NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. BRADLEY SMITH Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 67 WDA 2013

Appeal from the Judgment of Sentence March 28, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015947-2010

BEFORE: GANTMAN, P.J., DONOHUE, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.: FILED: April 29, 2014

Appellant, Bradley Smith, appeals from the judgment of sentence entered in the Allegheny County Court of Common Pleas, following his jury trial convictions for voluntary manslaughter and firearms not to be carried without a license.[1] We affirm.

The relevant facts and procedural history of this appeal are as follows.

> On November 13, 2010, [Appellant] and Abraham Mitchell [("Co-Defendant")] arranged to purchase fifteen bricks of heroin from Duerryl Whitaker [("Victim")] for $3,750.00. The purchase was facilitated and arranged by Jasmine Howard and Clarence White, who were relatives and friends of [Victim]. That evening, Howard and White drove to the Carnegie section of Allegheny County and picked up Appellant and [Co-Defendant]. They returned to Howard's

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[1] 18 Pa.C.S.A. §§ 2503(b), 6106, respectively.

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* Former Justice specially assigned to the Superior Court.

apartment in the Crafton Heights section of the City of Pittsburgh where they awaited [Victim's] arrival. At approximately 7:00 p.m., [Victim] arrived with a small cardboard box containing the heroin. [Victim] had a brief conversation with Howard in her bedroom and then went to the living room where he approached Appellant and [Co-Defendant] to discuss the heroin purchase.

The money and drugs were placed on the couch for the transaction, but Appellant took back the money when he saw that [Victim] had only brought approximately thirty bundles of heroin. When Appellant took back the money, [Victim] stated, "No, whoa, whoa, nah," and a struggle ensued between Appellant and [Victim]. [Victim] managed to get on top of Appellant, and Appellant pulled out a .22 revolver and shot it once, apparently not striking [Victim]. Appellant and [Victim] began to wrestle over the gun, and [Co-Defendant] pulled out a .380 semiautomatic and fired a warning shot into the couch. Howard ran into her bedroom to retrieve her handgun, and Appellant and [Victim] continued to struggle. [Co-Defendant] ran over to [Victim] and shot him multiple times…and fled the apartment. Appellant, now freed from the struggle as a result of [Victim] being shot by [Co-Defendant], also shot [Victim], grabbed the heroin, and fled the apartment. He was pursued by Howard, who shot him in the leg as he ran down the hallway. [Co-Defendant] and Appellant escaped down a staircase to the outside of the building.

Howard returned to her apartment to find [Victim] unresponsive and lying on his face. After turning him over, she called 911 and yelled out the window for help. [Victim] was pronounced dead on scene by responding paramedics. As a result of being shot a total of seven times, [Victim] suffered a perforated lung, spleen, stomach, pericardium, aorta, and femoral vein, as well as a fractured rib and left shoulder. The cause of death was multiple gunshot wounds to the trunk, and the manner of death was homicide.

The gunshots inside Howard's apartment alerted [an apartment complex security guard], who saw Appellant and [Co-Defendant] emerge from the building. [The guard] drew his weapon and ordered both fleeing shooters

> to stop. Appellant and [Co-Defendant] fled down the fence line adjacent to the building, with [the guard] in pursuit and continuously ordering them to stop. [Co-Defendant] jumped down a steep hill to a parking lot below, and escaped through a pathway. Appellant jumped down the hill and fell, dropping the box of heroin, and ran away limping to the pathway without the heroin. [The guard] pursued Appellant until [the guard] tripped at the entrance to the pathway. The pathway led to the Crucible Street side of the apartment complex and access to a Port Authority Busway. Unable to continue the pursuit, [the guard] returned to the apartment building and gave a detailed description of what Appellant was wearing and his direction of flight to City of Pittsburgh Police on scene. Officers Aaron Loughran and Vincent Pacheco began to search for Appellant and [Co-Defendant] in their respective marked police vehicles.
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> Officer Loughran quickly located and pursued Appellant, who had made his way onto the busway. Officer Loughran continuously ordered Appellant to stop, but Appellant continued to run away. When Officer Loughran could no longer pursue Appellant in his car, he exited his vehicle and chased Appellant down a staircase that was part of the busway complex. Appellant left the complex and ran up a hillside, and Officer Loughran radioed Appellant's direction of flight to Officer Pacheco. Shortly thereafter, Officers Pacheco and Loughran apprehended Appellant, and [the guard] identified Appellant as one of the individuals he chased from the apartment building complex. Appellant was transported to the hospital for a gunshot wound to the leg.
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> Police recovered one .22 caliber bullet, four .380 cartridge casings, and one .380 caliber bullet fragment from inside the apartment. The medical examiner's office removed one .22 caliber bullet and two .380 caliber bullets from [Victim] during the autopsy. The crime lab was able to determine that the .380 caliber bullets and fragment matched each other and were discharged from the same firearm.

(Trial Court Opinion, filed July 18, 2013, at 6-9) (all internal citations and

footnotes omitted).

On January 11, 2011, the Commonwealth filed a criminal information charging Appellant with criminal homicide, robbery, conspiracy, and carrying a firearm without a license. Following trial, a jury convicted Appellant of voluntary manslaughter and carrying a firearm without a license. The jury found Appellant not guilty of the remaining counts. Prior to sentencing, the Commonwealth provided notice of its intent to seek a five-year mandatory minimum sentence for a crime of violence committed with a firearm, pursuant to 42 Pa.C.S.A. § 9712. With the benefit of a pre-sentence investigation ("PSI") report, the court conducted Appellant's sentencing hearing on March 28, 2012. At the conclusion of the hearing, the court sentenced Appellant to eight (8) to sixteen (16) years' imprisonment for the voluntary manslaughter conviction.[2] The court imposed a consecutive term of two (2) to four (4) years' imprisonment for the firearms conviction.

Appellant timely filed a post-sentence motion on Monday, April 9, 2012. In it, Appellant argued that the court failed to consider his rehabilitative needs, based its decision solely on the seriousness of the offense, and failed to provide adequate reasons to justify the sentence

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[2] With a prior record score of zero (0), an offense gravity score of eleven (11), and a deadly weapon "used" enhancement, the standard range for Appellant's voluntary manslaughter conviction was fifty-four (54) to seventy-two (72) months. The aggravated range was up to eighty-four (84) months' imprisonment. The statutory maximum for this offense (first degree felony) is twenty (20) years. ***See*** 18 Pa.C.S.A. § 1103(1).

imposed. After Appellant obtained the trial and sentencing transcripts, the court permitted him to file a supplemental post-sentence motion on August 31, 2012. In it, Appellant asserted, "The [t]rial [c]ourt failed to place adequate reasons on the record to justify the sentencing decision and why it sentenced outside of the sentencing guidelines on the Voluntary Manslaughter conviction." (Supplemental Post-Sentence Motion, filed 8/31/12, at 2). Appellant also contended that the court imposed a sentence that was disproportionate to the criminal conduct. On December 12, 2012, the clerk of courts entered an order denying Appellant's post-sentence motions by operation of law.

Appellant timely filed a notice of appeal on January 4, 2013. The court did not order Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant, however, voluntarily filed a Rule 1925(b) statement on July 1, 2013.

Appellant now raises three issues for our review:

> WAS EVIDENCE INSUFFICIENT TO PROVE VOLUNTARY MANSLAUGHTER WHEN THE EVIDENCE SHOWED THAT THE BULLET SHOT FROM [APPELLANT'S] FIREARM THAT WAS RECOVERED FROM THE VICTIM DID NOT CAUSE A FATAL INJURY?
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> DID THE TRIAL COURT ABUSE ITS DISCRETION BY ADMITTING TAPE RECORDED STATEMENTS BY A WITNESS WHEN THE COMMONWEALTH IMPERMISSIBLY USED THESE STATEMENTS TO IMPEACH ITS OWN WITNESS AND THE TRIAL COURT ERRONEOUSLY TREATED THE STATEMENTS AS SUBSTANTIVE EVIDENCE?

> DID THE SENTENCING COURT ABUSE ITS SENTENCING DISCRETION BY IMPOSING AN EXCESSIVE SENTENCE OUTSIDE OF THE AGGRAVATED RANGE WITHOUT CONSIDERING ALL STATUTORILY REQUIRED FACTORS?

(Appellant's Brief at 6).

In his first issue, Appellant contends the trial evidence demonstrated that Co-Defendant shot and killed the victim. Appellant emphasizes Co-Defendant's own trial testimony, where he admitted shooting Victim because he feared for his life. Appellant asserts the ballistic and medical evidence confirmed that Co-Defendant fired the fatal shots. Specifically, Appellant argues "the only bullet discharged from [his] revolver hit [Victim] in the left shoulder, causing a non-fatal injury, and the .380 caliber bullets that caused the death of [Victim] came from [Co-Defendant's] firearm." (Appellant's Brief at 20). Because the single shot from Appellant's firearm did not kill Victim, Appellant concludes the evidence was insufficient to support his voluntary manslaughter conviction. We disagree.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted…in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless

> the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, 613 Pa. 642, 32 A.3d 1275 (2011) (quoting ***Commonwealth v. Jones***, 874 A.2d 108, 120-21 (Pa.Super. 2005)).

The Crimes Code defines voluntary manslaughter as follows:

> **§ 2503. Voluntary manslaughter**
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> **(a) General rule.—**A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
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> (1) the individual killed; or
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> (2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.
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> **(b) Unreasonable belief killing justifiable.—**A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable.

18 Pa.C.S.A. § 2503(a), (b).

"[T]he elements necessary to establish unreasonable belief voluntary manslaughter, which is sometimes loosely referred to as [']imperfect self-defense['] require proof of 'an unreasonable belief rather than a reasonable belief that deadly force was required to save the actor's life.'" ***Commonwealth v. Ventura***, 975 A.2d 1128, 1143 (Pa.Super. 2009), *appeal denied*, 604 Pa. 706, 987 A.2d 161 (2009) (quoting ***Commonwealth v. Tilley***, 528 Pa. 125, 141, 595 A.2d 575, 582 (1991)). "All other principles of justification…must [still be met…to establish] unreasonable belief voluntary manslaughter." ***Ventura, supra*** at 1143 (quoting ***Tilley, supra*** at 141, 595 A.2d at 582).

A person may be convicted as an accomplice if: (1) there is evidence the defendant intended to aid or promote the commission of the underlying offense; and (2) the defendant actively participated in the crime by soliciting, aiding, or agreeing to help the principal. 18 Pa.C.S.A. § 306; ***Commonwealth v. Brewer***, 876 A.2d 1029 (Pa.Super. 2005), *appeal denied*, 585 Pa. 685, 887 A.2d 1239 (2005). "While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene." ***Id.*** at 1033 (quoting ***Commonwealth v. