

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
RASHAWN MOSLEY,	:	
	:	
Appellant	:	No. 2192 MDA 2012

Appeal from the Judgment of Sentence entered on November 2, 2012
in the Court of Common Pleas of Dauphin County,
Criminal Division, No. CP-22-CR-0003813-2004

BEFORE: OTT, STABILE and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED MAY 23, 2014

Rashawn Mosley (“Mosley”) appeals from the judgment of sentence imposed following his convictions of one count each of criminal homicide, robbery, recklessly endangering another person and carrying a firearm without a license.¹

The trial court set forth the relevant facts in its Opinion, which we adopt herein by reference. **See** Trial Court Opinion, 8/7/13, at 3-9.

Following a long and complex procedural history, a jury convicted Mosley of the above-mentioned crimes. The sentencing court sentenced Mosley to an aggregate sentence of life in prison, followed by thirteen and one-half to twenty-seven years in prison. Mosley filed a Post-Sentence

¹ **See** 18 Pa.C.S.A. §§ 2501(a), 3701(a)(1), 2705, 6106(a).

Motion, which the sentencing court denied. Thereafter, Mosley filed a timely Notice of Appeal.

On appeal, Mosley raises the following issues for our review:

1. Whether the trial court erred when it failed to suppress [Mosley's] statement to police where he did not understand and could not knowingly, voluntarily, and intelligently waive his **Miranda**^[2] rights and where [Mosley] requested counsel prior to giving statements, but the request was denied him[,], and officers continued to interrogate him in violation of his constitutional rights?
2. Whether the trial court erred in denying [Mosley's] pretrial motion for recusal when the trial court had previously presided over [Mosely's] prior guilty plea and subsequent [Post Conviction Relief Act ("PCRA")³] [P]etition, the denial of which was overturned and remanded by the Superior Court of Pennsylvania resulting in a new trial and proceedings before the same court?
3. Whether the trial court erred when it denied [Mosley's Post-Sentence Motion] where there was no reasonable basis upon which to impose an aggravated range sentence [for robbery and carrying a firearm without a license], and the trial court did not place any reasons on the record in order to justify this excessive departure from the guidelines?
4. Whether the trial court erred in failing to grant [Mosley's] post-sentence [M]otion requesting [a] new trial or an arrest of judgment where the verdict was against the weight of the evidence to shock one's sense of justice[,], where [Mosley's] statement to police was a result of coercion, was not voluntary, and should not have been considered, [and] where witness Christopher Stevenson ["Stevenson"] testified that his statement to police was a result of coercion and was not voluntary and should not have been considered, and where the only known eye[.]witness to the crimes, Daniel Giorgione

² **See *Miranda v. Arizona***, 384 U.S. 436 (1966).

³ **See** 42 Pa.C.S.A. §§ 9541-9546.

["Giorgione"], testified that he saw the person that committed the crimes and it was not [Mosley], but another individual?

Brief for Appellant at 11-12 (footnotes added).

In his first issue, Mosley contends that the trial court erred by failing to suppress his statements to police because they were made without a knowing, voluntary and intelligent waiver of his **Miranda** rights. **Id.** at 20. Mosley asserts that, due to his young age, limited education⁴ and the manner in which the detectives were treating him, his waiver was not voluntary. **Id.** Mosley also contends that he requested to speak to an attorney both prior to and while detectives were questioning him, but was denied that right. **Id.** at 21.

In its Opinion, the trial court set forth the relevant law, addressed Mosley's suppression claim, and concluded that it lacks merit. Trial Court Opinion, 8/7/13, at 9-12. We agree with the sound reasoning of the trial court and affirm on this basis. **See id.**

In his second issue, Mosley contends that the trial judge erred by failing to recuse himself after the case was remanded for a new trial, following a prior appeal. Brief for Appellant at 23. Mosley notes that the trial judge presided over Mosley's withdrawal of his guilty plea, and denied his pretrial Motions. **Id.** at 23. Further, Mosley notes that this Court twice overturned the trial judge's denial of PCRA relief. **Id.** at 24. For these

⁴ Mosley claims that his statements were made to police when he was nineteen years of age and had only completed school through the eighth grade. Brief for Appellant at 21.

reasons, Mosley claims that the trial judge appeared biased, and Mosley did not believe that the trial judge could give him a fair trial. **Id.** at 23.

In its Opinion, the trial court set forth the relevant law, addressed Mosley's recusal claim, and concluded that it lacks merit. Trial Court Opinion, 8/7/13, at 12-14. We discern no abuse of discretion by the trial court and affirm on this basis. **See id.**

In his third claim, Mosley contends that the trial court erred by imposing sentences for robbery and carrying a firearm without a license in the aggravated guideline range without placing reasons for doing so on the record. Brief for Appellant at 25. Mosely asserts that the record is devoid of any reasons to support the imposition of aggravated sentences, despite the fact that the sentencing court was provided with a pre-sentence investigation report and victim impact statements. **Id.**

Mosley challenges the discretionary aspects of his sentence. "Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right." **Commonwealth v. Moury**, 992 A.2d 162, 170 (Pa. Super. 2010). Prior to reaching the merits of a discretionary sentencing issue,

[this Court conducts] 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, [**see**] 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, [**see**] 42 Pa.C.S.A. § 9781(b).

Moury, 992 A.2d at 170 (citation omitted).

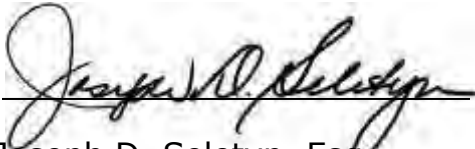
Here, Mosley filed a timely Notice of Appeal. He also filed a timely Post-Sentence Motion. However, Mosley has not included a concise statement of the reasons relied upon for allowance of appeal in his brief, pursuant to Pa.R.A.P. 2119(f). Because Mosley failed to comply with the prerequisites for challenging the discretionary aspects of his sentence, we cannot address this issue. **See Commonwealth v. Tuladziecki**, 522 A.2d 17, 19 (Pa. 1987) (holding that any discretionary sentencing issue that is not raised in a Rule 2119(f) statement is waived on appeal); **see also** Pa.R.A.P. 2119(f) (stating that “[a]n appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence.”).

In his fourth claim, Mosley contends that the verdict was against the weight of the evidence. Brief for Appellant at 26. In support of this argument, Mosley contends that his confession was given as a result of his inability to understand his **Miranda** rights and the denial of his right to speak with an attorney. **Id.** at 26-27. Mosley also contends that Stevenson was coerced by police to implicate Mosley in the homicide. **Id.** at 27. Finally, Mosley contends that Giorgione, as the only witness to the shooting, identified James Cousins as the shooter, rather than Mosley. **Id.**

In its Opinion, the trial court set forth the relevant law, addressed Mosley's weight of the evidence claim, and concluded that it lacks merit. Trial Court Opinion, 8/7/13, at 18-19. We agree with the sound reasoning of the trial court and affirm on this basis. ***See id.***

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/23/2014

S25038-14

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: DAUPHIN COUNTY, PENNSYLVANIA

vs.

: NO. 2004-CR-3813

RASHAWN MOSLEY

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MEMORANDUM OPINION

Rashawn Mosley was charged with Criminal Homicide, Robbery, Aggravated Assault, Recklessly Endangering Another Person, and Carrying a Firearm Without a License, stemming from events that took place on July 6, 2004. On September 7, 2005, Defendant Mosley pled guilty to Third Degree Murder, Robbery, and Carrying Firearms Without a License. Under the terms of the negotiated plea agreement, Defendant was sentenced to twenty (20) to forty (40) years of imprisonment. On February 22, 2006, Defendant filed a *pro se* PCRA petition, and counsel was assigned. Defendant sought reinstatement of his trial rights and/or appellate rights. Alternatively, he requested an evidentiary hearing. This Court denied relief without a hearing.

Following an appeal to the Pennsylvania Superior Court, Defendant's case was remanded for a hearing.¹ A hearing was held, and on January 28, 2009, this Court entered an order dismissing the PCRA petition. Defendant filed a second notice of appeal, alleging that this Court erred in denying the PCRA petition where trial counsel was ineffective and the guilty plea was unlawfully induced and involuntary. In a memorandum decision filed on June 7, 2010, the Superior Court concluded that the evidence adduced at the PCRA hearing established that an exculpatory eyewitness existed and was available to testify that he identified another individual as the shooter. As counsel offered no explanation for the failure to interview such witness and

¹ The Superior Court remanded for and evidentiary hearing because Defendant's claim that his guilty plea was unknowingly entered based upon ineffective assistance of counsel, might have warranted relief.

the record revealed no support for such inaction, the order dismissing the PCRA petition was reversed, and the case was remanded for a new trial.

A new trial was held, and on February 2, 2012, such trial resulted in a hung jury. Defendant's case was listed for trial again, and on September 14, 2012, following a jury trial, Defendant was found guilty of Criminal Homicide, Robbery, Recklessly Endangering Another Person, and Carrying a Firearm Without a License.² Defendant was subsequently sentenced to life imprisonment for the homicide conviction, ten (10) to twenty (20) years of imprisonment for the robbery, and three and one-half (3 ½) to seven (7) years of imprisonment for carrying a firearm without a license.³ Defendant's post-sentence motion was filed and denied on November 16, 2012, and a notice of appeal was filed on December 12, 2012.

In his statement of matters complained of on appeal, Defendant raises the following issues:

- (1) The trial court erred in denying the motion to suppress defendant's statement where Mr. Mosley did not understand and could not knowingly, voluntarily and intelligently waive his Miranda rights and where Mr. Mosley requested counsel prior to giving his statements, but this request was denied him, and the officers continued to interrogate Mr. Mosley, all in violation of his constitutional rights.
- (2) The trial court erred in denying defendant's pretrial motion for recusal when the trial court had presided over appellant's prior guilty plea and subsequent PCRA petition, the denial of which was overturned and remanded by the Superior Court of Pennsylvania resulting in new trial proceedings before the same trial court.
- (3) The trial court erred when it denied the defendant's motion to modify the sentence where there was no reasonable basis upon which to impose an aggravated range sentence at counts two and five, and this Honorable Court did not place any reasons on the record in order to justify this excessive departure from the guidelines.

² The Aggravated Assault charge was dismissed.

³ No further penalty was imposed for the recklessly endangering another person conviction.

- (4) The trial court erred in failing to grant defendant's post-sentence motion requesting a new trial or an arrest of judgment when the verdict was against the weight of the evidence. Mr. Mosley testified that his statement to the police was made as a result of coercion, was not voluntary, and as such, should not be considered. Mr. Christopher Stevenson also testified that his statement to the police was made as a result of coercion, was not voluntary, and as such, should not be considered. In addition, the only known eyewitness to the crimes, Mr. Daniel Giorgione, testified that he saw the person who committed the crimes and the individual was not Mr. Mosley. Mr. Giorgione identified a different individual as being the person who committed the crimes. As such, defendant's convictions of second-degree murder, robbery, recklessly endangering another person, and carrying a firearm without a license are so contrary to the weight of the evidence as to shock one's sense of justice.

The facts in this case, as reflected in the notes of trial testimony, are as follows: The first Commonwealth witness, Jonathan Morrow, a Harrisburg firefighter, testified that he was at his mother-in-law's house on July 6, 2004, shortly after midnight. [Notes of Testimony, September 11, 2012, Volume 2, p. 18]. Mr. Morrow heard two gunshots at that time, in very quick succession. [N.T., 9-11-12, p. 19]. Mr. Morrow testified that an individual at Thirteenth and Hanover said their friend had been shot, so Mr. Morrow went to a vehicle at that intersection, where he found the victim lying partially inside the car. [N.T., 9-11-12, vol. 2, p. 19]. He pulled him out to discover that the victim had a gunshot wound that went through his left arm and into his chest. [N.T. 9-11-12, vol. 2, p. 20].

Dr. Wayne Ross, a forensic pathologist at the Dauphin County Coroner's Office, performed the autopsy on the victim, Christopher Thompson, on July 7, 2004. [N.T., 9-11-12, vol. 2, pp. 26-28]. He testified that the gunshot hole had gone through Thompson's left arm and then entered his left chest, and that the wound was immediately fatal. [N.T., 9-11-12, vol. 2, pp. 29-30]. Dr. Ross determined that the shooter would have been three (3) to four (4) feet away, or

greater, as there was no evidence of soot or gunshot powder residue on the clothing or body.

[N.T., 9-11-12, vol. 2, p. 32].

The passenger in the car with the victim at the time of the shooting was Daniel Giorgione. Mr. Giorgione testified that the victim, Christopher Thompson, lived near him in Lemoyne and, on the evening of the shooting, Mr. Giorgione stopped to talk to Mr. Thompson. He had heard that Mr. Thompson knew how to get heroin from Harrisburg. [N.T., 9-13-12, vol. 4, pp. 9-10]. Mr. Giorgione had a “nice bit of money” on him, and offered to hook up Mr. Thompson with a bag or two of heroin in exchange for a ride to Harrisburg to purchase the drugs. [N.T., 9-13-12, vol. 4, pp. 10]. Initially, Mr. Thompson said no, but later changed his mind, got his car, picked up Mr. Giorgione, and they drove to Harrisburg before or around midnight. [N.T., 9-13-12, vol. 4, pp. 11-13]. The men proceeded to Hall Manor in Harrisburg. After not finding any heroin, they were on their way out of Hall Manor when they saw two individuals and decided to approach them to see if they had what they were looking for. [N.T., 9-13-12, vol. 4, pp. 17-19]. When Thompson and Giorgione pulled up, the two individuals were on Giorgione’s (passenger) side of the car. One of the men, described by Mr. Giorgione as a light-skinned Hispanic or black/white mixed, asked the men to pull into the parking lot. [N.T., 9-13-12, vol. 4, pp. 19]. After parking, the individual who initially spoke with Mr. Giorgione through the car window went inside and the other individual approached Mr. Giorgione and asked to see his money. [N.T., 9-13-12, vol. 4, pp. 20-23]. Mr. Giorgione told the man that Mr. Thompson had the money, at which time the individual went around to the driver’s side of the car. At that point, he pulled out a gun, pointed it in Mr. Thompson’s face, and demanded the cash. [N.T., 9-13-12, vol. 4, pp. 23-24]. Without waiting on an answer, he hit Mr. Thompson in the face with the gun. At that point, Mr. Giorgione told Mr. Thompson to just take the money

and drop most of it on the ground so they could get out of there. When Mr. Thompson tried to give the man part of the money, he responded that it was not all of it. Mr. Thompson then turned the car on, at which time the individual shot Mr. Thompson. [N.T., 9-13-12, vol. 4, pp. 24-25]. Mr. Thompson tried to drive away, and another shot went off in the background. By the time they reached the intersection of Thirteenth and Hanover, Mr. Thompson went unconscious. [N.T., 9-13-12, vol. 4, pp. 25-26]. The police arrived quickly and Mr. Giorgione was questioned by the officers while still at Manor Hall and again at the police station for an extended period of time. [N.T., 9-13-12, vol. 4, pp. 26-28]. Mr. Giorgione described the shooter as very dark-skinned, with a dark baseball hat and gold teeth. [N.T., 9-13-12, vol. 4, pp. 32-33]. Mr. Giorgione was eventually asked to look at a photo array and he chose a photograph of an individual that he identified as the shooter. The person in the photograph was not Defendant Mosley. [N.T., 9-13-12, vol. 4, pp. 35-37]. Rather, the person identified was James Cousins. Mr. Giorgione was told by police four years after the shooting that he had chosen the wrong person from the photo array. [N.T., 9-13-12, vol. 4, pp. 37-39].

Detective John O'Connor with the Harrisburg City Police was the lead investigator in this homicide case. [N.T., 9-11-12, vol. 2, pp. 45]. Based upon Daniel Giorgione's identification of James Cousins as the shooter, Detective O'Connor executed a search warrant at Mr. Cousins' house. The following items were found: a 9-milimeter pistol was found on the second floor rear balcony; ammunition; and gold teeth in the rear bedroom inside of a couch. [N.T., 9-11-12, vol. 2, pp. 45-47].

Christopher Stevenson, Defendant Mosley's brother, also offered testimony. Mr. Stevenson, who is in state prison for third-degree murder, testified that he gave a recorded statement to police back on September 3, 2004 regarding the homicide in question. [N.T., 9-11-

12, vol. 2, pp. 79-81]. At the time of Mr. Thompson's homicide, Mr. Stevenson had no criminal record. [N.T., 9-11-12, vol. 2, p. 80]. On January 31st, 2012, Mr. Stevenson testified for the first time that the September 3rd, 2004 statement was not true. [N.T., 9-11-12, vol. 2, p. 83].

Specifically, Mr. Stevenson testified that the police told him that he would be charged with conspiracy to commit homicide if he did not say what they told him to say. He was told that if he did not plead guilty to fabricating evidence, he would be charged with conspiracy to commit homicide. [N.T., 9-11-12, vol. 2, pp. 83-88]. Specifically, Mr. Stevenson said in his 2004 statement that he was thrown up against a wall by law officials, and that is how he was coerced. [N.T., 9-12-12, vol. 3, pp. 15-16]. That statement, which was forty-five minutes in length, pinned Christopher Thompson's murder on Mr. Stevenson's brother (Defendant Mosley). [N.T., 9-12-12, vol. 3, p. 16]. Mr. Stevenson testified that he was forced to make a falsified statement about an innocent man. [N.T., 9-12-12, vol. 3, p. 20].

Detective Victor Rivera of the Harrisburg Police Department was the detective who took the 2004 statements from Mr. Stevenson. [N.T., 9-11-12, vol. 2, pp. 91-92]. Detective Rivera had received information from other individuals that implicated Christopher Stevenson and Defendant Mosley in the murder of Christopher Thompson. [N.T. 9-12-12, vol. 3, p. 12]. Detective Rivera testified that he issued Mr. Stevenson his Miranda rights, and Mr. Stevenson chose to proceed without an attorney. [N.T., 9-11-12, vol. 2, p. 92]. Over the course of the interview, Mr. Stevenson admitted that he was present at the homicide, witnessed it, and gave specifics of what occurred. While initially hesitant, he eventually gave the names of those involved, and who pulled the trigger. [N.T., 9-11-12, vol. 2, pp. 92-94]. Detective Rivera also

stated that there were no threats made against Mr. Stevenson, and no physical interaction. [N.T., 9-12-12, vol. 3, p. 5].⁴

In addition to taking the statement from Christopher Stevenson, Detective Rivera also took a statement from Defendant. [N.T., 9-11-12, vol. 3, pp. 27-28]. On the morning of September 3, 2004, Detective Rivera, Detective O'Connor, Detective Lau, and eventually Detective Heffner met with Defendant. At that time, Detective Rivera verbally gave Defendant his constitutional rights, which Defendant said he understood and wished to talk to the detectives without an attorney present. [N.T., 9-11-12, vol. 3, p. 29]. The statement of Defendant began at 9:27 a.m. and ended at 9:42 a.m.; it was an interview and was not recorded. [N.T., 9-11-12, vol. 3, p. 31]. Following the interview, Defendant submitted a recorded statement to Detective Rivera. Detective Rivera relayed to Defendant that Shamell Cameron had provided a statement and pinned Defendant as the shooter, and that Stevenson had also provided a statement identifying Defendant as the shooter, and that Ronnie Peppers implicated Defendant as well. [N.T., 9-11-12, vol. 3, pp. 32-33]. At no point during the statement was Defendant threatened or grabbed. [N.T., 9-11-12, vol. 3, pp. 34-35].

Detective Donald Heffner, who was present for some of the interview process with Defendant, testified that during the time he was there, Defendant did not ask for an attorney. Detective Heffner was not present when Detective Rivera gave Defendant his constitutional rights. [N.T., 9-11-12, vol. 3, pp. 52-53]. When asked if he witnessed any physical abuse of Defendant, Detective Heffner stated, "No. We don't touch defendants. I mean, that is just ludicrous. We don't do that." He also testified that no one threatened Defendant. [N.T., 9-11-12, vol. 3, p. 54].

⁴ The audio recording of Mr. Stevenson's statement was played aloud for the jury.

Detective David Lau also verified that during his presence at Defendant's statements, Defendant did not ask for an attorney, was never threatened, and at no time did anyone get physical with him. [N.T., 9-11-12, vol. 3, pp. 64-65].

Detective John Cassidy O'Connor was also present during part of Defendant's interviewing/statement process. He was present when Detective Rivera explained Defendant's constitutional rights and confirmed that Defendant indicated that he understood such rights and never asked for an attorney. [N.T., 9-11-12, vol. 3, pp. 78-79]. Detective O'Connor stated that after Defendant was shown statements from Ronnie Peppers and Shamell Cameron, he put his head down and admitted to being the shooter. [N.T., 9-11-12, vol. 3, p. 80]. Finally, Detective O'Connor testified that at no time did anyone get physical with Defendant during the questioning, or threaten him in any way. [N.T., 9-11-12, vol. 3, p. 82].

