NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. EMILY BELLOWS-SHAFFER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 434 MDA 2013

Appeal from the Order Entered September 27, 2012
In the Court of Common Pleas of Bradford County
Criminal Division at No(s): CP-08-CR-0000537-2011

BEFORE: DONOHUE, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.: **FILED APRIL 30, 2014**

Emily Bellows-Shaffer ("Shaffer") appeals the judgment of sentence entered September 27, 2012, in the Bradford County Court of Common Pleas, following her conviction of second degree murder,[1] burglary,[2] and related charges for the September 2010 killing of Carol Hickok. Shaffer was sentenced to an aggregate term of life imprisonment, and a $26,000 fine. On appeal, Shaffer challenges the trial court's admission of excerpts from her videotaped statement to police and diary entries, both the sufficiency and weight of the evidence, the court's jury instructions, the constitutionality

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. § 2502(b).

[2] 18 Pa.C.S. §3502(a).

of her life sentence, and the legality of the fine imposed. For the reasons set forth below, we affirm in part, vacate in part and remand for further proceedings.

The facts underlying Shaffer's arrest and conviction are aptly summarized by the trial court as follows:

> On September 15, 2010, Roger Hickok[3] left his home in the very early morning hours to go for coffee as he usually did. His wife, Carol Hickok and son C.H., age 11, were sleeping. Carol Hickok was C.H.'s step-mother. [Shaffer] is C.H.'s mother. Later in the morning, Mr. Hickok called his home to determine if his wife would be taking C.H. to school. C.H. answered the telephone and said he could not find Carol. C.H. then did find Carol outside, laying at the bottom of stairs leading up to the home's deck. There was a significant amount of blood and a wound on her head. C.H. called his father to inform him and Roger Hickok returned home. While on his way home, he called 911. Roger Hickok determined that his wife was dead and she was pronounced dead at 8:16 a.m. Blood was also observed in Carol Hickok's bedroom on the floor, dresser, and doors of the bedroom. The bed and pillows had been stripped of the sheets and bedding. A blood stained bed comforter was discovered in the washing machine at the home. There was a bloody towel/rag in the bedroom. Blood was also observed on the deck and on the steps where Carol Hickok was found. An autopsy revealed blunt force trauma to the head, neck and torso as well as contusions of the extremities.
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> Roger Hickok and [Shaffer] had an affair while he was married to Carol Hickok. C.H. is the son of the relationship of [Shaffer] and Roger Hickok. Roger Hickok and [Shaffer] had an ongoing relationship after the birth of C.H. and throughout all

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[3] The trial court spelled Roger and Carol's last name as "Hickock." However, the trial transcript lists the correct spelling as "Hickok." Accordingly, we have corrected the spelling throughout the trial court's recitation of the facts.

> times relevant to this case. Roger Hickok obtained custody of C.H. when he was 5 years of age, and C.H. resided with Roger and Carol Hickok full time since then. Carol Hickok treated C.H. as though he were her own child. [Shaffer] was not happy that Roger Hickok had custody of their son. [Shaffer] kept a diary where she wrote numerous entries some of which indicated bitterness for Roger Hickok and wanting to hurt him and wanting her son.
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> Sometime after Carol Hickok's death, Roger Hickok took C.H. and [Shaffer] to his home in Florida for the winter. Roger Hickok felt that C.H. needed to have his mother near. Roger Hickok and C.H. returned from Florida in the spring of 2011, but [Shaffer] remained in Florida at the home.
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> On or about July 19, 2011, [Shaffer] returned to Bradford County for a custody proceeding which she had filed for. She contacted the Pennsylvania State Police advising them she had information about the Hickok death and wanted to speak with them. The Pennsylvania State Police picked her up and an interview ensued which lasted close to 8 hours. During the later part of the interview, [Shaffer] admitted that she drove to the Canton home from Williamsport (approximately 40 minutes) in the early morning hours because she knew Roger Hickok would not be home at that time. She entered the house uninvited, encountered Carol Hickok and physically fought with her. It was determined that Carol Hickok hit her head on the dresser and that she was strangled. [Shaffer] then left the residence. However, she returned shortly thereafter to attempt to clean up and pulled Carol Hickok's body outside across the deck and down the steps to make it appear that she fell down the steps. She then attempted to clean up the bedroom and the sheets but did not know how to work the washing machine. She then left.

