NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. FRANK JOSEPH SCHAEFFER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1459 EDA 2012

Appeal from the Judgment of Sentence April 25, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0001360-2011

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, J.: Filed: February 12, 2013

Appellant, Frank Joseph Schaeffer, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial conviction for criminal conspiracy to commit burglary, theft by unlawful taking or disposition, and receiving stolen property.[1] We affirm.

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them. We add only that the trial court sentenced Appellant on April 25, 2012, to seven and one-half (7½) to sixteen (16) years' incarceration for criminal conspiracy to commit burglary. On Monday, May 7, 2012, Appellant

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[1] 18 Pa.C.S.A. §§ 903, 3921(a), and 3925 respectively.

timely filed post-sentence motions, which the court denied the same day. On May 15, 2012, Appellant timely filed a notice of appeal. The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P 1925(b), and Appellant complied.

Appellant raises four issues for our review:

> DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO CLARIFY THE VERDICT AND FIND THE VERDICT WAS AMBIGUOUS WITH RESPECT TO THE CRIMINAL CONSPIRACY CHARGE BECAUSE OF THE FAILURE TO INCLUDE ON THE VERDICT SHEET THE CHARGE APPELLANT ALLEGEDLY CONSPIRED TO COMMIT?
>
> WAS THE EVIDENCE INSUFFICIENT TO SUPPORT THE CHARGE OF CONSPIRACY TO COMMIT BURGLARY BECAUSE THE RECORD IS DEVOID OF ANY EVIDENCE ESTABLISHING BEYOND A REASONABLE DOUBT THAT APPELLANT ENTERED AN AGREEMENT WITH ANY OTHER PERSON THE OBJECT OF WHICH WAS TO BURGLARIZE THE VICTIM'S RESIDENCE?
>
> DID THE TRIAL COURT ERR BY GRADING THE THEFT CHARGES AS MISDEMEANORS OF THE SECOND DEGREE BECAUSE THE COMMONWEALTH FAILED TO MEET ITS BURDEN OF ESTABLISHING THE VALUE OF THE PROPERTY ALLEGEDLY STOLEN IN THIS MATTER AND THEREFORE, THE CRIMES SHOULD HAVE BEEN GRADED AS MISDEMEANORS OF THE THIRD DEGREE AS A MATTER OF LAW?
>
> DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION BY IMPOSING A SENTENCE OUTSIDE THE SUGGESTED GUIDELINES RANGE BECAUSE THE TRIAL COURT GAVE ITS REASON FOR EXCEEDING THE GUIDELINES APPELLANT'S CRIMINAL RECORD, A GROUND ALREADY FACTORED INTO THE SENTENCING GUIDELINES?

(Appellant's Brief at 3).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

> [W]e conduct a four-part analysis to determine: (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. 720; (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).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases." ***Commonwealth v. Williams***, 562 A.2d

1385, 1387 (Pa.Super. 1989) (*en banc*) (emphasis in original) (internal quotation marks omitted).

What constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists "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." ***Sierra, supra*** at 912-13. A claim that a sentence is manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627.

Sentencing is a matter vested in the sound discretion of the sentencing court. ***Commonwealth v. Lee***, 876 A.2d 408, 413 (Pa.Super. 2005). On appeal, this Court will not disturb the judgment of the sentencing court absent an abuse of discretion. ***Commonwealth v. Fullin***, 892 A.2d 843, 847 (Pa.Super. 2006). When imposing a sentence, the sentencing court is required to consider the sentence ranges set forth in the Sentencing Guidelines, but is not bound by them. ***Commonwealth v. Yuhasz***, 592 Pa. 120, 132, 923 A.2d 1111, 1118 (2007) (noting guidelines are "purely advisory in nature"). The guidelines are merely "advisory guideposts" that

