted to be in her residence.

Commonwealth of Pennsylvania v. Robert Minor

Criminal Appeal—Sufficiency—Waiver

A challenge to insufficient evidence, without detailing what element(s) of crimes were not proven, waives issue for appellate review.

No. CC 2016-13630. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—June 20, 2018.

OPINION

This is a direct appeal from the judgment of sentence entered on January 23, 2018, following a jury trial that took place between November 1, 2017 and November 8, 2017. The Defendant was charged in a seven (7) count information as follows: Count One (1) - Criminal Attempt Homicide (18 Pa. C.S.A. § 901); Count Two (2) - Aggravated Assault (18 Pa. C.S.A. §2702 (a)(1)); Count Three (3) - Conspiracy to commit Aggravated Assault (18 Pa. C.S.A. § 903); Count Four (4) - Criminal Mischief (18 Pa. C.S.A. §3304(a)(5); Count Five (5) - Possession of a Weapon (18 Pa. C.S.A. §907(b); Count Six (6) - Simple Assault (18 Pa. C.S.A. §2701(a)(1); and Count Seven (7) - Recklessly Endangering Another Person (18 Pa. C.S.A. §2705).

At the conclusion of trial, the jury found the Defendant not guilty of Criminal Attempt Homicide (Count One), Aggravated Assault (Count Two) and Possession of a Weapon (Count Five). The jury found the Defendant guilty of the remaining charges. Sentencing was deferred to allow for the preparation of a Pre-Sentence Investigation Report (“PSI”). On January 23, 2018, the Defendant was sentenced at Count Three (3) to a term of imprisonment of 2 ½ to 5 years, to be followed by a four (4) year term of probation. At Count Four (4), the Defendant was sentenced to a 1-2 year period of imprisonment, to be followed by a four (4) year term of probation. The sentences of imprisonment were ordered to run concurrently with one another. The Defendant also received a sentence of two (2) years’ probation at Count Six (6) and Count Seven (7) of the information. The probationary periods were ordered to run concurrently with one another, and were all ordered to commence upon the Defendant’s release from imprisonment.

A timely post-sentence motion was filed on February 1, 2018. The motion was denied immediately following a hearing that was held on February 16, 2018. On February 28, 2018, Trial Counsel sought leave to withdraw from the case. The court granted counsel’s motion that same day, and the Office of Conflict Counsel was appointed to represent the Defendant on his appeal.

On March 14, 2018, a Notice of Appeal was filed. On March 16, 2018, the court ordered the Defendant to file his Concise Statement of Matters Complained of on Appeal (“Concise Statement”) pursuant to Pa. R.A.P. 1925(b) no later than April 6, 2018. After receiving one extension of time, the Defendant filed a timely Concise Statement on June 8, 2018. The Defendant’s Concise Statement raises the following issue for review:

The defendant alleges that the verdict as to Counts 3, 4, 6, and 7 was insufficient as a matter of law. Specifically, the defendant alleges the evidence presented, including the testimony of the complaining witness and officers, even in the light most favorable to the Commonwealth, was insufficient to establish the elements of the crimes of Criminal Conspiracy – Aggravated Assault, Criminal Mischief, Simple Assault, and Recklessly Endangering Another Person, even if believed by the fact-finder. (Concise Statement, p. 3).

The issue raised in the Defendant’s Concise Statement should be deemed waived on appeal for the reasons that follow.

I. DISCUSSION

A. The Defendant failed to preserve his challenge to the sufficiency of evidence because the Concise Statement fails to state with any specificity the element or elements upon which he alleges that the evidence was insufficient.

The standard of review for challenges to the sufficiency of evidence is well-settled. Our appellate court has explained the standard as follows:

As a general matter, our standard of review of sufficiency claims requires that we evaluate the record “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. Widmer*, 744 A.2d 745, 751 (Pa. 2000). “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. Brewer*, 876 A.2d 1029, 1032 (Pa. Super. 2005). Nevertheless, “the Commonwealth need not establish guilt to a mathematical certainty.” *Id.*; see also *Commonwealth v. Aguado*, 760 A.2d 1181, 1185 (Pa. Super. 2000) (“[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant’s innocence”). Any doubt about the defendant’s guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. See *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. 2001).

The Commonwealth may sustain its burden by means of wholly circumstantial evidence. See *Brewer*, 876 A.2d at 1032. Accordingly, “[t]he fact that the evidence establishing a defendant’s participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence.” *Id.* (quoting *Commonwealth v. Murphy*, 795 A.2d 1025, 1038–39 (Pa. Super. 2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant’s crimes beyond a reasonable doubt, the appellant’s convictions will be upheld. See *Brewer*, 876 A.2d at 1032.

Commonwealth v. Rahman, 75 A.3d 497, 500-01 (Pa. Super. 2013) (quoting *Commonwealth v. Pettyjohn*, 64 A.3d 1072 (Pa. Super. 2013)) (citations omitted). Moreover, “the trier of fact, who determines credibility of witnesses and the weight to give the evidence produced, is free to believe all, part, or none of the evidence.” *Commonwealth v. Brown*, 701 A.2d 252, 254 (Pa. Super. 1997).

However, our appellate court has made clear that, “[i]n order to preserve a challenge to the sufficiency of the evidence on appeal, an appellant’s Rule 1925(b) Statement must state with specificity the element or elements upon which the appellant alleges that the evidence was insufficient.” *Commonwealth v. Garland*, 63 A.3d 339, 344 (Pa. Super. 2013) (citing *Commonwealth v. Gibbs*, 981 A.2d 274, 281 (Pa. Super. 2009)). The court has noted that “[s]uch specificity is of particular importance in cases where, as here, the appellate was convicted of multiple crimes each of which contains numerous elements that the Commonwealth must prove beyond a reasonable doubt.” *Gibbs*, *supra*, at 281 (emphasis added).

In *Commonwealth v. Stiles*, 143 A.3d 968, 982 (Pa. Super. 2016), the appellate court found that the Defendant waived his challenge to the sufficiency of evidence where the Defendant was convicted of two (2) counts of first-degree murder and two (2) counts of VUFA, and the Defendant’s concise statement simply alleged that the convictions were “based on insufficient evidence because the circumstantial inferences drawn from the evidence were unwarranted and unreliable.” The *Stiles* court found that the concise statement “failed clearly to state any element upon which he alleged the evidence was insufficient.” *Id.* at 982; See also *Commonwealth v. Roche*, 153 A.3d 1063 (Pa. Super. 2017) (finding waiver of challenge to sufficiency of evidence where concise statement “failed to specify the allegedly unproven elements of the crimes”).

In the present case, the Defendant was convicted of four (4) different offenses after the Commonwealth presented evidence that he, along with two (2) other individuals, conspired together and fired over a dozen gunshots at a moving vehicle which was being driven by a woman who was well-familiar with the Defendant and his co-conspirators. (Jury Trial Transcript, 11/1/17-11/8/17, pp. 105-07, 110-12, 116-18, 123-29, 131-32, 139-43, 148-50, 167-68, 171, 175, 198-99, 203, 208, 229, 239-40, 278, 301, 348).

Just like in *Stiles*, *supra*, and *Garland*, *supra*, the Defendant in this case was convicted of multiple crimes, each of which contains numerous elements that the Commonwealth had to prove beyond a reasonable doubt at trial. As was the case in *Stiles* and *Garland*, the Defendant’s Concise Statement sets forth a generic, boilerplate challenge to the sufficiency of evidence which fails to specify which element or elements of which offenses he is alleging was insufficient to sustain the multiple convictions in this case. Other than stating that the testimony of the “complaining witnesses” was insufficient to prove the offenses of conviction, the Defendant fails to offer any explanation as to how or why that testimony fell short of establishing any of the elements for any of the charged offenses. The lack of specific allegations to support the Defendant’s challenge to the sufficiency of evidence precludes meaningful appellate review. See *Commonwealth v. Voss*, 482 A.2d 593, 599 (Pa. Super. 1984).

Had this case involved a single conviction for a straight-forward offense, the court would have attempted to engage in a discussion as to why the evidence was sufficient to sustain the conviction. However, this case involves four (4) different offenses, including criminal conspiracy, which is far from a straight-forward legal construct. The Defendant’s non-specific and overly-broad Concise Statement has substantially impaired this court’s ability to meaningfully respond to the issue raised. In the event that the court deems that the issue has not been waived, this court will, to the best of its ability, provide an Opinion at that time.