Defendant Mosley took the stand at trial. In contradiction of the detectives' testimony, Defendant testified that he specifically asked for a lawyer to be present when Detective Rivera told him he had a right to one. [N.T., 9-11-12, vol. 3, p. 121]. Defendant stated that he was later told that he would not be getting a lawyer, and was not permitted to make a telephone call to his aunt. [N.T., 9-11-12, vol. 3, p. 122]. He also indicated that while his constitutional rights were given to him, he did not understand what he was waiving. [N.T., 9-11-12, vol. 3, p. 126]. Defendant testified that the detectives told him that his friends were "telling" on him, and that they had statements from such from such friends implicating him in the murder, which they showed to him. [N.T., 9-11-12, vol. 3, pp. 126-27]. At that point, Defendant says he asked for a lawyer again. He testified that Detective Heffner told Detective Rivera, "[D]on't put no marks or bruises on him." [N.T., 9-11-12, vol. 3, p. 128]. After Detective Heffner left, Defendant stated that "Detective Rivera rolled his sleeves up. He snatched me up. I was scared. I didn't

know what to do.... I was scared, so I said it.” [N.T., 9-11-12, vol. 3, p. 128]. “I was scared, so whatever they wanted me to say, that’s why I said it. I said it. I didn’t think about the consequences or nothing. I did say what they wanted me to say.” [N.T., 9-11-12, vol. 3, p. 128]. On cross-examination, Defendant stated that his request for a lawyer and Detective Rivera throwing him “up against the wall” happened in between statements, while the recorder was off. [N.T., 9-11-12, vol. 3, pp. 137-38].

In the first question presented for our review, Appellant challenges the trial court's denial of his motion to suppress his statement to Detective Rivera. The standard of review for an appellate court reviewing an order denying a motion to suppress is as follows:

We are limited to determining whether the lower court's factual findings are supported by the record and whether the legal conclusions drawn therefrom are correct. We may consider the evidence of the witnesses offered by the Commonwealth, as verdict winner, and only so much of the evidence presented by defense that is not contradicted when examined in the context of the record as a whole. We are bound by facts supported by the record and may reverse only if the legal conclusions reached by the court were erroneous.

Commonwealth v. Charleston, 16 A.3d 505, 513 (Pa. Super. 2011) (quoting *Commonwealth v. Hughes*, 908 A.2d 924, 927 (Pa. Super. 2006)).

Detective Rivera was the first witness to testify at the suppression hearing. Much of his trial testimony, as set forth above, mirrored the statements made at the suppression hearing. Detective Rivera testified that before Defendant made his first recorded statement, on September 3, 2004, he gave Defendant his *Miranda* rights. [Notes of Testimony, Suppression Hearing, July 22, 2011, p. 5]. Defendant was given his rights by Detective Rivera at 9:20 a.m. The first recorded statement started at 9:27 a.m. and ended at 9:42 a.m. [N.T., Hearing, 7-22-11, p. 6]. Further, Detective Rivera attested that Defendant acknowledged he understood his rights and

wished to continue the interview without an attorney. [N.T., Hearing, 7-22-11, p. 6]. Detective Rivera was the primary interviewer. [N.T., Hearing, 7-22-11, p. 10].

Detective Rivera also testified that before Defendant gave his second statement, Detective Rivera again advised him of his *Miranda* rights and Defendant again acknowledged that he understood such rights. [N.T., Hearing, 7-22-11, p. 6]. The second statement started at 10:51 a.m., and ended at 11:22 a.m. [N.T., Hearing, 7-22-11, p. 6]. Detective Rivera averred that at no time during either statement did Defendant request an attorney. [N.T., Hearing, 7-22-11, p. 7]. When asked if at any point did he or any of the other detectives assault or threaten Defendant, Detective Rivera replied no. [N.T., Hearing, 7-22-11, p. 7]. At various points throughout the interviewing process, other detectives were present; namely, Detective John O'Connor, Detective Lau, and Detective Heffner. [N.T., Hearing, 7-22-11, p. 7].

Detective O'Connor testified at the suppression hearing. His testimony was consistent with Detective Rivera's testimony; specifically, that Detective Rivera conveyed *Miranda* warnings to Defendant, that Defendant understood such warnings, that Defendant never requested an attorney. [N.T., Hearing, 7-22-11, pp. 14-16]. Detective O'Connor iterated that during Defendant's first statement, he denied having anything to do with the homicide, and in the second statement he confessed to the killing. [N.T., Hearing, 7-22-11, p. 15].

Detective Heffner, who was not present for the reading of Defendant's *Miranda* rights, testified that while he was present for the interviews, Defendant at no point requested an attorney. [N.T., Hearing, 7-22-11, pp. 19-20].

Defendant testified at the suppression hearing. Defendant stated that Detective Rivera read him his *Miranda* rights. [N.T., Hearing, 7-22-11, p. 24]. He also stated that the other detectives walked in close to the end of the reading of his *Miranda* rights. [N.T., Hearing, 7-22-

11, p. 24]. Defendant testified that although he was read his constitutional rights, he did not understand that he was giving up those rights. [N.T., Hearing, 7-22-11, pp. 24-25]. He also testified that he asked for a lawyer when he was told he had a right to an attorney. [N.T., Hearing, 7-22-11, p. 25]. Defendant claimed he said, "I want a lawyer. I don't want to talk. I want a lawyer." [N.T., Hearing, 7-22-11, p. 26]. He also asserted that both Detective Rivera and Detective Lau were present when he made such request. [N.T., Hearing, 7-22-11, p. 26]. Defendant went on to explain that Detective Heffner said he was going to get him a lawyer, then came back and stated that he could not get him one. [N.T., Hearing, 7-22-11, p. 26].