Trial Court Opinion, 4/24/2013, at 1-3.

Shaffer was arrested and charged with criminal homicide, burglary, aggravated assault, criminal trespass and tampering with or fabricating

physical evidence.[4] She filed a pretrial motion to dismiss the homicide charges, which was denied by the trial court on January 31, 2012. Thereafter, on April 25, 2012, and May 24, 2012, Shaffer filed both initial and supplemental motions in *limine* seeking, *inter alia*, to exclude her diary entries, as well as photographs related to her custody dispute with Roger Hickok. By order entered June 8, 2012, the trial court granted Shaffer's motion to exclude the custody photos, but deferred a ruling on the diary entries until the Commonwealth determined which specific diary entries it intended to introduce at trial. The trial court ordered the Commonwealth to provide Shaffer with the list of diary entries prior to June 25, 2012, a directive with which the Commonwealth complied.[5]

On June 25, 2012, Shaffer filed another motion in *limine*, objecting to the introduction of her diary entries in general, and listing the specific entries the Commonwealth intended to introduce which she deemed objectionable. She also moved to exclude eight specific excerpts from her videotaped statement to police as inadmissible, and included three additional excerpts that she deemed were necessary for the purpose of context. ***See*** Additional Motions in *Limine*, 6/25/2012, at ¶¶ 14-17. Although the certified

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[4] 18 Pa.C.S. §§ 2501, 3502(a), 2702, 3503(a)(1)(i), and 4910(2), respectfully.

[5] The Commonwealth also provided Shaffer with a list of proposed excerpts from her videotaped statement to police that it intended to introduce at trial.

record does not include an order denying the motions in *limine*, Shaffer states in her brief that the court denied her requests, and the trial transcript reveals that the objectionable video excerpts and diary entries were introduced at trial.

The case proceeded to a jury trial. On August 10, 2012, a jury returned a verdict of guilty on the charges of second degree murder, burglary (two counts), aggravated assault, criminal trespass, and tampering with or fabricating physical evidence.[6] On September 10, 2012, the trial court imposed a mandatory minimum life sentence for the charge of second degree murder, and a consecutive sentence of 24 to 90 months for one charge of burglary. All of the other convictions merged for purposes of sentencing. Shaffer filed timely post sentence motions, which the trial court denied on February 19, 2013, following a hearing. This timely appeal followed.[7]

First, Shaffer argues the trial court erred in denying her pretrial motion to exclude irrelevant and prejudicial excerpts from her videotaped statement

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[6] The jury found Shaffer not guilty of first degree murder, third degree murder, and manslaughter.

[7] On March 11, 2013, the trial court ordered Shaffer to file a concise statement of errors complained of on appeal. Shaffer complied with the trial court's directive and filed a concise statement on March 26, 2013.

to police[8] and her diary entries.[9] She contends the introduction of this evidence deprived her of a fair trial.

When considering a challenge to the admission of evidence, we must bear in mind the following:

> The admission of evidence is solely within the province of the trial court, and a decision thereto will not be disturbed absent a showing of an abuse of 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.

Commonwealth v. Murray, 83 A.3d 137, 155-156 (Pa. 2013) (citations and internal punctuation omitted).

Although, generally, all relevant evidence is admissible at trial, a trial court may exclude otherwise relevant evidence if its probative value is outweighed by the danger of unfair prejudice. Pa.R.E. 402, 403. "'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, Comment.

> However, "[e]vidence will not be prohibited merely because it is harmful to the defendant." "[E]xclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision

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[8] Some excerpts from her videotaped statement were played for the jury, while others were read to the jury from the transcript of the interview.

[9] We have reordered Shaffer's first three arguments for ease of disposition.

> based upon something other than the legal propositions relevant to the case."

Commonwealth v. Antidormi, 84 A.3d 736, 750 (Pa. Super. 2014) (citations omitted).