II. CONCLUSION

The Defendant’s Concise Statement failed to preserve his challenge to the sufficiency of evidence because it failed to state with specificity the element or elements upon which he alleges that the evidence was insufficient.

BY THE COURT:

/s/Lazzara, J.

Date: June 20, 2018

**Paul Lowe v.
Mark Lazzaro, Sr.**

Breach of Contract—Statute of Frauds—General Warranty Deed—Specific Performance

Court entered non-jury verdict in favor of Plaintiff who allegedly sold real property to Defendant for \$100.00 plus unpaid liens pursuant to verbal agreement. Defendant prepared, had signed and recorded a general warranty deed to the property reciting \$100.00 price. Defendant failed to pay liens. Plaintiff sued to recoup the payment thereof by Plaintiff. Defendant raised statute of frauds defense which was rejected by the trial judge.

No. AR 17-2446. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—August 20, 2018.

OPINION

I write this Opinion in support of my May 9, 2018 non-jury verdict in favor of Plaintiff, which has been appealed to the Superior Court of Pennsylvania by Defendant. Plaintiff was the owner of a house at 2213 Webster Avenue in West Mifflin (“the property”). The property was unoccupied and in need of many repairs, as well as subject to over \$8,000 in delinquent real estate taxes. In 2015 Defendant came across the property in his professional capacity as a building inspector for West Mifflin. Though the property was not listed for sale, Defendant, in his personal capacity, reached out to Plaintiff to ask if he would be interested in selling the property to Defendant. Plaintiff agreed to sell the property to Defendant for \$100 and the value of Defendant paying all delinquent taxes on the property. The parties reached a “hand shake agreement” regarding the sale of the property, and Defendant paid Plaintiff \$100 in cash. After this agreement was reached, the parties met at a notary to execute a deed for the property, which Defendant had prepared on his behalf. The deed listed only the \$100 as the consideration for the sale of the property. Approximately one year after the property was transferred to Defendant, Plaintiff applied to refinance his home. During Plaintiff’s attempt to refinance, he learned that \$8,881.88 in delinquent taxes were owed on the property. After learning that the delinquent taxes had not been paid on the property, Plaintiff repeatedly attempted to contact Defendant about the unpaid taxes. Ultimately, Plaintiff paid the \$8,881.88 tax bill in order to complete the refinancing of his home.

Plaintiff initiated an action against Defendant at the magistrate level to recover the cost of paying the back taxes owed on the property and was awarded \$9,053.38. Defendant appealed this decision to the Court of Common Pleas of Allegheny County. On October 16, 2017 a compulsory arbitration hearing was held and Plaintiff was awarded \$8,881.88 plus court costs. Defendant appealed the arbitration award and on May 9, 2018 a non-jury trial was held before me. On May 9, 2018 I issued a non-jury verdict awarding Plaintiff \$8,881.88 plus court costs. Defendant filed a Motion for Post-Trial Relief, which I denied on May 23, 2018. On June 8, 2018 Defendant filed a Notice of Appeal.

In his Concise Statement of Errors Complained of on Appeal, Defendant contends that I made two errors. Defendant contends I made an error by not applying the Statute of Frauds to nullify the parties’ unwritten, hand shake agreement. Defendant also contends I made an error by disregarding the legal terminology in the General Warranty Deed that translates into Plaintiff guaranteeing no taxes or other debts lien the property.

Plaintiff credibly testified that he and Defendant entered into an oral agreement for Plaintiff to sell the property to Defendant for the price of \$100 plus Defendant satisfying the delinquent taxes on the property. (transcript of May 9, 2018 trial, hereinafter referred to as “T,” pp. 8-10, 18) However, Defendant’s testimony that he had not agreed to pay the delinquent taxes was not credible. If, in fact, Defendant did not agree to pay the delinquent taxes on the property as the purchase price, then he treated the purchase of the property much differently than he treated the purchase of other similar properties. For example, Defendant purchased another condemned property in the area for approximately \$10,000, versus the alleged \$100 that Defendant claims the parties agreed upon as the purchase price for the property in this case. (T. p. 69). With another condemned property purchased by Defendant, he obtained the results of a title search before completing the transaction for the sale of that property, whereas with the property at issue in this case, Defendant claims to have completed the transfer of the property without waiting for the results of the title search. (T. pp. 73-74). Defendant provided no explanation for these discrepancies in the treatment of the purchase of the property and therefore, I did not find Defendant’s testimony claiming that he did not agree to pay the delinquent taxes as the purchase price to be credible¹.

Shortly after reaching this oral agreement, Defendant had a general warranty deed prepared that he brought with him to the notary’s office where the parties would be executing the deed. (T. pp. 11, 77, 82-83). The deed was executed by Plaintiff and his wife and Defendant recorded the deed. (T. p. 62). Had the deed not been executed by Plaintiff and his wife, the Pennsylvania Statute of Frauds² would invalidate a specific performance lawsuit by the Defendant to enforce the oral contract. However, the Statute of Frauds is not applicable to a lawsuit seeking only money damages arising from an oral contract for the sale of real estate. *See Polka v. May*, 383 Pa. 80 at 84, 118 A.2d 154 at 156 (1955) and *Empire Properties, Inc. v. Equireal, Inc.*, 449 Pa.Super. 476 at 486, 674 A.2d 297 at 302 (1996). Since there was credible evidence that the parties entered into an oral contract that was breached by the Defendant, I was correct in not applying the Statute of Frauds and awarding Plaintiff the money damages sought in the lawsuit.

Also, according to the Restatement of Contracts, once a transfer of property has actually occurred, an oral promise to pay a specified price for the land becomes enforceable. (comment d. to Restatement (First) of Contracts §193 (1932) June 2018 Update). Further, the price of the land is not always identical with the consideration for the promise to transfer it. (*Id.* Comment a.). Therefore, once Plaintiff and his wife signed the deed prepared by Defendant, the promise to pay the delinquent taxes on the property as its purchase price became enforceable and Defendant breached the parties’ oral contract by failing to pay the taxes as agreed upon by the parties.

In addition, Defendant did not set forth the Statute of Frauds as an affirmative defense in a New Matter pleading³. The Statute of Frauds, however, must be set forth in a New Matter pleading or it is waived. *See Pennsylvania Rules of Civil Procedure* nos. 1030(a) and 1032(a). Therefore, my failure to apply the Statute of Frauds also was correct because the Defendant waived his ability to assert it as a defense.

Relative to Defendant’s contention that the General Warranty Deed constituted Plaintiff’s guarantee to pay the delinquent taxes, Plaintiff was not represented by an attorney and did not understand the legal significance of signing a general warranty deed. Plaintiff understood only that the deed prepared by Defendant “was a document that was utilized to basically transfer the property from myself to [Defendant].” T., p. 11. Therefore, the deed did not constitute a “meeting of the minds” to modify the previous hand shake agreement.⁴ Instead, this was another breach of that agreement by Defendant because his agreement to pay

the delinquent taxes should have appeared as additional consideration in the deed he prepared. Therefore, I was correct to disregard the language that guaranteed against delinquent taxes in the deed prepared by the Defendant

BY THE COURT:
/s/Hertzberg, J.

¹ My credibility determination also was based on Defendant's demeanor while testifying.

² 33 P.S. §1

³ Defendant apparently served his written Answer to the lawsuit on Plaintiff but neglected to file it with the Department of Court Records. *See* T. pp. 22-23. No copy was introduced into evidence and it was undisputed that the unfiled Answer did not reference the Statute of Frauds. *See* T. pp.109-110.

⁴ In the deed from Plaintiff and his wife to Defendant the legal language that comprises the general warranty begins with the last paragraph on the first page, which states:

And the said Grantor, its successors and assigns doth covenant, promise and agree, to and with the said Grantee that it, the said Grantor, its successors and assigns, shall and will Warrant and forever defend the hereinabove described premises, with the hereditaments and appurtenances, unto the said Grantee, its successors and assigns, against the said Grantor and against every other person lawfully claiming or who shall hereafter claim the same or any part thereof, by, from or under it/him, them or any of them.

Plaintiff's exhibit A from May 9, 2018 trial. Only a person with experience in real estate transactions would understand that this obscure language is a guarantee by the Seller that the property has no liens and/or other claims against it.

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PLJ

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OPINIONS

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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 5¹ and 6², 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.

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 were 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 landline 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 A.2d 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 public 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 Children's 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 hanger 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 A.2d 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

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PLJ

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Commonwealth of Pennsylvania v. Kevin Hamilton

Criminal Appeal—Sufficiency—Suppression—Four Corners—Trash Pull—Miranda—Confidential Informant

Various claims raised on appeal after defendant had admitted to police that he flushed heroin and crack cocaine down toilet while entry was made into his home.