Defendant's testimony was that the detectives thought he was lying during the first statement, that he repeatedly asked for a lawyer, and that Defendant's friends were implicating him in the murder. [N.T., Hearing, 7-22-11, pp. 27-28]. Detective Rivera showed him statements from Christopher Stephenson and Shamal Cameron. [N.T., Hearing, 7-22-11, p. 28]. Defendant attested that prior to his second statement, he was not read his *Miranda* rights. [N.T., Hearing, 7-22-11, p. 30]. Defendant confessed to the homicide during the second statement.

In denying Defendant's motion to suppress his confession, this Court stated as follows:

THE COURT: [T]he Court has heard the statements and the rather lengthy aspects of it. The defendant was well aware things were being recorded. Although he testifies repeatedly asking for a lawyer, repeatedly saying he didn't want to speak, none of that shows up, and one would logically think it would in recording statement right in front of him[.] That ... goes without saying. There is also the credibility issue of the testimony that has been given. Suppression is denied.

MS. CORNICK: Your Honor, could I just ask you to address our issue about the express waiver? Our argument is that while he indicated he received and understood his rights, he never expressly waived those rights.

THE COURT: I think he clearly did understand them and I think he clearly waived those rights. That is what the testimony shows.

It is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given to their testimony. *Commonwealth v. Griffin*, 785 A.2d 501, 505 (Pa. Super. 2001). The suppression court is free to believe all, some or none of the evidence presented at the suppression hearing. *Id.* See *Commonwealth v. Wright*, 867 A.2d 1265 (Pa. Super. Ct. 2005) (on appeal from a suppression hearing, the appellate court must defer to the credibility determinations of the trial judge who had the opportunity to observe the witnesses' credibility).

The record of the suppression hearing clearly supports this Court's determination; there is no basis for reversal of the decision to deny the motion to suppress. Detective Rivera was clear in his testimony that after Miranda rights were issued for both statements, there was no request from Defendant for counsel to be present. The testimony of Detectives O'Connor and Heffner was entirely consistent with Detective Rivera's pronouncements. Moreover, Defendant's recorded statement, admitted as a Commonwealth exhibit, revealed no requests by Defendant for counsel. The factual findings are clearly supported by the record, *Charleston, supra*, and this Court's credibility determination cannot be disturbed. *Griffin, supra*.

In Defendant's second issue on appeal, he challenges this Court's denial of a motion to recuse.

The standards for recusal are well established. 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. *Rizzo v. Haines*, 520 Pa. 484, 512-513, 555 A.2d 58, 72 (1989); *Commonwealth v. Miller*, 541 Pa. 531, 664 A.2d 1310 (1995). As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. *Commonwealth v. Travaglia*, 541 Pa. at 143-145, 661 A.2d at 370, citing *Goodheart v. Casey*, 523 Pa. 188, 565 A.2d 757 (1989). In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend

to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. *Goodheart v. Casey*, 523 Pa. 188, 201–203, 565 A.2d 757, 764 (1989). Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overruled on appeal but for an abuse of discretion. *Id.* at 199–201, 565 A.2d at 763. In reviewing a denial of a disqualification motion, we recognize that our judges are honorable, fair and competent. *Reilly v. SEPTA*, 507 Pa. 204, 221–223, 489 A.2d 1291, 1300 (1985).

Commonwealth v. Abu-Jamal, 553 Pa. 485, 507, 720 A.2d 79, 89 (1998). See *Commonwealth v. King*, 576 Pa. 318, 322-23, 839 A.2d 237, 239-40 (2003) (in filing a motion for recusal, the moving party must allege facts tending to show bias, interest or other disqualifying factors....Once the judge decides whether to preside over the case, that decision is final and the case must proceed).

At the pre-trial hearing, held on January 3, 2012, this Court denied Defendant's motion for recusal. There, the Court stated:

Under my obligations as a trial judge for the case that has been assigned, I am just going to sit up here and call balls and strikes as to what is admissible and not admissible. I am not making a determination as to whether he is innocent or guilty....If he would request a trial by judge, I would recuse. But if you are asking for a jury trial, that takes it off the table....I am going to deny the motion for recusal.

[Notes of testimony, Pre-trial hearing, January 3, 2012, pp. 4-5]. The Court then entertained Defendant's justification for why he initially filed the motion for recusal.⁵ Defendant explained that the reason he filed such motion was because "everything" he filed in front of this Court has been denied, and he feels as though he would not receive a fair trial. [N.T., Pre-trial hearing, 1-3-12, p. 7]. This Court responded as follows:

I see what you are saying. I understand your perspective. I don't know how else to assure you that I am going to call the balls and strikes according to the rules of evidence. I see your point. Superior Court did overturn my decision, and I hold no animosity....However, at the time and under the circumstances presented, I

⁵ A supplemental motion for recusal was subsequently filed by defense counsel, Anne Gingrich, Cornick, Esq.

think I have called everything in the manner that's appropriate. And it has never been made with any animosity towards you personally. We have never known each other before....I don't know of any other history. I don't recall of any that we would have had representation judicially other than this particular case.....So, I understand your perspective, but that's not a basis, on your verbalized oral motion for reconsideration. That's the best way, I guess, to couch it. That concludes the hearing.