With regard to her videotaped statement to police, Shaffer challenges the introduction of her comment that she was "broke,"[10] as well as her recount of two prior incidents in which she had an encounter with the victim. She told police that in the summer of 2004, before Roger was awarded custody of C.H., she drove to the cabin behind his house to get her dog, and as she was leaving, the victim stood in front of the car to block her from doing so.[11] She also recounted an incident in the spring of 2007, when the victim "verbally accosted" her in a Dollar Store parking lot, "screaming at [Shaffer] about [her] dog being in the car."[12] Shaffer argues evidence of her financial status was irrelevant to her state of mind at the time she killed the victim, and was "unfairly prejudicial" since the Commonwealth's only purpose in introducing that statement was to disparage her. Further, she contends the probative value of her prior encounters with the victim was

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[10] Transcript of 2nd Interview, 7/19/2011, at 27; ***see also*** N.T., 8/8/2012 (Afternoon Session), at 94.

[11] Transcript of 2nd Interview, 7/19/2011, at 55-56; ***see also*** N.T., 8/8/2012 (Afternoon Session), at 101.

[12] Transcript of 2nd Interview, 7/19/2011, at 56; ***see also*** N.T., 8/8/2012 (Afternoon Session), at 101.

minimal because the events were remote in time and "unfairly tended to show animosity." Shaffer's Brief at 31.

The Commonwealth, conversely, sought to introduce evidence of Shaffer's financial status to demonstrate that her finances had been deteriorating during the year before the crime, and to provide a motive for her attack of the victim. As the Commonwealth states in its brief: "If Roger Hickok needed [Shaffer] to care for him and their son, she would have a secure financial position." Commonwealth's Brief at 12. Further, the Commonwealth contends the evidence of Shaffer's prior encounters with the victim were relevant to demonstrate that Shaffer "knew she would not be allowed in the home[.]" ***Id.***

The trial court concluded that none of these excerpts from Shaffer's videotaped statement was unduly prejudicial. We agree. The fact that Shaffer was "broke" was relevant to demonstrate her financial dependence on Roger. Moreover, even if we were to conclude that the trial court erred in permitting this brief statement in Shaffer's police interview, we would find any error was harmless since Roger discussed Shaffer's tenuous finances during his testimony.[13] Indeed, Roger testified he had "helped her" with

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[13] ***See Commonwealth v. Hairston***, 84 A.3d 657, 671 (Pa. 2014) ("Harmless error exists if the record demonstrates … the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence[.]") (citation omitted).

rent and utility bills in the past.[14] Moreover, he testified that before Shaffer was evicted in September of 2010, he paid her landlord $500 "to give her a couple more weeks … so she could get out of there," and then permitted her to stay in a shop on his property after his wife was killed.[15]

Furthermore, we also agree with the trial court's finding that Shaffer's recount of her two "encounters" with the victim was not unduly prejudicial. Indeed, testimony regarding **the victim's** purported animosity toward Shaffer actually supports her claim that the victim's death was the result of a spontaneous affray. Moreover, as the Commonwealth explained, this evidence also demonstrated that Shaffer should have known she was not welcome in the Hickoks' home. Therefore, we agree with the conclusion of the trial court that these excerpts from her videotaped statement were not unduly prejudicial.

With regard to her diary entries, Shaffer argues, generally, that the excerpts read to the jury "included irrelevant and prejudicial evidence." Shaffer's Brief at 31. In fact, she contends that most of her writings did not "reveal animosity toward [the victim,]" but rather reflect her animosity toward Roger and her dissatisfaction with the amount of visitation he permitted her to have with her son. ***Id.***

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[14] N.T., 8/7/2012 (Afternoon Session), at 130.

[15] ***Id.*** at 149, 153.

Shaffer identifies the following three entries, in particular, as unfairly prejudicial. In the first, from November 27, 2009, she wrote,

> I wish I had a two by four, I'd hit you upside your head and scream at your lifeless body. Now, we're even. Because I have died a little every single day you have kept us apart. …
>
> From quote as good as it gets, do you understand me, you crazy fuck, end quote.

N.T., 8/9/2012 (Morning), at 95. She asserts this entry was irrelevant because it lacked a connection to the victim. Next, on January 13, 2010, Shaffer wrote about being angry and stated: "Gotta' line up the big guns." ***Id.*** at 99. Later, on September 9, 2010, only six days before the murder, she wrote, "I must do what I must do." ***Id.*** at 103. Shaffer contends both of these entries misled the jury into believing she was planning a violent act, when in fact she was referring to "going through legal channels to obtain custody or visitation of her son." Shaffer's Brief at 32.