No. CC 2016-14385. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—June 26, 2018.

OPINION

The Defendant has appealed from the judgment of sentence entered on November 16, 2017. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with two (2) counts of Possession of a Controlled Substance with Intent to Deliver,¹ two (2) counts of Possession of a Controlled Substance² and one (1) count each of Criminal Use of a Communication Facility,³ Tampering with or Fabricating Physical Evidence⁴ and Possession of Drug Paraphernalia.⁵ He appeared before this Court on June 22, 2017 for a hearing on his Pretrial Motion to Suppress, but that Motion was denied at the conclusion of the hearing. He next appeared before this Court on November 16, 2017 for a stipulated non-jury trial. At its conclusion, this Court found the Defendant not guilty of the Possession with Intent to Deliver charges and guilty of the remaining charges. The Defendant waived a Pre-Sentence Report and was immediately sentenced to a term of imprisonment of one (1) to two (2) years. No Post-Sentence Motions were filed. This appeal followed.

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

1. Sufficiency of the Evidence

Initially, the Defendant argues that the evidence was insufficient to support the convictions for Criminal Use of a Communication Facility and Tampering with Physical Evidence. A review of the record reveals that these claims are meritless.

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

Briefly, the evidence presented at the stipulated non-jury trial established that the Pittsburgh Police Department executed a search warrant at the Defendant’s home at 147 Orchard Street following information provided by a confidential informant and police corroboration through surveillance and two (2) trash pulls. Following the execution of the search warrant the Defendant asked to speak with Detective Churilla, and told the detective that when the police initially entered his home, he had flushed crack cocaine and heroin down the toilet. He also stated that the drugs found during the search were his and the flip phone was his “dirty phone.” Subsequent examination of the flip phone revealed text messages related to the sale of drugs.

Our Crimes Code defines Criminal Use of a Communication Facility as follows:

§7512. Criminal use of communication facility

(a). *Offense defined.* - A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L. 233, No. 64) known as *The Controlled Substance, Drug, Device and Cosmetic Act*. Every instance where the communication facility is utilized constitutes a separate offense under this section.

...

(c). *Definition.* - As used in this section, the term “communication facility” means a public or private instrumentality used or useful in the transmission of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part, including, but not limited to, telephone, wire, radio, electromagnetic, photoelectronic or photo-optical systems or the mail.

18 Pa.C.S.A. §7512.

In order to sustain a conviction for Criminal Use of a Communication Facility, our courts have held that “[t]he Commonwealth must prove, beyond a reasonable doubt that: (1) Appellants knowingly and intentionally used a communication facility; (2) Appellants knowingly, intentionally or recklessly facilitated an underlying felony; and (3) the underlying felony occurred.” *Commonwealth v. Moss*, 852 A.3d 374, 382 (Pa.Super. 2004). Here, the Commonwealth established, through the Defendant’s admission and its own investigation, that the cell phone recovered during the search belonged to the Defendant and that he used it to arrange the sale of illegal drugs. The evidence was clearly sufficient to establish the elements of Criminal Use of a Communication Facility and so this claim must fail.

Regarding the Tampering with Physical Evidence claim, our Crimes Code defines it as follows:

§4910. Tampering with or fabricating physical evidence

A person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1). *alters, destroys, conceals or removes any record, document or thing with intent to impair its veracity or availability in such proceeding or investigation;*

18 Pa.C.S.A. §4910

Here, the Defendant admitted to the police that he flushed heroin and crack cocaine down the toilet while entry was being made into his home. In *Commonwealth v. Govens*, 632 A.2d 1316 (Pa.Super. 1993), our Superior Court specifically addressed the flushing of drugs with regard to the intent element of the statute. It stated that “[t]he trier of fact can reasonably infer that appellant had become aware that his drug dealing was under investigation when he heard the police knock at his door and announce their presence. Appellant’s reaction, by running into the bathroom and attempting to get rid of the evidence, readily confirms his awareness of a police investigation and his intent to impede the same. In this regard, we agree with the Commonwealth that ‘it is absurd to suggest that [appellant] attempted to destroy the evidence for any reason other than to keep it out of the hands of police... Certainly, by destroying evidence to avoid arrest, [appellant] necessarily demonstrated his intent to impair a police investigation.’” *Commonwealth v. Govens*, 632 A.2d 1316, 1329 (Pa.Super. 1993).

As noted above, the Defendant admitted to flushing heroin and crack cocaine down the toilet as the police were entering his home to execute the search warrant. As in *Govens*, there is no reasonable argument that the Defendant flushed the drugs with any intent other than to keep them from being discovered by the police. By admitting his awareness of the police entry into his home and his reactionary flushing of the cocaine and heroin, the Defendant also admitted his intent to keep those drugs from discovery by the police. The evidence was sufficient to establish the elements of the claim for Tampering with Physical Evidence. This claim must also fail.

2. Suppression - Probable Cause

Next, the Defendant avers that this Court erred in denying his Motion to Suppress, because “based on the ‘four corners’ of the search warrant, it was issued based on information that failed to establish probable cause.” This claim is meritless.

When reviewing a challenge to the trial court’s denial of a suppression motion, the appellate court “is limited to determine whether the suppression courts factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, [the appellate court] may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court’s factual findings are supported by the record, [the appellate court is] bound by those findings and may reverse only if the court’s legal conclusions are erroneous... Where, as here, the appeal of the determination for he suppression court turns on allegations of legal error, the suppression court’s legal conclusions are not binding on an appellate court, ‘whose duty it is to determine if the suppression court properly applied the law to the facts’... Thus, the conclusion of law of the courts below are subject to [the appellate court’s] plenary review.” *Commonwealth v. Jones*, 988 A.2d 649, 654 (Pa. 2010).

At the conclusion of the suppression hearing, defense counsel presented a detailed “four corners” argument, wherein he averred that the information from the confidential informant was not reliable, subsequent surveillance was inconclusive and the warrant did not provide any specifics on the field testing of the garbage.

In *Commonwealth v. Gagliardi*, 128 A.3d 790 (Pa.Super. 2015), our Superior Court discussed the use and corroboration of a confidential informant in establishing probable cause to obtain a search warrant. It stated: “[a] determination of probable cause based upon information received from a confidential informant depends upon the informant’s reliability and basis of knowledge viewed in a common sense, non-technical manner. Thus, an informant’s tip may constitute probable cause where police independently corroborate the tip, or where the informant has provided accurate information of criminal activity in the past, or where the informant whims participated in the criminal activity. The corroboration by police of significant details disclosed by the informant in the affidavit of probable cause meets the *Gates* threshold... (‘Information received from an informant whose reliability is not established may be sufficient to create probable cause where there is some independent corroboration by police of the informant’s information...’) The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause. Probable cause exists where the facts and circumstances within the affiant’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable causation in the belief that a search should be conducted.” *Commonwealth v. Gagliardi*, 128 A.3d 790, 795 (Pa.Super. 2015), citing *Commonwealth v. Clark*, 28 A.3d 1284, 1288 (Pa. 2011).

Here, the affidavit of probable cause noted that the confidential informant has provided information in four (4) other cases, one (1) of which resulted in a guilty plea and three (3) of which were still pending at the time of the application. The affidavit noted that the confidential informant “has been with Quincy Leonard when he went to 147 Orchard St. and picked up several bricks of heroin from Kevin, LNU. The CI stated that the bricks of heroin were wrapped in porno paper.” The informant identified the Defendant from a photograph. Thereafter, the police confirmed the information with surveillance, two (2) trash pulls and field testing of items therein.

At the conclusion of the suppression hearing, this Court placed its findings and conclusions on the record. It stated:

THE COURT: Okay. Mr. Sweeney, I agree with you that individually these items would not lead to a good search warrant. However, looking at the totality of the circumstances, I believe the warrant is good. There was a tip from a known person whose veracity with dealing drugs was verified. There was a photo of the defendant shown to this person. There was a trash pull where there was residue found, and, again, I don’t know very many people that take their garbage down the block, and if that were the only thing we had, then I would worry about it. There was also surveillance set up by the officers and a second trash pull. So I do think that the warrant is good.

(Suppression Hearing Transcript, p. 20-21).

As the record reflects, this Court appropriately considered the totality of the circumstances in evaluating whether there was sufficient probable cause for the issuance of the search warrant. This court properly considered the confidential informant’s past history, the information he provided and the police corroboration of that information. This Court’s findings of fact and conclusions of law were supported by the record and so this claim of error must also fail.