recommend rather than require a given sentence. ***Commonwealth v. Walls***, 592 Pa. 557, 570, 926 A.2d 957, 965 (2007). A court may depart from the guidelines, provided the court gives its reasons for the departure. ***Commonwealth v. Eby***, 784 A.2d 204, 206 (Pa.Super. 2001). Such reasons include the need to protect the public, the rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community. ***Commonwealth v. Sheller***, 961 A.2d 187, 190 (Pa.Super. 2008), *appeal denied*, 602 Pa. 666, 980 A.2d 607 (2009).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Michael E. Erdos, we conclude Appellant's issues merit no relief. The trial court properly disposes of the questions presented. (***See*** Trial Court Opinion, filed August 14, 2012, at 4-10) (finding: (1) court provided clear jury instructions specifying charge of conspiracy to commit burglary, made no mention of any other type of conspiracy, and jury issued unambiguous verdict convicting Appellant of conspiracy to commit burglary; (2) during short time that burglary was in progress SUV was parked at victim's house, passenger alit from SUV, SUV left victim's house and returned within minutes, Appellant matched description of SUV passenger; shortly thereafter, Appellant was discovered inside SUV in possession of proceeds of burglary, Appellant's and cohort's fingerprints were on stolen jewelry and SUV; therefore,

circumstantial evidence provided sufficient basis for jury to infer Appellant conspired with cohort to burglarize victim's residence; (3) police officers testified at trial to quantity and characteristics of dozens of pieces of stolen jewelry; Commonwealth presented photographs of stolen jewelry; evidence at trial was sufficient to allow jury to value stolen property at more than fifty dollars; therefore, evidence was sufficient to support second degree misdemeanor gradation; and (4) Appellant's ten prior burglary convictions and multiple state sentences did not deter Appellant's criminal conduct, Appellant committed most recent burglary soon after release on parole; court cited need to protect public from repeat offender and Appellant's low probability of rehabilitation as reasons for departure from sentencing guidelines). Accordingly, we affirm on the basis of the trial court opinion.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

Commonwealth of Pennsylvania	:	**CP-51-CR-0001360-2011**
	:	
v.	:	
	:	**1459 EDA 2012**
Frank Schaffer	:	

OPINION

ERDOS, J.

Frank Schaffer (hereinafter Appellant) appeared before the Court of Common Pleas, Criminal Trial Division, on March 14, 2012 where a jury found Appellant guilty of conspiracy to commit burglary, theft by unlawful taking, and receiving stolen property. On April 25, 2012, Appellant was sentenced to a total term of incarceration of seven and one-half to sixteen years.

This appeal followed.

FACTS:

Appellant entered a plea of not guilty to all charges against him and asserted his right to trial by jury. The sum and substance of the evidence at trial was as follows:

> On October 7, 2010 at around 12:30 p.m., Colleen Sharp exited through the back door of 4716 Convent Lane, the residence that she shares with her husband Michael, to take her dog for a walk. NOTES OF TESTIMONY, Trial, 3/13/2012, at 38. At about the same time, Jason Harrison, a resident of that block, noticed a gray, four-door SUV parked in the driveway of the Sharp residence. *Id.* at 56. Harrison noticed a male with olive complexion, or possibly Hispanic, get out of the passenger side of the SUV, walk up to the residence, knock on the front door, and look through the glass on the front door and windows. *Id.* at 56-57. Harrison did not see the man's face. *Id.* A few minutes later, he observed the man walk towards the driveway of the house and make a waving gesture towards the backyard. *Id.* at 58. He then observed the SUV drive eastbound on Convent Lane, but did not see whether the man he had been watching got into the vehicle before it left. *Id.* Harrison followed the SUV in his own vehicle and wrote down its license plate

number. *Id.* at 59-61. He observed it make a U-turn back toward Convent Lane, and drive towards the direction of Convent Lane, and was able to notice that the driver of the SUV was a male with a tattoo on his arm. *Id.* at 60-61. He then drove approximately five minutes to get gas, at which point he decided to drive back to the Sharp residence. *Id.* at 63.