Our review of the diary excerpts, in context, reveals that Shaffer was referring to Roger, not the victim, when she wrote she wanted to hit him with a two by four. The full context of that diary entry, as read by the prosecutor at trial, was as follows:

> It is difficult to find the proper word or words to describe the overwhelming pain I endured as I listened to the narration of my son's life delivered without one single thought about my feelings that his life is being lived with the most important person who should be in it barred.
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> The next paragraph says:

> I wish I had a two by four, I'd hit you upside your head and scream at your lifeless body. Now, we're even. Because I have died a little every single day you have kept us apart. …
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> From quote as good as it gets, do you understand me, you crazy fuck, end quote. Paragraph, yep, that'll do.
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> It continues -
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> There will be no I love yous until this situation is resolved. How, slash, why on earth would slash could I love anyone who could so carelessly, heartlessly do this to me, who would be so blind and selfish.

N.T., 8/9/2012 (Morning Session), at 94-95. Furthermore, these comments were relevant to demonstrate her growing frustration with Roger, and he and the victim's decision not to allow her to be a bigger part of her son's life. With regard to the other two excerpts, a contextual reading reveals no murderous plot, but rather, Shaffer's intent to seek more visitation with her son. Indeed, immediately after she wrote on September 9, 2010, "I must do what I must do[,]" she lamented, "I wonder if Tommy Walrath will take a custody case pro bono." ***Id.*** at 103-104. Again, these writings reflect Shaffer's growing frustration and anger toward the custody arrangement. Therefore, we conclude that Shaffer's diary entries were relevant to establish her state of mind at the time of the murder, and were not so prejudicial as to warrant their exclusion.[16]

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[16] Moreover, even if we were to conclude that the trial court erred in admitting these particular diary entries, we would find any error harmless in light of Shaffer's videotaped confession. ***See Hairston***, ***supra***, at 671 (erroneous admission of evidence may be harmless error where (1) the prejudice to the defendant was de minimus, (2) the evidence was
(Footnote Continued Next Page)

Next, Shaffer challenges the sufficiency of the evidence to support her convictions of second degree murder and burglary. She contends the Commonwealth failed to prove she entered the Hickoks' home with the intent to commit a crime therein. Accordingly, Shaffer argues the evidence was insufficient to support her conviction of burglary, and because burglary was the predicate offense underlying her conviction of second degree murder, she claims the evidence was insufficient to support that charge as well.

Our well-settled standard of review of a challenge to the sufficiency of the evidence is 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***, 560 Pa. 308, 744 A.2d 745, 751 (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

(Footnote Continued) ———————————

cumulative of untainted evidence, or (3) there was overwhelming evidence of guilt and the prejudicial effect of the error was so insignificant it could not have contributed to the verdict).

> combined circumstances. ***See Commonwealth v. DiStefano,*** 782 A.2d 574, 582 (Pa.Super. 2001).

Commonwealth v. Pedota, 64 A.3d 634, 636 (Pa. Super. 2013) (citation omitted), *appeal denied*, 74 A.3d 126 (Pa. 2013). Moreover, it is important to bear in mind that "[t]he 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. Feese***, 79 A.3d 1101, 1119 (Pa. Super. 2013) (quotation omitted).

"A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony," including burglary. 18 Pa.C.S. § 2502(b), (d). "The malice or intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim." ***Commonwealth v. Lambert***, 795 A.2d 1010, 1022 (Pa. Super. 2002), *appeal denied*, 802 A.2d 521 (Pa. 2002).

"Under Pennsylvania law the crime of burglary is defined as an unauthorized entry with the intent to commit a crime after entry." ***Commonwealth v. Alston***, 651 A.2d 1092, 1094 (Pa. 1994), *citing* 18 Pa.C.S. § 3502; ***Commonwealth v. Wilamowski***, 633 A.2d 141 (Pa. 1993). The Commonwealth need not allege or prove what particular crime the defendant intended to commit after his forcible entry into a private residence, but rather, the intent to commit a crime may be may be inferred

from the surrounding circumstances. ***Alston***, ***supra***, 651 A.2d at 1094, 1095.