3. Suppression - Miranda

Finally, the Defendant argues that this Court erred in denying his Motion to Suppress in regard to statements made at the time of the search. He argues that he was in custody and had been subjected to interrogation but had never been informed of his *Miranda* rights. A review of the record reveals that this claim is also meritless.

“The principles surrounding *Miranda* warnings are...well-settled. The prosecution may not use statements stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel... Thus, *Miranda* warnings are necessary any time a defendant is subject to a custodial interrogation. As the United States Supreme Court explained, ‘the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent’... Moreover, in evaluating whether *Miranda* warnings are necessary, a court must consider the totality of the circumstances... In conducting the inquiry, we must also keep in mind that not every statement made by an individual during a police encounter amounts to an interrogation. Volunteered or spontaneous utterances by an individual are admissible even without *Miranda* warnings... Similarly, *Innis* does not ‘place the police under a blanket prohibition from informing a suspect about the nature of the crime under investigation or about the evidence relating to the charges against him.’” *Commonwealth v. Gaul*, 912 A.2d 252, 258 (Pa. 2006), internal citations omitted. Moreover, “since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can only extend to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.” *Commonwealth v. Umstead*, 916 A.2d 1146, 1150 (Pa.Super. 2007), citing *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980).

At the suppression hearing, the following occurred:

- Q. (Ms. Konoval): Now, without getting into further details about the search itself, the items discovered, did you speak to the defendant after you searched the master bedroom?
- A. (Det. Churilla): He asked to speak to me.
- Q. He asked to speak to you?
- A. Yes.
- Q. Did you hear him ask to speak to you?
- A. Yes.
- Q. Were you back in the living room?
- A. I came down the steps, and at this time I informed the other detectives there that we needed to get both of them dressed - both of them would be himself and then his girlfriend at the time who was living with him - that it there was narcotics recovered.
- Q. So let me just clarify. You came down the stairs after searching the master bedroom, and you said to other detectives, we need to get both of them - referring to the defendant and a female who was in the house - dressed?
- A. Yes.
- Q. You said that based on what?
- A. Because the narcotics - the narcotics were found in the master bedroom itself. So that's why - target in the investigation was both names on the search warrant is Mr. Hamilton and his girlfriend.
- Q. Did you say anything else before the defendant spoke to you?
- A. I can't recall.
- Q. Did you say anything to him directly before he spoke to you?
- A. No.
- Q. Did you say anything to his girlfriend directly?
- A. Not that I can recall.
- Q. Were there any people in that house when S.W.A.T. made entry other than the defendant and his girlfriend?
- A. There was his children were there.
- Q. About how old are they?
- A. I would say from being an infant to maybe being teenagers.
- Q. After you told another detective we need to get them both dressed, what happened?
- A. He asked - he wanted to say something to me.
- Q. Did he speak to you directly? Did he speak to another officer?
- A. He spoke to me directly.
- Q. Do you remember the exact words he used?
- A. Can I talk to you?
- Q. What did you say?
- A. I said yeah.
- Q. What did he say?
- A. Basically, pretty much said, listen. Everything is mine. She has nothing to do with this. Basically taking responsibility for what was found in the house.

As the record reflects, Detective Churilla was giving directions to his fellow officers regarding getting the Defendant and his girlfriend dressed so that they could be taken to jail. The statement was not made or addressed to the Defendant. The Defendant's subsequent statement was spontaneously volunteered and was not made in response to an interrogation. Given the spontaneous and volunteered nature of the statement, it is clearly admissible despite the fact that the Defendant had not yet been read his *Miranda* warnings. Given these facts and circumstances, this Court was well within its discretion in denying the Motion to Suppress. This claim must also fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on November 16, 2017 must be affirmed.

BY THE COURT:

/s/McDaniel, J.

¹ 35 P.S. §780-113(a)(30)

² 35 P.S. §780-113(a)(16)

³ 18 Pa.C.S.A. §7512(a)

⁴ 18 Pa.C.S.A. §4910(1)

⁵ 35 P.S. §780-113(a)(32)

Commonwealth of Pennsylvania v. Adam Pastories

Criminal Appeal—PCRA—SVP—Untimely—Muniz—Retroactivity

Because the Pa. Supreme Court has not held that Commonwealth v. Muniz has retroactive effect, the petitioner's PCRA petition is untimely.

No. CC 201203065, 201511675. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—July 9, 2018.

OPINION

The Defendant has appealed from this Court's Order of April 10, 2018, which dismissed his Amended Post Conviction Relief Act Petition without a hearing. However, a review of the record reveals that because the Petition is untimely, this Court lacks the jurisdiction to address it. The Petition was, therefore, properly dismissed.

The Defendant was charged at CC 201203065 with two (2) counts each of Aggravated Indecent Assault¹ and Indecent Assault.² He appeared before this Court on May 21, 2012 and, pursuant to a plea agreement with the Commonwealth, pled guilty to one (1) count of Indecent Assault and the remaining charges were withdrawn. He was immediately sentenced pursuant to the agreement to a term of imprisonment of six (6) to 12 months with a term of probation of two (2) years. No Post-Sentence Motions were filed and no direct appeal was taken.

Thereafter, the Defendant was charged at CC 201511675 with two (2) counts of Failure to Comply with Registration Requirements.³ He appeared before his Court on March 3, 2016 and pled guilty to both counts. He was immediately sentenced to a term of imprisonment of four (4) to eight (8) years. No Post-Sentence motions were filed and no direct appeal was taken.

No further action was taken until January 17, 2018, when the Defendant filed a pro se Post Conviction Relief Act Petition. Scott Coffey, Esquire, was appointed to represent the Defendant and an Amended Petition was filed on February 23, 2018. After giving the appropriate notice of its intent to do so,⁴ this Court dismissed the Amended Petition without a hearing on April 10, 2018. This appeal followed.

On appeal, the Defendant has raised two (2) claims of error. However, a review of the record reveals that the Petition was untimely filed and, therefore, was properly dismissed.

Pursuant to 42 PA.C.S.A. §9545(b), any and all PCRA Petitions, "including a second or subsequent petition, shall be filed within one year of the date the judgment of sentence becomes final..." 42 Pa.C.S.A. §9545(b)(1). In this case, the Defendant's judgments of sentence became final on June 20, 2012 (CC 201203065) and April 4, 2016 (CC 201511675), when he failed to file a direct appeal. Therefore, in order to be timely, any PCRA Petitions should have been filed by June 20, 2013 and April 4, 2017, respectively. The instant Petition, filed on January 17, 2018, is well outside of that time limitation for both informations. However, the Amended Petition avers that the Petition is timely due to *Commonwealth v. Muniz*, 169 A.3d 1189 (Pa. 2017), wherein our Supreme Court held that the retroactive application of SORNA's registration requirements violated the *ex post facto* clauses of the United States and Pennsylvania constitutions.

The Post Conviction Relief Act states, in relevant part:

§9545. *Jurisdiction and proceedings.*

(b) *Time for filing petition.* –

(1) *Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment became final, unless the petition alleges and the petitioner proves that:*

(iii) *the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided by this section and has been held by that court to apply retroactively.*

42 Pa.C.S.A. §9545(b)(iii).

In *Commonwealth v. Murphy*, 180 A.3d 402 (Pa.Super. 2018), our Superior Court interpreted the effect of *Muniz* on an otherwise-untimely PCRA Petition. In *Murphy*, the defendant's judgment of sentence became final in 2009. In October, 2017, the defendant attempted to challenge the lifetime registration requirement of SORNA based on our Supreme Court's decision in *Muniz*. However, our Superior Court found that *Muniz* did not operate to save an otherwise-untimely PCRA Petition. It held, "we acknowledge that **this Court** has declared that '**Muniz** created a substantive rule that retroactively applies in the collateral context.' **Commonwealth v. Rivera-Figueroa**, 174 A.3d 674, 678 (Pa.Super. 2017). However, because Appellant's PCRA Petition is untimely (unlike the petition at issue in **Rivera-Figueroa**), he must demonstrate that the Pennsylvania Supreme Court has held that **Muniz** applies retroactively in to satisfy section 9545(b)(1)(iii)... Because at this time, no such holding has been issued by our Supreme Court, Appellant cannot rely on **Muniz** to meet that timeliness exception." *Commonwealth v. Murphy*, 180 A.3d 402, 405-406 (Pa.Super. 2018), *emphasis in original*.