Sharp returned to her home approximately seven minutes later she had left with her dog. *Id* at 39. Upon entering the house, she noticed her husband's green gym bag by the back door that was not there before she left. *Id.* She called her husband on the telephone as she walked up the stairs to the second floor. *Id.* at 40. When she was approximately halfway up the stairs, she noticed her husband's sports officiating equipment strewn across the upstairs hallway. *Id.* at 41. Sharp immediately left her residence and called the police. *Id.* When the police arrived, Officer Gallagher accompanied Sharp into her residence and upstairs to the master bedroom. *Id.* Sharp indicated that her jewelry was missing. *Id.* at 41, 71. Michael Sharp traveled from his work to the house after getting off the phone with his wife. *Id.* at 46.

When Harrison returned to Convent Lane, he informed police about what he had seen and provided them with the vehicle's license plate numbers. *Id.* at 63-64. Officer Gallagher then broadcast the description of the SUV over police radio. *Id.* at 72.

Officer Shaw was with Officer McNicholas parked in an unmarked patrol car at a Lowe's store on the 3700 block of Aramingo Avenue when he noticed an SUV matching the description traveling southbound on the 3600 block of Aramingo Avenue. *Id.* at 81. The officers pursued the vehicle and followed it as it turned into the parking lot of a Wendy's restaurant at the corner of Aramingo and Venango Avenues, approximately five to eight miles from the Sharp's residence. *Id.* at 81-82. Officer Shaw approached the passenger side front door of the parked SUV. *Id.* at 83. He observed movement in the back seat area, opened the back door, and observed Appellant sitting in the back passenger-side seat. *Id.* Appellant was in possession of a small black bag approximately twelve inches in length in his left hand and a piece of gold jewelry in his right hand. *Id.* Shaw took Appellant into custody and recovered the black bag, which contained various pieces of jewelry. *Id.* Responding officers arrived at the scene shortly after Officer Shaw placed the defendant into custody. Officer McNicholas found the driver of the SUV, identified as Joseph Kohran, inside of the Wendy's bathroom. *Id.* at 91, 115.

Harrison and Michael Sharp traveled to the Wendy's. *Id.* at 47, 64. There, Harrison positively identified the SUV and Kohran, whom he recognized by the tattoo on his arm. *Id.* at 65. Michael Sharp positively identified his and his wife's jewelry, consisting of dozens of pieces, and one of his suitcases that were in the SUV. *Id.* at 47, 50.

On October 8, 2012 around 1:35 p.m., a search warrant was executed on the SUV. NOTES OF TESTIMONY, Trial, 3/14/2011, at 11. Detectives recovered a jewelry box from within a suitcase in the rear seat and other jewelry from the vehicle. *Id.* The vehicle, a bottle of Mountain Dew in the front cup holders, and the recovered jewelry box were fingerprinted. *Id.* The fingerprint analysis on the jewelry box and exterior door revealed that the prints were from Apprellant. *Id.* at 35. The fingerprints recovered from the soda bottle and the driver door came back to Kohran. *Id.*

The jury convicted Appellant of theft by unlawful taking, receiving stolen property, and conspiracy to commit burglary, and acquitted him of burglary. The jury also found that the total value of the stolen jewelry was greater than $2000, making the theft offenses felonies of the third degree. Prior to sentencing, the Court downgraded the thefts to second degree misdemeanors -- with a value between $50 and $200 -- because it did not believe the jury's finding as to valuation was supported by the record. The Court then sentenced Appellant to seven and one-half to sixteen years incarceration. The sentencing guidelines for his felony offense, with an offense gravity of 6 and a prior score of REFEL, was 27-40 months +/- 6.

DISCUSSION:

Appellant raised the following claims on appeal:

1) The Court abused its discretion when it denied appellant's motion to clarify the verdict because the verdict was ambiguous with respect to the criminal conspiracy charge because of the failure to include with specificity on the verdict sheet the charge appellant allegedly conspired to commit.