Shaffer argues there was no evidence to support a finding that she intended to commit a crime when she entered the Hickoks' home. She points to the following evidence in support: (1) she was not armed, even though she did own a gun; (2) she did not **forcibly** enter the residence, but rather entered through the unlocked garage door;[17] and (3) she told police that she entered the home only because she wanted to see her son, but that she encountered the victim, almost immediately.[18] Shaffer contends that the "[p]hysical evidence at the scene, including [her] blood, suggests that [she] and the victim were engaged in a struggle[,]" that occurred only **after** she entered the home. Shaffer's Brief at 23. Moreover, she argues her frustration and anger towards Roger is not evidence of her intent to commit a crime because "the death of Carol Hickok did nothing to change the lawful custody of her son." ***Id.*** at 24.

The trial court concluded, however, that the attendant circumstances supported the jury's finding that Shaffer unlawfully entered the Hickoks' home with the intent to commit a crime therein. ***See*** Trial Court Opinion, 4/24/2013, at 4. We agree.

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[17] Roger testified that his home was, "for the most part," unlocked. N.T. 8/8/2012 (Morning Session), at 59.

[18] N.T., 8/9/2012 (Morning Session), at 24-25.

The evidence presented at trial revealed that Shaffer drove 40 miles in the early morning hours and stealthily entered the victim's home through the garage, without the permission of the owners. During her statement to police, Shaffer mentioned several times that she **knew** she was not supposed to be in the Hickoks' home. ***Id.*** at 61, 71. Indeed, she acknowledged that she did not park her car in the Hickoks' driveway, but rather "a couple hundred yards" away. N.T., 8/9/2012 (Morning Session), at 12-13. Further, as the trial court noted in its opinion, Shaffer's diary entries written before the murder indicated that "she was angry/frustrated as she wanted what the victim had – victim's husband and [Shaffer's own] son[.]"[19] ***Id.*** Therefore, the jury could have reasonably inferred that Shaffer entered the Hickoks' home with the intent to commit a crime therein, whether it be to harm the victim, or interfere with the custody of her son.[20] Although Shaffer told police she entered the home just to see her son, the jury was

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[19] ***See*** N.T., 8/9/2012 (Morning Session), at 92, 105, 107 (quoting diary entries in which Shaffer refers to (1) not having a husband; (2) having someone else's husband expect her to fulfill "deficiencies in his marriage while his quote wife end quote reaps the benefits of that quote marriage end quote;" (3) being tired of being "invisible" and "overlooked;" (4) the victim chaperoning C.H.'s school trip as "a knife in [her] heart" because "that is [her] job."

[20] ***See***, ***e.g.,*** 18 Pa.C.S. § 2904, "Interference with custody of children." ("A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so.").

free to disbelieve her statements, particularly since the evidence demonstrated that there was a standing arrangement at C.H.'s school that she could meet him for lunch, as long as she did not remove him from the premises. N.T., 8/7/2012 (Morning Session), at 130. Accordingly, because we conclude the evidence was sufficient to support her conviction of burglary, we further find Shaffer's burglary conviction was a sufficient predicate felony to support her conviction of second degree murder. Therefore, her challenge to the sufficiency of the evidence fails.

In her next issue, Shaffer challenges the weight of the evidence.[21] In particular, she argues the scientific evidence presented by the coroner and pathologist concerning the victim's time of death demonstrated that Roger was still home when the victim died, and "would have been present to admit or deny [Shaffer] entry to the home." Shaffer's Brief at 27. Moreover, Shaffer argues the jury should not have relied on either her statements to police or Roger's testimony that she was not invited into the home, but rather the "unbiased" testimony of the coroner and pathologist which was "based upon physical findings at the scene." ***Id.*** at 28.

Our review of a weight of the evidence claim is well-established:

> A weight of the evidence claim concedes that the evidence is sufficient to sustain the verdict, but seeks a new trial on the

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[21] We note that Shaffer properly preserved her weight of the evidence claim by raising the issue in her post sentence motion. ***See*** Pa.R.Crim.P. 607(A)(3).

> ground that the evidence was so one-sided or so weighted in favor of acquittal that a guilty verdict shocks one's sense of justice. ***Commonwealth v. Widmer***, 560 Pa. 308, 318–20, 744 A.2d 745, 751–52 (2000); ***Commonwealth v. Champney***, 574 Pa. 435, 443–44, 832 A.2d 403, 408–09 (2003). On review, an appellate court does not substitute its judgment for the finder of fact and consider the underlying question of whether the verdict is against the weight of the evidence, but, rather, determines only whether the trial court abused its discretion in making its determination. ***Widmer***, 560 Pa. at 321–22, 744 A.2d at 753; ***Champney***, 574 Pa. at 444, 832 A.2d at 408.