Given the Murphy Court's finding that *Muniz* has not been held to apply retroactively, it is clear that the Defendant cannot rely on the *Muniz* decision as a basis for the retroactive constitutional right exception to the time limitation provisions of the Post Conviction Relief Act.

Inasmuch as the Defendant has failed to satisfy the requirements of the retroactive Constitutional right exception to the Post Conviction Relief Act, his Petition was properly classified as untimely. See *Commonwealth v. Wojtaszek*, 951 A.2d 1169 (Pa.Super. 2008). "Given the fact that the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner." *Commonwealth v. Mazzarone*, 856 A.2d 1208, 1210 (Pa.Super. 2004). See also *Commonwealth v. Bennett*, 842 A.2d 953, 956 (Pa.Super. 2004) and *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999). As such, this Court is bound by the time limitation provisions of the Act and, therefore, properly dismissed the Defendant's Amended Post Conviction Relief Act Petition.

Accordingly, for the above reasons of fact and law, this Court's Order of April 10, 2018, which dismissed his Amended Post Conviction Relief Act Petition without a hearing must be affirmed.

BY THE COURT:
/s/McDaniel, J.

¹ 18 Pa.C.S.A. §3125(a)(4) - 2 counts

² 18 Pa.C.S.A. §3126(a)(4) - 2 counts

³ 18 Pa.C.S.A. §4915.1(a)(1) and §4915.1(a)(2)

⁴ This Court originally dismissed the Petition without giving notice of its intent to do so on March 13, 2018. However, three (3) days later, upon realizing the error, this Court vacated the Order of March 13, 2018 and issued the appropriate Notice of Intent.

Commonwealth of Pennsylvania v. Jeremy Hensel

Criminal Appeal—Probation Violation—Sentencing (Discretionary Aspects)—RRRI

Court asks for remand of case so that it can make a RRRI determination on the record.

No. CC 201411315, 201411316, 201503974. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—July 9, 2018.

OPINION

The Defendant has appealed from the judgment of sentence entered on February 13, 2018 following the revocation of his probation. A review of the record reveals that the judgment of sentence should be affirmed, but that the case should be remanded for additional proceedings.

The Defendant was charged with the following crimes: At CC 201411315 with two (2) counts of Terroristic Threats¹ and one (1) count each of Simple Assault,² Defiant Trespass³ and Harassment;⁴ At CC 201411316 with Simple Assault,⁵ Theft by Unlawful Taking,⁶ Defiant Trespass,⁷ Disorderly Conduct⁸ and Harassment;⁹ and at CC 201503974 with Terroristic Threats.¹⁰ He appeared before this Court on June 10, 2015 and, pursuant to a plea agreement with the Commonwealth, pled guilty to Terroristic Threats (1 count), Simple Assault and Defiant Trespass at CC 201411315 and to Simple Assault and Defiant Trespass at CC 201411316. Pursuant to the agreement, the remaining charges from those informations were withdrawn. He was immediately sentenced at those informations to a term of imprisonment of 112 days time served, with a subsequent term of probation of two (2) years. No Post-Sentence Motions were filed and no direct appeal was taken. Thereafter, the Defendant appeared before this Court on August 5, 2015 and, pursuant to a plea agreement with the Commonwealth, pled guilty to the sole count of Terroristic Threats at CC 201513974. He was immediately sentenced to a term of probation of two (2) years. Again, no Post-Sentence Motions were filed and no direct appeal was taken.

On February 13, 2018, the Defendant appeared before this Court for a probation violation hearing. Upon finding that the Defendant was in violation of the terms of his probation, this Court revoked the Defendant's probation and imposed consecutive terms of imprisonment of two (2) to four (4) years at CC 201411315, one (1) to two (2) years at CC 201411316 and two (2) to four (4) years at CC 201503974. Timely Post-Sentence Motions were filed and were denied on March 13, 2018. This appeal followed.

On appeal, the Defendant raises several claims of error, which this Court has re-ordered and addresses as follows:

1. Excessive Sentence

Initially, the Defendant argues that this Court erred in imposing an excessive sentence and in not considering the various sentencing factors when crafting its sentence. A review of the record demonstrates that this claim is meritless.

It is well-established that review of a sentence imposed following the revocation of probation proceeds according to the standard applicable to all sentences. “Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, abused its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.” *Commonwealth v. Booze*, 952 A.2d 1263, 1278 (Pa.Super. 2008), internal citations omitted. “When imposing a sentence of total confinement, the sentencing judge must state the reasons for the sentence in open court...Furthermore, the sentencing judge must explain any deviation from the sentencing guidelines...Nevertheless, a lengthy discourse on the trial court’s sentencing philosophy is not required.” *Commonwealth v. McVay*, 849 A.2d 270, 275 (Pa.Super. 2004), internal citations omitted.

Additionally, it bears mention that “upon revocation of probation, a sentencing court possesses the same sentencing alternatives that it had at the time of the initial sentencing.” *Commonwealth v. Byrd*, 663 A.2d 229, 231 (Pa.Super. 1995). See 42 Pa.C.S.A. §9771. Moreover, “it is well established that the sentencing alternatives available to a court at the time of initial sentencing are all of the alternatives statutorily available under the Sentencing Code...[and] at any revocation of probation hearing, the court is similarly free to impose any sentence permitted by the Sentencing Code...” *Commonwealth v. Wallace*, 870 A.2d 838, 842-43 (Pa. 2005), internal citations omitted.

At the time of the pleas, this Court noted that the maximum sentence for Terroristic Threats was five (5) years and the maximum sentence for Simple Assault was two (2) years. (Sentencing Hearing Transcript, 6/10/15, p. 4 and Sentencing Hearing Transcript 8/5/15, p. 3). At the revocation hearing, this Court imposed terms of imprisonment of two (2) to four (4) years at the Terroristic Threats charge and one (1) to two (2) years at the Simple Assault charge, which sentences were well below the maximum sentencing guidelines.

Moreover, at the revocation hearing, this Court noted that it had read and considered both a Pre-Sentence Report and a Behavior Clinic Report (Probation Violation Hearing Transcript, p. 7). “Where pre-sentence reports exist, [the appellate court] shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant’s character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. *Commonwealth v. Macias*, 968 A.2d 773, 778 (Pa.Super. 2009). This Court then placed its reasons for imposing sentence on the record. It stated:

THE COURT: The record will reflect that the Court has reviewed the Behavior Clinic report. I’ve ordered, read and considered the presentence report. The defendant has a prior record score of 4.

I have reviewed five probation violation reports and have received many, many letters from the defendant. The record will also reflect that July 5th of 2017 was a Gagnon 1.

...

Okay. So we went over where we are. This is a Stage 2 hearing. Mr. Henzel, you have been referred to JRS, but you didn’t in fact comply with any of them. You can’t even seem to cooperate while you are in the Allegheny County Jail.

...

You were referred to the DRC, the Day Reporting Center. And you were listed to go to the CBT program, which you failed to do. You were eventually placed in a CRR program, but were then 302’d for threatening to kill others at the CRR program.

You have threatened your probation officer with some pretty serious accusations. Your record for six months, when you were a minor, you had sexual intercourse with your six-year old sister, and in fact stabbed her. You have another assault in 2013. And then you have three assaults in 2013; two cases with one victim, and the third case with another victim.

In 2013, you called your sister, after eight years, and this would be the sister that you were adjudicated for sexually assaulting her, and threatened her and her family.

Every action that you have been involved in involves anger, danger and violence. If you are in the jail in your cell and you want to be angry and violent, that’s up to you. But out in society, you can’t do that.

You have refused every single effort that we have given you to rehabilitate yourself. You have never been employed for any length of time. You never did well under county supervision. You are a danger to the community, and apparently anyone whom crosses your path.

I understand that you may have some mental health issues; however, I see you making no effort to deal with those issues. All you do is get angry, and you assault, and you are violent.

(Probation Violation Hearing Transcript, pp. 7-8, 9-11).

As demonstrated by the record, this Court clearly placed ample reasons for its sentence on the record. The sentence imposed was within the guideline range available at the time of the initial sentencing and therefore, was legal. The sentence imposed was not in violation of the Sentencing Guidelines, either due to its length or the reasons contained in the record for its imposition. The sentence was legal and did not constitute an abuse of discretion. Therefore, this claim must fail.

2. Sentencing Credit

Next, the Defendant argues that this Court erred in failing to award him sentencing credit for four (4) days - June 2 and 3, 2014 and August 22 and 23, 2017. This Court’s review of the record reveals that the Defendant is correct and that he is due credit for those four (4) days. This Court has filed a Corrected Order of Sentence herewith and believes that resolves this claim of error in its entirety.