2) The evidence was insufficient to sustain the charge of conspiracy to commit burglary because the record contains no evidence establishing beyond a reasonable doubt that appellant entered into an agreement with any other person the object of which was to burglarize the victim's residence. At most, the evidence established that appellant conspired to commit the crimes of theft-receiving stolen property and/or theft-unlawful taking.

3) The Court erred by grading the theft charges as misdemeanors of the second degree because the Commonwealth failed to meet its burden establishing the value of the property allegedly stolen in this matter, and therefore, the crimes should have been graded as misdemeanors of the third degree as a matter of law.

4) The Court committed an abuse of discretion by imposing a sentence outside the suggested guidelines range because the trial court gave as its reason for exceeding the guidelines appellant's criminal record, a ground already factored into the sentencing guidelines.

Denial of Motion to Clarify the Verdict

Although the verdict slip did not specify burglary as the object of the conspiracy in this case, the Court's jury instructions which specify burglary as the object of the conspiracy were in and of themselves sufficient to infer that the jury unambiguously convicted Appellant of conspiracy to commit burglary. Thus, the Court did not abuse its discretion by denying Appellant's motion to clarify the verdict.

Appellant is correct in his assertion that "absent clear evidence of the jury's intent to the contrary, a general conspiracy verdict must be resolved in favor of the defendant, and may be construed only as a conviction of conspiracy to commit the least serious underlying offense for which the jury could properly have found the defendant to have conspired to commit." *Commonwealth v. Riley*, 811 A.2d 610, 620 (Pa. Super. 2002). In *Riley*, the Superior Court remanded a conspiracy conviction for re-sentencing because it was not clear on which of the original substantive charges, burglary or theft, the jury based its conspiracy conviction. *Id.* The Court reasoned that because both the bills of information and the verdict slip charged conspiracy to commit "burglary and/or theft," and because the jury instructions did not ask the jury to specify which offense was the object of the conspiracy, it was impossible for the trial court to draw specific conclusions from the jury's general conspiracy verdict. *Id.* at 618-19.

In the instant case, however, there was clear evidence supporting the jury's intent in convicting Appellant of conspiracy to commit burglary. The jury's verdict could not have been ambiguous or impossible to interpret because the Court gave specific and clear instructions several times that the charge was for conspiracy to commit burglary.

The Court first charged the jury on the elements of conspiracy generally, introducing the charge with "[t]he defendant has been charged with *conspiracy to commit burglary*." NOTES OF

TESTIMONY, Trial, 3/14/2011, at 16 (emphasis added). At the end of the general charge, the Court reiterated that "[t]o be proven guilty of being a conspirator, the defendant must have intended to act jointly with the other members of the conspiracy and must have intended that the crimes, *in this case burglary*, alleged to be the goal of the conspiracy would be committed." *Id.* at 19 (emphasis added). The Court specifically mentioned burglary as the object of the conspiracy two times when explaining the elements of conspiracy to commit burglary, and then explicitly stated the overt act in furtherance of conspiracy to commit burglary:

> In terms of conspiracy as is charged in this case, in order to find the defendant guilty of *conspiracy to commit burglary*, you must be satisfied the following three elements have been proved beyond a reasonable doubt; first, that the defendant agreed with another person or persons that one or more of them would engage in conduct for the planning and/or commission of the *crime of burglary*; second, that the defendant and the other person or persons intended to promote or facilitate the committing of a burglary . . . In this case the Commonwealth is alleging that the *overt act in furtherance of the conspiracy was entering the property on Convent Lane and actually taking the property of the residents there.*

Id. at 20 (emphasis added).

These specific instructions left the jury no room to speculate or choose between burglary or theft as the object of the conspiracy. Although the verdict slip charged only conspiracy generally, the Court specified burglary as the object of the conspiracy four times and made no mention of any other type of conspiracy. Thus, there is no need to give the Appellant the benefit of a downgrade because it would be unreasonable to infer that the jury rendered a general or ambiguous verdict based on the clarity and specificity of the instructions given to them. *Cf. Commonwealth v. Jacobs*, 39 A.3d 977, 985-87 (Pa. 2012) (distinguishing *Riley* by finding clear evidence of jury's intent with respect to conspiracy conviction based on the trial evidence itself).