Commonwealth v. Lyons, 79 A.3d 1053, 1067 (Pa. 2013), *cert. denied*, 2014 WL 348454 (U.S. Apr. 7, 2014).

Here, the trial court found that Shaffer's argument regarding the time of death and the inconsistencies in Roger's testimony was unpersuasive, and that it was not "shocked at the jury's verdict." Trial Court Opinion, 4/24/2013, at 5. We detect no basis upon which to find an abuse of discretion.

Bradford County Coroner Thomas Carmen testified he arrived on the scene at about 8:16 a.m., and the victim was in full rigor mortis at that time. N.T., 8/7/2012 (Afternoon Session), at 22, 25. He further testified that although the "normal window period" for full rigor mortis is three to eight hours after death, "there's a lot of variables" that can affect the time rigor mortis sets. ***Id.*** at 25. Forensic pathologist Dr. Samuel Land, who performed the autopsy on the victim, testified rigor mortis generally takes six to eight hours to set. N.T., 8/8/2012 (Morning Session), at 25. However, he also stated that the fact that the victim was found in rigor mortis "doesn't really give a very accurate time frame at all" because

environmental factors can affect how long it takes for rigor mortis to set. ***Id.*** Therefore, Shaffer's argument that the scientific evidence proved the victim was killed before Roger left in the morning is unavailing. The physical evidence concerning time of death was, at best, inconclusive, and the jury was free to credit her statement to police that she entered the victim's home uninvited and killed her during a struggle.[22] Accordingly, Shaffer's challenge to the weight of the testimony fails.

In her fourth claim, Shaffer challenges the trial court's jury instruction regarding the admissibility of her statements to police. She claims the instruction was confusing and "not completely accurate." Shaffer's Brief at 34.

When reviewing a trial court's jury charge, we adhere to the following standard of review:

> [T]his Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper. We further note 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. Only where there is

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[22] We emphasize Shaffer's argument on appeal that Roger **may** have given her permission to enter the home is not supported by any evidence presented at trial. Shaffer did not testify at trial, nor did she indicate in her statement to police that Roger was home when she arrived, or gave her permission to enter the home. Rather, Shaffer told police that she entered the home through the garage and was, almost immediately, confronted by the victim. N.T., 8/9/2012 (Morning Session), at 24-25.

> an abuse of discretion or an inaccurate statement of the law is there reversible error.

Antidormi, ***supra***, 84 A.3d at 754 (citations omitted).

Shaffer objects to the following jury charge:

> You heard about many statements that [Shaffer] made to the Pennsylvania State Police, and you saw the, and heard the videos and the statements that were recorded. Normally, out of court statements such as that are not admitted as evidence. One exception however, is that an admission or confession can be accepted as evidence. **I will caution you that you may consider the admissions made by [Shaffer] as evidence, but the other portions of the statements are not evidence. You have been permitted to hear the portions of statements that [Shaffer] made, to allow you to consider the context in which those admissions were made**.

N.T., 8/10/2012 (Morning Session), at 73-74 (emphasis supplied). Shaffer argues the Commonwealth requested this instruction so as to limit the jury's consideration of exculpatory statements that she made during her "confession." She explains that the portions of her statement that were relayed to the jury "included excerpts tending to show that [her] intent in entering the residence was merely to see her son, and that she went to the home with no intent to harm [the victim]." Shaffer's Brief at 33-34.

With regard to Shaffer's claim that the instruction was inaccurate, we note that Shaffer has failed to cite any relevant authority for the proposition that a defendant's self-serving, **exculpatory**, extrajudicial statements are admissible at trial. ***See Commonwealth v. Benson***, 10 A.3d 1268 (Pa. Super. 2010) (trial court properly precluded defendant from questioning police officer regarding contents of exculpatory statement he made to police

after his arrest since statement was not against penal interest pursuant to Pa.R.E. 804(b)(3)), *appeal denied*, 24 A.3d 863 (Pa. 2011).