3. RRRI Eligibility

Finally, the Defendant argues that his sentence is illegal because this Court failed to make a determination of his RRRI eligibility. The case should be remanded for further proceedings as discussed below.

The Recidivism Risk Reduction Incentive Act states, in relevant part:

§4505. Sentencing

(a) *Generally.* – At the time of sentencing, the court shall make a determination whether the defendant is an eligible offender.

18 Pa.C.S.A. §4505 and

§4503. Definitions

“Eligible offender.” A defendant or inmate convicted of a criminal offense who will be committed to the custody of the department and who meets all of the following eligibility requirements:

(1) Does not demonstrate a history of present or past violent behavior...

...(3) Has not been found guilty of or previously convicted of or adjudicated delinquent for or an attempt or conspiracy to commit a personal injury crime as defined under Section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the Crime Victims Act...

18 Pa.C.S.A. §4503.

As noted above, at the probation violation hearing, this Court noted the Defendant’s extensive criminal history including a juvenile adjudication for Rape and Aggravated Assault and adult convictions for Simple Assault and Terroristic Threats. It is clear that the Defendant is not RRRI eligible due to the nature of the present charges and prior convictions. However, this Court concedes that it failed to specifically state that he was not RRRI eligible at the revocation hearing. As such, the case should be remanded for a new sentencing hearing during which this Court will make a specific finding as to the Defendant’s RRRI ineligibility.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on February 13, 2018 should be affirmed but the case should be remanded for an on-the-record determination of the Defendant’s RRRI ineligibility.

BY THE COURT:
/s/McDaniel, J.

¹ 18 Pa.C.S.A. §2706(a)(1) - 2 counts

² 18 Pa.C.S.A. §2701(a)(1)

³ 18 Pa.C.S.A. §3503(b)(1)

⁴ 18 Pa.C.S.A. §2709(a)

⁵ 18 Pa.C.S.A. §2701(a)(1)

⁶ 18 Pa.C.S.A. §3921(a)

⁷ 18 Pa.C.S.A. §3503(b)(1)

⁸ 18 Pa.C.S.A. §5503(a)(2)

⁹ 18 Pa.C.S.A. §2709(a)

¹⁰ 18 Pa.C.S.A. §2706(a)(1)

Commonwealth of Pennsylvania v. Isaiah Hereford

Criminal Appeal—PCRA—Homicide (1st Degree)—Identification—Ineffective Assistance of Counsel—Waiver—After-Discovered Evidence

Multiple issues raised in defendant’s PCRA petition after convictions for three counts of murder in the first degree.

No. CC 2010-10538. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—July 12, 2018.

OPINION

The Defendant has appealed from this Court’s Order of January 10, 2018, which dismissed his counseled Post Conviction Relief Act Petition following an evidentiary hearing. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, this Court’s Order should be affirmed.

The Defendant was charged with Criminal Homicide,¹ Criminal Attempt,² Aggravated Assault,³ Robbery,⁴ Burglary,⁵ Carrying a Firearm Without a License,⁶ Possession of a Firearm by a Minor,⁷ Criminal Conspiracy⁸ and Recklessly Endangering Another Person (REAP)⁹ in relation to events that occurred when he was 17 years old. Prior to trial, the REAP counts were withdrawn. A jury trial was subsequently held before this Court from August 1-4, 2011. Following the close of the Commonwealth’s case, this Court granted the Defendant’s Motion for Judgment of Acquittal at the Possession of a Firearm by a Minor charge. At the conclusion of the trial, the Defendant was convicted of three (3) counts of first-degree murder and all remaining charges.

On November 1, 2011, the Defendant appeared before this Court and was sentenced to three (3) concurrent terms of life imprisonment, plus two (2) additional concurrent terms of imprisonment of five (5) to ten (10) years. No Post-Sentence Motions were filed and a direct appeal was taken. Thereafter, the Defendant filed a timely Concise Statement of Matters Complained of on Appeal at this Court’s direction, raising sufficiency, weight of the evidence, evidentiary and decertification issues. However, while this Court’s review was pending, the United States Supreme Court issued its decision in *Miller v. Alabama*, 132 S.Ct. 2455 (US. 2012),

holding that mandatory life sentences without the possibility of parole were illegal for those offenders who committed their crime prior to the age of 18. In light of *Miller*, this Court conceded that the Defendant should be re-sentenced, and by Order of the Superior Court dated June 4, 2013, the judgment of sentence was vacated and the case was remanded for resentencing. The proscribed re-sentencing hearing was held before this Court on December 15, 2014, at which time the Defendant was sentenced to three (3) consecutive terms of imprisonment of 15 years to life, for an aggregate total of 45 years to life. Timely Post-Sentence Motions were filed and were denied on January 7, 2015. The judgment of sentence was affirmed by the Superior Court on May 3, 2016 and the Defendant's subsequent Petition for Allowance of Appeal was denied on September 27, 2016.

While his appeals were pending, the Defendant filed a pro se Post Conviction Relief Act Petition. Chris Eyster, Esquire, was appointed to represent the Defendant, and he subsequently filed a counseled PCRA Petition on September 25, 2017. An evidentiary hearing was held on January 10, 2018 and at its conclusion, this Court denied relief and dismissed the Petition. This appeal followed.

Briefly, the evidence presented at trial established that on the evening of June 14, 2010, Brittany Poindexter went to her brother's apartment in the Crawford Village housing complex in the McKeesport area for what turned out to be a surprise 18th birthday party. The party went on for several hours, with both family and friends present, and eventually guests began to leave. By the early morning hours of June 15, 2010, only five (5) people were left: Brittany, her brother Jahard, Jahard's boyfriend/roommate Marcus Madden, Brittany's boyfriend Tre Madden and their friend, Angela Sanders. Shortly after 1:00 a.m., someone knocked on the screen door of the apartment; it was generally presumed that the person was there to buy a cigarette, since Jahard and Marcus sold cigarettes and marijuana out of the apartment. Marcus got up to open the door and when he did, two (2) men entered holding guns. The men told everyone to "get down" and asked "where's the money?" When Jahard got up to get the money, the men started shooting. Jahard Poindexter, Tre Madden and Angela Sanders were killed in the gunfire and Marcus Madden was shot and injured. At trial, Marcus Madden identified the Defendant as the first man who entered the apartment with a gun and one of the shooters.

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

1. *Issues Relating to Expert Witness on Eyewitness Identification*

Initially, the Defendant argues that counsel was ineffective for failing to call an expert witness in eyewitness identification or to file a pre-trial motion seeking permission to call such an expert. Similarly, he avers that this Court denied him a fair PCRA hearing by failing to allow him to call the proposed expert witness at the evidentiary hearing. His claims are meritless.

The Defendant relies on *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), wherein our Supreme Court held that "the admission of expert testimony regarding eyewitness identification is no longer per se impermissible in our Commonwealth, and join the majority of jurisdictions which leave the admissibility of such expert testimony to the discretion of the trial court." *Commonwealth v. Walker*, 92 A.3d 766, 792-793 (Pa. 2014). He argues that counsel should have presented the testimony of psychologist Dr. Margaret Reardon, who would have explained the nature of memory and factors that can influence the accuracy of eyewitness identifications, or that he should have sought permission to do so. He argues counsel should have raised the *Walker* case in support of her testimony. He argues that this Court further erred in not allowing Dr. Reardon to testify at the evidentiary hearing.

At the time of trial in 2011, it was the law of this Commonwealth that expert testimony regarding the reliability of eyewitness identification was unequivocally not permitted. Therefore, the Defendant was not permitted to introduce such expert testimony at trial and any pre-trial attempt to do so would have been unsuccessful, as this Court would have been constrained to deny the motion. Although the *Walker* decision did allow such testimony following its decision on May 28, 2014, *Walker* was not made retroactive. As this Court explained at the evidentiary hearing:

THE COURT: Okay. Maybe this will help us get to the end of it. Okay. After the Walker argument - first of all, our trial date was August 1st of 2011. Allocatur was on April of 2011, prior to the trial date. The Walker case was not decided until May 28 of 2014, some two-and-a-half years after the allocatur petition went to the Supreme Court.

There is no - the case in fact would not have allowed this testimony to be permitted, nor would I have - the Court - have granted this petition in August of 2011. This is not the law of the land, and there's no retroactivity. So the fact of Dr. Reardon testifying or not is a nonissue in this case.