[N.T., Pre-trial hearing, 1-3-12, pp. 7-8].

In denying Defendant's motion for recusal, the Court made clear that it held no personal animosity towards Defendant, and has decided all issues regarding Defendant in an appropriate manner. There is nothing of record that indicates that the Court would rule upon any issue unfairly or with prejudice of any kind. *Abu-Jamal, supra*. There was no abuse of discretion. *Id.*

In his third issue, Defendant challenges the Court's denial of his motion to modify sentence, claiming there was no reasonable basis upon which to impose an aggravated range sentence at counts two and five, and that there were no reasons given on the record for departure from the guidelines. "Sentencing is a matter vested in the sound discretion of the sentencing court whose judgment will not be disturbed absent an abuse of discretion." *Commonwealth v. Harclerode*, 768 A.2d 1132, 1134 (Pa. Super. 2001) quoting *Commonwealth v. Adams*, 760 A.2d 33 at 39 (Pa. Super. 2000) . Only when a sentence is clearly unreasonable may an appellate court reverse a sentence that falls within the statutory guidelines. *Commonwealth v. Fenton*, 750 A.2d 863, 867 (Pa. Super. 2000), citing *Commonwealth v. Koren*, 646 A.2d 1205, 1208 (Pa. Super. 1994). When reviewing the discretionary aspects of the sentence, the appellate court will reverse only if the "appellant can demonstrate a manifest abuse of discretion by the sentencing judge." *Commonwealth v. Hermanson*, 449 Pa. Super. 443, 674 A.2d 281, 283 (Pa. Super. 1996), quoting *Commonwealth v. Koren, supra*, at 1208. 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. Kocher*, 529 Pa. 303, 602 A.2d 1308, 1310 (1992).

When reviewing a sentence, the appellate court gives great weight to the sentencing court's decisions because the sentencing court "is in the best position to view the character of the defendant, whether the defendant displayed remorse, defiance, or indifference, and the overall effect and nature of the crime." *Commonwealth v. Viera*, 442 Pa. Super. 348, 659 A.2d 1024, 1030 (1995). "[T]he trial court must consider the character of the defendant and the particular circumstances of the offense in light of the legislative guidelines for sentencing, and the court must impose a sentence that is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." *Commonwealth v. Guth*, 735 A.2d 709, 711 (Pa. Super. 1999), quoting *Commonwealth v. Burkholder*, 719 A.2d 346, 350 (Pa. Super. 1998). "Where the record strongly indicates that the lower court was aware of the relevant sentencing considerations and attempted to weigh them appropriately, appellate courts are not free to interfere arbitrarily." *Commonwealth v. Semuta*, 386 Pa. Super. 254, 562 A.2d 894, 897 (1989), citing *Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12, 18 (1988). If the record reveals the judge set forth reasons for sentencing and considered the particular circumstances of the case, the court's discretion should not be disturbed. *Commonwealth v. McKiel*, 427 Pa. Super. 561, 629 A.2d 1012, 1014 (1993).

At the sentencing hearing, the Commonwealth submitted victim impact statements and heard statements from the victim's aunt, Ginger Brophy, and the victim's mother, Cheryl Groome. [Sentencing Notes of Testimony, November 1, 2012, pp. 4-13]. The Court also had the benefit of a pre-sentence report. "Our Supreme Court has determined that where the trial court is

informed by a pre-sentence report, it is presumed that the court is aware of all appropriate sentencing factors and considerations, and that where the court has been so informed, its discretion should not be disturbed.” *Commonwealth v. Downing*, 990 A.2d 788, 794 (Pa. Super. 2010).

Before sentence was imposed, counsel for Defendant highlighted a few points from the presentence investigation, including the fact that Defendant has no education beyond the eighth grade, no special training or skills, and that both parents died when he was a teenager. [Sentencing, N.T., 11-1-12, pp. 13-14]. In light of such factors, counsel asked that the sentences at Counts 2, 4, and 5 run concurrent to the sentence at Count 1. [Sentencing, N.T., 11-1-12, p. 14].

Defendant offered his own statement prior to sentencing. Specifically, Defendant did not take any blame for the crimes committed:

I stand here as an innocent man, and everybody they – everybody is entitled to their own opinion, and that’s something that I can’t change and nobody else, but I say that to say I was coerced, forced, and beaten to confess to a crime that I didn’t commit. I was wrongly induced to plead guilty to a crime that I didn’t commit, and I was wrongfully charged and convicted for a crime I didn’t commit.

[Sentencing, N.T., 11-1-12, p. 14].

Following Defendant’s statement, the Court imposed the following sentence:

I’ve got a different view of coming home than you do. Maybe your fight ought to be with yourself. Take a look inside to fight to save your soul. This family actually offered you that opportunity. Be that as it may, hopefully today we’ll be closing the grave of Christopher Thompson so that he may rest in peace. The loss and the sorrow will never cease for the family and those [who] touched his life. Hopefully by the sentence imposed today it will ease the pain somewhat and the family has already begun to rejoice in where Christopher is today.