Moreover, Shaffer's reliance on the Supreme Court's decision in ***Commonwealth v. Simmons***, 662 A.2d at 621 (Pa. 1995), misplaced. In ***Simmons***, the Commonwealth introduced evidence of an **inculpatory** statement made by the defendant that did not amount to a confession. There, only hours after the defendant had killed the victim, Anna Knaze, the defendant attempted to rape another woman who lived in the same neighborhood. That woman testified that while he was trying to rape her, the defendant stated, "If you open your fucking mouth, you'll get the same thing as Anna Knaze got." ***Id.*** at 635. The Supreme Court concluded that the extrajudicial statement, although not a confession, "show[ed] that [the defendant had] a peculiar knowledge as to the victim's murder since it was made approximately fourteen (14) hours before she was found dead in her house." ***Id.*** Conversely, here, the statements Shaffer seeks to admit as evidence are exculpatory. Hence, the court's charge on the issue was legally correct.

With regard to Shaffer's contention that the instruction on self-serving statements was confusing, we note that she does not offer an alternative charge in her brief, nor is the transcript from the charging conference

included in the certified record.[23] Accordingly, we are unable to determine what she contends a more appropriate charge would be. Furthermore, Shaffer has failed to demonstrate how she was prejudiced. Indeed, if, as she contends, the instruction did not clearly inform the jury "what portion of a statement is an admission and what part is self-serving statement,"[24] the jury would have considered **all of her statements** as evidence, including those **exculpatory statements** that benefitted Shaffer's defense. Therefore, Shaffer's challenge to the court's jury instruction is without merit.

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[23] After the trial court charged the jury, Shaffer's counsel objected to the self-serving statements instruction stating it was "confusing to the Jury" and "prejudicial to the defense." N.T. 8/10/2012 (Morning Session), at 95. The prosecutor interjected that he disagreed and asked what relief counsel was requesting. ***Id.*** At that point, the following exchange took place:

> THE COURT: I thinks she's just putting it on the record because she objected to it initially, when we were in chambers going over it. Is that right? Is that all you're doing? You're not asking for any relief right now.
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> [Defense Counsel]: I mean, you could –
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> THE COURT: Right, I could probably fix it, but I'm not going to. Yeah. Okay.
>
> [Defense Counsel]: Yes, I'm placing it on the record, - I mean, it would be even more confusing to un-instruct the jury of that at this point. But I do have that objection –

Id. at 95-96.

[24] ***Id.*** at 95.

In her penultimate issue, Shaffer contends the life sentence imposed by the trial court violates her Eighth Amendment right against cruel and unusual punishment, "particularly where the verdict establishes that the Commonwealth did not prove an intentional killing." Shaffer's Brief at 36.

Shaffer does not provide any caselaw to support this assertion, citing only the dissent in a United States Supreme Court decision involving a life sentence for drug trafficking. ***See id.***, *citing* ***Harmelin v. Michigan***, 501 U.S. 957 (1992) (Stevens, J. dissenting). Furthermore, her apparent reliance on the Supreme Court's recent decision in ***Miller v. Alabama***, 132 S.Ct. 2455 (2012), is misplaced. In ***Miller***, the Supreme Court held that "mandatory life 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***, 123 S.Ct. at 2460 (emphasis supplied). Here, conversely, Shaffer was 53 years old at the time she committed the murder. The ***Miller*** decision simply does not apply to the facts of this case. Accordingly, Shaffer's constitutional challenge to her life sentence fails.

Lastly, Shaffer challenges the trial court's imposition of $26,000.00 in fines as part of her sentence. Specifically, the trial court imposed a $25,000 fine for the second degree murder conviction, and a $1,000 fine for the burglary conviction, in addition to $16,000 in restitution. Shaffer argues the trial court's failure to consider her ability to pay before imposing the fines violates Section 9726 of Sentencing Code.

Preliminarily, we note that Shaffer treats this issue as a challenge to the discretionary aspects of her sentence. However, a claim that the trial court imposed a fine without considering the defendant's ability to pay challenges the legality of a sentence, and is, therefore, appealable as of right. ***Commonwealth v. Thomas***, 879 A.2d 246, 262 (Pa. Super. 2005), *appeal denied*, 989 A.2d 917 (Pa. 2010). ***See also Commonwealth v. Boyd***, 73 A.3d 1269, 1273-1274 (Pa. Super. 2013) (holding defendant's claim that there was no record of his ability to pay a fine was challenge to the legality of his sentence, but claims that trial court failed to consider evidence or refused to allow defendant to supplement the record would raise discretionary aspects of sentencing challenges).