Do you want to proceed on other grounds? You may, Mr. Eyster.

MR. EYSTER: Just for the record, Your Honor, we intended to call Dr. Reardon, and the Court indicated that you weren't going to allow us to do that.

THE COURT: I did, because I know Dr. Reardon is a professional, that she's very busy. Rather than to have her come her and sit all day, as a courtesy to the doctor, I indicated that I had already reviewed the case and that I would not allow her testimony, although I have read her entire report as well as most of her CV.

It has nothing to do with Dr. Reardon. It has to do with the law on August 1st of 2011.

(E.H.T. p. 38-39).

Inasmuch as expert testimony regarding eyewitness identification was absolutely barred at the time of trial, counsel was not ineffective for failing to present such testimony or for failing to make a pretrial motion seeking permission to present that testimony, as such a motion would have been denied. Because counsel will never be ineffective for failing to raise a meritless claim, there is no basis for a finding of ineffectiveness here. Similarly, because such testimony was absolutely barred at trial, there was no basis for allowing Dr. Reardon to testify at the evidentiary hearing, as this Court explained. This claim is also meritless.

2. *Ineffective Assistance of Counsel - Witness Gina Simmons*

The Defendant also argues that trial counsel was ineffective for failing to discover and call Gina Simmons at trial. A review of the record reveals that this claim is meritless.

At trial, the Defendant presented an alibi defense. He testified that at the time of the shooting, he was with his girlfriend, Montaeya White, at her residence located at 645 North Grandview Avenue in McKeesport. He now avers that trial counsel was ineffective for failing to discover and present the testimony of witness Gina Simmons, who lived two (2) doors down from Montaeya White, at 635 North Grandview Avenue.

A careful examination of the record reveals that this issue was previously raised in the context of this Court's denial of Post-Sentence Motions based on after-discovered evidence¹⁰ and it was the sole issue raised on the aforementioned direct appeal. The Superior Court undertook an extensive analysis of the claim and concluded that the testimony of Gina Simmons did not meet the four-prong test for a new trial based on after-discovered evidence. Specifically, it found that the Defendant had proffered no explanation for his failure to produce her testimony sooner even though she was a neighbor and he had a court-appointed private investigator, that her testimony would have been cumulative of the testimony of the Defendant, Montaeya White and Tiara Snyder, that it would have been improper impeachment of Marcus Madden and "it was not of such a nature and quality that it would likely compel a different verdict if a new trial had been granted." (Superior Court Opinion, 232 WDA 2015, p. 20).

In his PCRA Petition, the Defendant re-raises the same after-discovered evidence claim concerning Gina Simmons' testimony, this time through the lens of an ineffectiveness claim against trial counsel J. Richard Narvin, Esquire for both failing to discover her existence and for failing to supervise the private investigator such that he would have discovered her existence. However, a careful examination of the record reveals that the Defendant has failed to establish the elements of his ineffectiveness claim.

As it specifically relates to a claim for ineffectiveness for the failure to call a witness, the petitioner must establish that "(1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial." *Commonwealth v. Matias*, 63 A.3d 807, 810-811 (Pa.Super. 2013). At the evidentiary hearing, Gina Simmons testified that after hearing the shots, she looked out her bedroom window where she was able to see a parking lot. A few minutes after she heard the shots, she saw two (2) black males running away from where the shots had been fired. Fifteen minutes later, once the police had arrived, she went outside and spoke to the Defendant and Montaeya.

Regarding the first prong, it is clear that Ms. Simmons "existed" and is not a phantom creation. However, the Defendant is unable to establish the second and fourth prongs, that she was available and willing to testify for him at trial.

During the evidentiary hearing, Ms. Simmons testified that she was present when the Defendant was arrested and she was aware he was tried and convicted in the killings, but stated that she did not come forward because she was scared:

Q. (Ms. Pettit): So you didn't know [the investigator] was coming; just one days someone knocked on your door?

A. (Ms. Simmons): No, no, his father.

Q. Whose father?

A. Isaiah. He said, I understand - how he know, I didn't know. I don't know.
He said, I understand that you have some information about my son's case.

Q. Okay.

A. I said, what information?

He said, I heard you were looking out the window. You seen things.

I said, yes, I did.

And he said, well, is it okay if my son's attorney contacts you for questioning?

I said, sure.

Now, if you don't know why I didn't say anything in the beginning, it's because I have children.

...

Q. So you were aware that he was arrested and charged with murder?

A. Yes.

Q. Were you aware that he was convicted of murder?

A. Yes, I was.

Q. Were you aware that he was originally sentenced to life in prison without the possibility of parole?

A. I knew he was sentenced to life. The details, I did not know.

Q. Okay. So what happened between the incident and the date that the investigating officer came to your house that you were no longer afraid to share what you allegedly knew?

A. Well, evidently whoever it was didn't think that I knew who did it because they weren't coming and bothering me. Nobody even knows I'm appearing for court now, but I was not going to put my life and my children's lives in jeopardy by saying I seen someone running up the hill and seeing it wasn't Isaiah, because they may find - not Isaiah but the person that did it, they think I seen them, they might come out after me and my family.

Q. But you don't have these fears today?

A. No, I don't.

...

Q. So, Ms. Simmons, you actually went down to the crime scene, checked that out. You went over, and you talked with the defendant fifteen minutes after you heard gunshots. Yet, you did nothing for two years to come forward and say that you had information that you believe could have helped the defendant?

A. For two years, no, I didn't. I was dealing with my own problems. As I said before, I am not going to put my children's lives in jeopardy.

(Evidentiary Hearing Transcript, pp. 17-18, 20-21, 22-23).

As Ms. Simmons stated repeatedly, she was too afraid for herself and her children to come forward and testify on the Defendant's behalf. Thus, there is no reasonable argument that she was both available and willing to testify for the Defendant at trial and this Court cannot so find. As such, the Defendant has failed to establish the second and fourth prongs of the ineffectiveness test.

As to the third prong, that counsel knew or should have known of the witness, the Defendant presented the testimony of trial counsel, who testified that he failed to adequately supervise his investigator. He stated:

Q. (Mr. Eyster): Was there any reason why you didn't find [Gina Simmons] prior to the trial, or your investigator?

A. (Mr. Narvin): Well, maybe I was - I failed in adequate supervision of the investigator, because I would think one of the things I would be required to do would be to canvas the neighborhood and find people.

You know, those are certainly generally my instructions. I certainly wanted him to obtain as much helpful information as possible, but again, as to the precise details of what I told him, I do not recall.

(E.H.T., p. 28-29).

On cross-examination, Attorney Narvin testified that had the Defendant notified him about Gina Simmons, he would have followed up on it:

Q. (Ms. Pettit): Okay. Do you recall if your client told you that he had a conversation with someone named Gina Simmons, the neighbor?

A. (Mr. Narvin): I have no current recollection of that, but I would have hoped that he had told me that I would have done something about it.

Q. Would you agree with me that it would be your normal course of conduct to follow up on something like that if a client tells you that?

A. I would agree that's correct.

(E.H.T., p. 42-43).

A careful examination of Attorney Narvin's testimony reveals it is not as unequivocal as the Defendant now portrays it to be. While Attorney Narvin states that he may not have supervised his investigator properly because he did not obtain Ms. Simmons' statement, we also know from Ms. Simmons' testimony that she was scared and was not willing to give a statement or testimony prior to trial. Thus, it seems entirely plausible that Attorney Narvin did not, in fact, fail to supervise his investigator properly, as the investigator could not find what did not want to be found. Again, given Ms. Simmons' admitted unwillingness to testify and Mr. Narvin's testimony regarding his normal course of conduct in following-up on helpful witnesses, the Defendant fails in establishing that Mr. Narvin knew or should have known of her existence prior to trial.

Finally, as to the last element of the ineffectiveness test, that the absence of Ms. Simmons' testimony was so prejudicial as to have denied the Defendant a fair trial, this Court refers to and incorporates the Superior Court's analysis in its May 3, 2016 Memorandum Opinion. After noting that the testimony was cumulative of that presented by the Defendant, Montaeys Williams and Tiara Snyder, the Court determined that the absence of the evidence was not so prejudicial as to require a new trial. It stated:

Our review of the certified record reflects that the alleged after-discovered evidence that is possibly exonerating to Appellant is the portion of Ms. Simmons's statement placing Appellant on his girlfriend's porch fifteen minutes after the gunshots were heard in the neighborhood.²³ However, appellant testified at trial and personally declared that it was only a five-minute walk from the scene of the shootings to his girlfriend's home. N.T., 8/1-4/11, at 511. Therefore, testimony reveals that Appellant had ample time to participate in the commission of the crime, take the admitted five-minute walk to his girlfriend's house, and then be observed by Ms. Simmons on the porch of the girlfriend's home fifteen minutes after the crime occurred. Hence, we conclude that this evidence is not of such a nature and character that it would likely compel a different verdict if a new trial had been granted.

² For ease of reference, we reproduce that portion of the statement below:

Around 15 min later I went outside to see what was going at that time I saw [Appellant] and his girlfriend ont [sic] the porch of 645 N. Grandview Ave.

Amended Post-Sentence Motion, 1/31/12 (Docket Entry 32).

³ With regard to the portion of Ms. Simmons's statement indicating that she saw two men running when she looked outside of her window after hearing gunshots, and her belief that neither of the men were Appellant, there is no indication that those two men were the perpetrators of the instant crime. Consequently, we conclude that portion of Ms. Simmons's statement is not exonerating.

(Memorandum Opinion, p. 19-20).

Having found that Ms. Simmons' statement was not exonerating and would not have resulted in a different verdict, our Superior Court has already found that the absence of her testimony did not establish prejudice. As such, the Defendant has also failed to establish the last element of the ineffectiveness test.

Having utterly failed to establish the requirements of his claim for the ineffective assistance of counsel for failing to call Gina Simmons at trial, this claim must fail.

3. Ineffective Assistance of Counsel - Closing Argument

Next, the Defendant argues that counsel was ineffective for failing to argue that co-Defendant DeAnthony Kirk's note which stated "my co-de[fendant] wasn't their [sic] neither but he doesn't know me at all" was exculpatory during his closing argument. Again, this claim is meritless.

Generally, in order to establish a claim for the ineffective assistance of counsel, “a PCRA Petitioner must demonstrate, by a preponderance of the evidence, that: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel’s action or inaction; and (3) there is a reasonable probability that the result of the proceedings would have been different absent such error.” *Commonwealth v. Gibson*, 19 A.3d 512, 525-26 (Pa. 2011). “The law presumes that counsel was not ineffective, and the appellant bears the burden of proving otherwise...[I]f the issue underlying the charge of ineffectiveness is not of arguable merit, counsel will not be deemed ineffective for failing to pursue a meritless issue... Also, if the prejudice prong of the ineffectiveness standard is not met, ‘the claim may be dismissed on that basis alone and [there is no] need [to] determine whether the [arguable merit] and [client’s interests] prongs have been met.’” *Commonwealth v. Khalil*, 806 A.2d 415, 421-2 (Pa.Super. 2002). “With regard to the reasonable basis prong, [the appellate court] will conclude that counsel’s chosen strategy lacked a reasonable basis only if the petitioner proves that the alternative strategy not elected offered a potential for success substantially greater than the course acutely pursued.” *Commonwealth v. Busanet*, 54 A.3d 35, 46 (Pa. 2012).

Thus, in order to establish that Mr. Narvin was ineffective for failing to argue the letter in his closing argument, he would need to establish that the letter was exculpatory, that Mr. Narvin lacked a reasonable basis for failing to argue it during closing arguments and that he would have been acquitted had Mr. Narvin so argued. At the evidentiary hearing, under questioning by defense counsel, Mr. Narvin conceded that he lacked a reasonable basis for failing to include the letter in his closing argument, although a careful review of the record demonstrates that Mr. Narvin had no recollection of the letter or the reason he didn’t argue it in his closing argument:

Q. (Mr. Eyster): Now, Mr. Narvin, do you remember that the co-defendant was DeAnthony Kirk in this case?

A. (Mr. Narvin): I do.

Q. And do you remember that there was a letter that was authored by Mr. Kirk that was introduced at the trial?

A. Vaguely, not specifically, but I know what you are speaking of.

Q. Okay, and arguably there was contained in that letter exculpatory evidence regarding Mr. Hereford; is that correct?

A. Well, I don’t know what is in the letter, so I can’t answer that question, but my understanding is that there is an argument to be made for the fact that he was writing to indicated that Mr. Hereford had nothing to do with the crime. So that would be considered exculpatory.

...

Q. Do you recall that letter?

A. No. Actually, I have no current recollection of the letter.

...

Q. There was a statement contained herein that Kirk did not know Mr. Hereford; is that correct?

A. That’s correct.

Q. Did you have any reasonable basis for failing to make that argument at the time of trial relative to that statement?

A. Do you mean did I omit it for my closing to the jury?

Q. Yes. Did you omit that?

A. I’m assuming from your question that I did, and if I did, I had no reasonable basis for doing so. I think it would have been a good point to argue.

...

Q. (Ms. Pettit): Regarding this last document that Mr. Eyster showed you, do you recall if this was actually admitted as an exhibit at trial?

A. (Mr. Narvin): I’m sorry, I do not recall. You know, it was presented to me as admitted as Commonwealth’s evidence. I do not recall it being admitted. I have no current recollection of it.

(E.H.T., pp. 39-41, 43).

As the record reflects, Mr. Narvin stated repeatedly that he had no independent recollection of the letter or its admission and thus was not in a position to opine on his reasonable basis or lack thereof for including it in his closing argument.

Additionally, the Defendant has failed to establish the necessary prejudice to support a claim for the ineffective assistance of counsel. At trial, the Defendant presented an alibi defense and the testimony of Montaeya White and Tiara Snyder in support of that alibi. The jury did not credit that testimony, and chose instead to credit the testimony of victim and eyewitness Marcus Madden. Moreover, the letter was introduced into evidence by the Commonwealth and the jury did see it. Given the jury’s choice to credit the testimony of Marcus Madden over the testimony of the Defendant and his two (2) alibi witnesses while already being aware of the letter, there is no reasonable argument that an additional mention of it during closing arguments would have resulted in a different verdict. As the Defendant has failed to establish prejudice, he has failed to establish his claim of ineffectiveness. See *Khalil*, *supra*. This claim must also fail.

4. Ineffective Assistance of Counsel - Affidavit of Probable Cause

Finally, the Defendant argues that counsel was ineffective in failing to argue that the charges should have been dismissed because the affidavit of probable cause was based on false information from an unreliable source. However, a careful review of the record reveals that because the Defendant failed to raise this claim in his PCRA Petition, it is not cognizable at this time.

The Post Conviction Relief Act contains a strict waiver provision which states:

§9544. *Previous litigation and waiver*

(b) Issues waived. – For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.

42 Pa.C.S.A. §9544(b).

In interpreting the waiver provision of the Post Conviction Relief Act, our Supreme Court has “stressed that a claim not raised in a PCRA Petition cannot be raised for the first time on appeal. We have reasoned that ‘permitting a PCRA Petitioner to amend new claims to the appeal already on review would wrongly subvert the time limitation and serial petition restrictions of the PCRA... The proper vehicle for raising this claim is not the instant appeal, but rather a subsequent PCRA Petition.’” *Commonwealth v. Santiago*, 855 A.2d 682, 691 (Pa. 2004).

At the evidentiary hearing, the Defendant attempted to raise this claim by reading a statement into the record after counsel had finished his presentation. However, at that time, this Court advised the Defendant that because he had not raised the claim up until that point, it was not able to rule on it. (E.H.T. p. 45-46). Similarly, including the issue in the Concise Statement is not a remedy for having not raised it up to this point, and does not now put the issue before this Court. The Concise Statement is not a vehicle to add claims for the Superior Court’s consideration when he did not afford this Court an opportunity to review and rule on it. As such, this claim has been waived.

Accordingly, for the above reasons of fact and law, this Court’s Order of January 10, 2018, which dismissed his counseled Post Conviction Relief Act Petition without a hearing must be affirmed.

BY THE COURT:
/s/McDaniel, J.

¹ 18 Pa.C.S.A. §2501(a) – 3 counts

² 18 Pa.C.S.A. §901(a) – 2 counts

³ 18 Pa.C.S.A. §2702(a)(1) – 2 counts

⁴ 18 Pa.C.S.A. §3701(a)(1)(I)

⁵ 18 Pa.C.S.A. §3502(c)(1)

⁶ 18 Pa.C.S.A. §6101(a)(1)

⁷ 18 Pa.C.S.A. §6110.1(a)

⁸ 18 Pa.C.S.A. §903(a)(1)

⁹ 18 Pa.C.S.A. §2705 – 2 counts

¹⁰ This Court incorporates its Opinion dated May 20, 2015 herein;