AND NOW, this 1st day of November, 2012, I sentence the Defendant at Count 1, that of criminal homicide of the second degree, to be housed, fed, kept, and clothed at a state correctional institution for the rest of his natural life, impose a fine in the amount of \$1,000, restitution to Miss Groome in the amount of \$1,838.76, costs of these proceedings.

At Count 2, robbery, that the Defendant be housed at a state institution for not less than 10 years nor more than 20 years, that this sentence run consecutive to Count 1.

Count 3, the Defendant was found not guilty, and it shall be dismissed.

Count 4, no further sentence is imposed.

Count 5, carrying of a firearm, I sentence the Defendant to a term of state incarceration of not less than 3 and a half years nor more than 7 years, fine in the amount of \$500. This sentence shall run concurrent with Count 2 but consecutive to Count 1.

[Sentencing, N.T., 11-1-12, p. 17].

In addressing Defendant's claim that this Court did not state its reasoning on the record to justify an imposition of a departure from the guidelines, this Court reiterates that it had the benefit of a pre-sentence report. *Downing, supra*. In *Commonwealth v. Devers*, 519 Pa. 88, 101–102, 546 A.2d 12, 18–19 (1988), the Pennsylvania Supreme Court explained:

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 investigation 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. Additionally, the sentencing court must state its reasons for the sentence on the record. 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 pre-sentencing report; thus properly considering and weighing all relevant factors.

Commonwealth v. Fowler, 893 A.2d 758, 766–7 (Pa. Super. 2006) (citations omitted).

Here, the Court has had the benefit of reviewing information in the pre-sentence investigative report, heard statements from the victim's family, and is intimately familiar with the circumstances of the case, which was tried before the Court twice. Defendant showed an incredible lack of remorse. His preposterous accounts of being beaten, coerced, threatened, and repeatedly requesting (and being denied) an attorney during his interviews/ recorded statements are belied by the record in the suppression hearing, recorded statements, and trial transcripts.

Based upon the foregoing, this Court did not abuse its discretion and, thus, there is no merit to Defendant's sentencing claims.

Finally, Defendant challenges the weight of the evidence, claiming that this Court erred in failing to grant a new trial. Defendant points to two issues in particular: (1) that both Defendant and Christopher Stevenson testified that his statement to police was made as a result of coercion, and (2) that the only known eye-witness to the crime, Daniel Giorgione, testified that he saw the person who committed the crime and that such individual was not Defendant.

The standard of review for a challenge to the weight of the evidence is well-settled:

The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses. *See Commonwealth v. Champney*, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003), *cert. denied*, 542 U.S. 939, 124 S. Ct. 2906, 159 L. Ed. 2d 816 (2004). As an appellate court, we cannot substitute our judgment for that of the finder of fact. *See id.* Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. *See Commonwealth v. Passmore*, 857 A.2d 697, 708 (Pa. Super. 2004), *appeal denied*, 582 Pa. 673, 868 A.2d 1199 (2005). Our appellate courts have repeatedly emphasized that "[o]ne of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence." *Commonwealth v. Forbes*, 867 A.2d 1268, 1273 (Pa. Super. 2005) (internal quotes omitted).

Furthermore, 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. *Champney*, 574 Pa. at 444, 832 A.2d at 408 (citation omitted).

Commonwealth v. Rabold, 920 A.2d 857, 860-861 (Pa. Super. 2007).

A review of the record in this case reveals that, while there are conflicts in the evidence, such discrepancies are not sufficient to render the jury verdict so contrary to the evidence as to

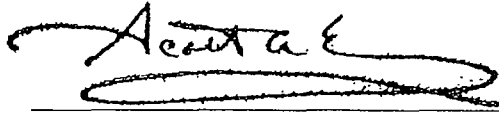
shock one's sense of justice. *Rabold, supra; Passmore, supra*. There was more than ample evidence of record to support the fact-finder's guilty verdict. While Defendant testified he was coerced, threatened, and physically mistreated at the hands of the interviewing detectives, such evidence was directly refuted by Detectives Rivera, Heffner, Lau, and O'Connor. The jury, as fact-finder, was free to believe all, part, or none of the evidence presented. *Rabold, supra*. It is solely within the fact-finder's province to assess weight and credibility of the evidence.

In the same vein, the jury's decision to attribute less weight to the testimony given by Daniel Giorgione and greater weight to the evidence implicating Defendant in the murder was well within the sphere of determining credibility issues and will not be disturbed. Given the statements from others implicating Defendant in the murder, along with Defendant's own confession (albeit later recanted), it can hardly be argued that the verdict is so contrary to the evidence that it shocks one's sense of justice.

A review of the entire record amply supports Defendant's conviction, and no error was made by this Court in denying a motion for a new trial. *See Commonwealth v. Blakeney*, 596 Pa. 510, ___ A.2d ___ (2008) (in reviewing first-degree murder case, Court articulated that a trial judge cannot grant a new trial on a weight of the evidence claim merely due to a conflict in testimony, but should only do so in extraordinary circumstances); *Commonwealth v. King*, 959 A.2d 405 (Pa. Super. 2008) (credibility of witnesses and weight of the evidence determinations are exclusively within the province of the jury; as such, there is no merit to the argument that the eyewitness testimony in a murder case was contradictory because a defense witness identified another individual as the shooter).

In light of the foregoing, Defendant's judgment of sentence for all offenses should be affirmed.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Scott Arthur Evans", written over a horizontal line.

Scott Arthur Evans, Judge

Distribution:

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