Section 9726(c) prohibits a trial court from sentencing a defendant to pay a fine "unless if appears of record that: (1) the defendant is able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." 42 Pa.C.S. § 9726(c). The statute also provides:

> In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

42 Pa.C.S. § 9726(d).

We find this Court's decision in ***Thomas***, ***supra***, instructive. In that case, the trial court imposed fines totaling $6,000 following Thomas's conviction of, *inter alia*, terroristic threats and simple assault for a domestic

dispute with his girlfriend. On appeal, he argued that the trial court imposed the fines without first considering his ability to pay. This Court agreed, concluding that the trial court did not make specific findings on the record concerning Thomas's ability to pay, but merely stated in its opinion that it had "all the appropriate information," which included the fact that Thomas had recently been sentenced to a ten year federal prison term. ***Thomas***, ***supra***, 879 A.2d at 264. This Court found "nothing in the record to support the trial court's general finding that [Thomas] has or will have the ability to pay a fine of $6,000." ***Id.*** Moreover, we noted the pre-sentence investigation report was not included in the certified record so we were unable to determine if that "report sheds any light on [Thomas's] ability to pay." ***Id.*** Accordingly, we "remand[ed] to the trial court for re-sentencing after a determination of [Thomas's] ability to pay a fine." ***Id.***

Here, like ***Thomas***, the sentencing transcript reveals no consideration of Shaffer's ability to pay $26,000 in fines. ***See generally*** N.T., 9/10/2012. Further, in its opinion, the trial court did not specifically address Shaffer's claim, but rather stated, "[t]he fine and order for restitution are consistent with the sentencing guidelines and should not be disturbed." Trial Court Opinion, 4/24/2013, at 8. The Commonwealth's argument on this claim is similarly scant. It contends that Shaffer's "pre-sentence investigation indicated ownership of assets" and that the trial court was not required "to accept [Shaffer's] claims re: her finances." Commonwealth's Brief at 13.

However, as in ***Thomas***, here, the pre-sentence investigation report is not included in the certified record.

We acknowledge that there was some discussion regarding Shaffer's potential assets during the hearing on her post sentence motions. In particular, the Commonwealth questioned her about her interest in a property in Florida, which she indicated had, at one time, been titled in both her and her ex-husband's name. N.T., 11/30/2012, at 4. However, she testified that she believed he had received the property *via* court order after their divorce, and she stated she never paid taxes on the home. ***Id.*** at 5. The Commonwealth also questioned Shaffer about possible surface rights to land owned by her family. ***Id.*** at 6. She explained, however, that the property was sold in 1970, and, as far as she knew, she was not due any money from any rights in that land. ***Id.*** at 7-8. At the conclusion of the hearing, the Commonwealth requested that the record remain open so that it could "check out the status of that Florida home[.]" ***Id.*** at 31.

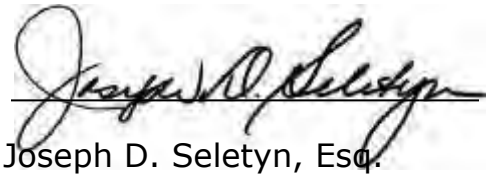
In its brief filed on February 11, 2013, the Commonwealth acknowledged that the Florida property had been awarded to Shaffer's ex-husband, although title had not been transferred. Commonwealth's Post-Sentence Brief, at unnumbered 6. It argued, however, that "[i]t is possible that the defendant might come into assets by inheritance from her children or some forgotten relative, or even some discovery of natural gas rights retained by one of her relatives." ***Id.*** This type of mere speculation on the

part of the Commonwealth, that Shaffer might, one day, come into an unexpected fortune, does not satisfy the requirements of Section 9726.

We conclude the record does not reveal whether the trial court considered Shaffer's ability to pay $26,000 in fines before imposing them at sentencing. This is especially true since (1) the court also directed her to pay $16,000 in restitution, and (2) the Commonwealth's evidence at trial highlighted her poor financial state. Therefore, we are constrained to vacate the imposition of fines, and remand for re-sentencing. ***See Thomas***, ***supra***.

Judgment of sentence affirmed in part, and vacated in part. Case remanded for re-sentencing. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/30/2014