Insufficient Evidence to Support Conspiracy to Commit Burglary

Appellant's claim that there was insufficient evidence of an agreement with Kohran to commit burglary is meritless. When reviewing the sufficiency of the evidence, the well-settled standard mandates a determination of whether the evidence, and all reasonable inferences deducible from the evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, are sufficient to establish all the elements of the offense beyond a reasonable doubt. *Commonwealth v. Hall*, 701 A.2d 190, 195 (Pa. 1997), cert denied, 523 U.S. 1082 (1998). It is within the province of the fact finder to determine the weight to be accorded each witness's testimony and to believe all, part, or none of the evidence introduced at trial. *Commonwealth v. Molinaro*, 631 A.2d 1040, 1042 (Pa. Super. 1993).

To sustain a conviction for criminal conspiracy, the Commonwealth must establish that (1) the defendant entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) there was a shared criminal intent, and (3) an overt act was done in furtherance of the conspiracy. *Commonwealth v. Johnson*, 719 A.2d 778, 784 (Pa. Super. 1998), *appeal denied*, 559 Pa. 689, 739 A.2d 1056 (1999). Moreover, an agreement to support a conspiracy conviction can be proven circumstantially:

> 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.

Commonwealth v. Perez, 931 A.2d 703, 708 (Pa. Super. 2007) (citation omitted). Additionally, geographical proximity to the scene of the crime and possession of the "fruits of the burglary"

close in time to the crime itself can be probative of a conspiracy to commit burglary. *See, e.g., Commonwealth v. Lovette*, 450 A.2d 975, 978 (Pa. 1982).

The circumstantial evidence presented at trial provided a sufficient basis for the jury to infer that Schaffer conspired with Kohran to burglarize the Sharp residence. In the short time period within which the burglary was committed, an SUV was parked at the house, and a passenger alit from the vehicle and appeared to scope out the residence and to signal to another person in the backyard. The SUV then left the location only to return a few minutes later. A few hours later, the vehicle is located several miles away with the previous driver on location and Appellant in the back seat inspecting proceeds of the burglary. In addition, the driver's and Appellant's fingerprints are on the car and the proceeds, and Appellant's skin color is consistent with the description given by the eyewitness of the person scoping out the house.[1] It was reasonable for the jury to infer from this "web of evidence" that Appellant and Kohran conspired to burglarize the Sharp residence-- not that Appellant was merely in the wrong place at the wrong time. *Perez*, 931 A.2d at 708.

Insufficient Evidence of Valuation to Support M2 Gradation of Theft Charges

Contrary to Appellant's assertion, the Commonwealth presented sufficient evidence of the value of the stolen jewelry to support the theft convictions as second degree misdemeanors. Appellant argues that the theft charges should have been automatically graded as third degree misdemeanors pursuant to the default provision of the gradation statute because the Commonwealth failed to present evidence of either the market value or replacement cost of the Sharps' jewelry. *See* 18 Pa. Cons. Stat. Ann. § 3903(b)(2) (when the value of stolen property is

[1] This similarity was argued by the Commonwealth in its closing argument but the Court did not make a formal record of Appellant's skin color. However, Appellant's arrest photo was moved into evidence and reflects that he could be reasonably described as white, Hispanic or olive-skinned.

under $50, the theft is graded as a third degree misdemeanor);18 Pa. Cons. Stat. Ann. § 3903(c)(3) ("[w]hen the value of property cannot be satisfactorily ascertained [...] its value shall be deemed to be an amount less than $50.").

Appellant cites *Commonwealth v. Goins* in support of his contention that he is entitled to the theft charges to be downgraded to third degree misdemeanors. 867 A.2d 526 (Pa. Super. 2004). In *Goins*, the Superior Court held that a jury could not conclude beyond a reasonable doubt that the value of a DVD duplication machine exceeded the $50 threshold because the Commonwealth failed to provide any evidence of its valuation. *Id.* at 530. Likewise, Appellant argues that the Commonwealth in this case provided neither testimony to show whether the jewelry was "real, costume, discounted, rare, or antique" nor any approximation of its market or replacement value.

Unlike in *Goins*, however, here there was evidence adduced at trial from which the jury could properly value the stolen jewelry.[2] Officers Shaw and Krebs testified as to the quantity and characteristics of the items. NOTES OF TESTIMONY, Trial, 3/13/2011, at 87-88; NOTES OF TESTIMONY, Trial, 3/14/2011, at 13. Additionally, the Commonwealth published to the jury photographs of the more expensive looking pieces. *Id.* at 46. It would simply defy common sense to suggest that the total value of these dozens of pieces of jewelry was less than $50. As such, the evidence was sufficient to support the M2 gradation.

[2] When it comes to valuation, "[t]he Commonwealth is not required to establish *precise* market value of the stolen property. Rather, the Commonwealth must present evidence from which a reasonable jury may conclude that the market value was *at least* a certain amount." *Commonwealth v. Hanes*, 522 A.2d 622, 626 (Pa. Super. 1987).

Excessive Sentence

Sentencing is within the sound discretion of the trial judge and a sentence will stand on appeal absent a manifest abuse of discretion. *Commonwealth v. Shugars*, 895 A.2d 1270, 1275 (Pa. Super. 2006). In addition to the sentencing guidelines, the court must consider general principles of sentencing such as the protection of the public, the gravity of the offense in relation to its impact on the victim and the community, and the rehabilitative needs of the defendant. *Commonwealth v. Culverson*, 34 A.3d 135, 144 (Pa. Super. 2011). It is well-settled that "the sentencing guidelines are merely advisory and the sentencing court may sentence a defendant outside of the guidelines so long as it places its reasons for the deviation on the record." *Commonwealth v. P.L.S.*, 894 A.2d 120 (Pa. Super. 2006) (citation omitted).

Here, Appellant presented poor prospects for rehabilitation because ten prior burglary convictions and multiple state sentences have not deterred his criminal conduct, and because Appellant committed the offense in this case shortly after he was released on parole from a 5-10 year state prison sentence. Thus, the Court's sentence was consistent with its desire to protect the community from a repeat offender who carries little to no hope of rehabilitation.

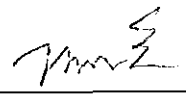
Nevertheless, Appellant claims that there was not a sufficient basis to deviate from the sentencing guidelines because the Court's only stated reason to aggravate the sentence -- the eleven prior burglaries --was already factored into the guidelines. In this case, however, Appellant's past record of burglaries was so extensive that simply characterizing his prior record as a REFEL understates his criminality. Indeed, two such priors would have qualified him as a REFEL. Because his criminal record was far worse than his prior record score suggests, and because he committed this latest burglary shortly after release on parole, aggravation was clearly appropriate.

CONCLUSION:

All four matters complained of on appeal lack merit. The jury's guilty verdict as to conspiracy to commit burglary was unambiguous and supported by evidence sufficient to establish all of the elements of the offense. Moreover, the Court did not err in grading the theft charges as second degree misdemeanors as a jury could reasonably conclude that the value of the stolen jewelry was between $50 and $200. Finally, imposing a sentence to seven and a half to sixteen years was appropriate because Appellant's chances of rehabilitation are small and the need to protect the community from this repeat offender is great. Accordingly, the Court's judgment of sentence should be **AFFIRMED.**

BY THE COURT:

DATE: 8/14/2012



MICHAEL E. ERDOS J.

Commonwealth v. Frank Schaffer
1459 EDA 2012
CP-51-CR-0001360-2011
Opinion

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Opinion upon the persons, And in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P. 114:

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Date: 8/14/12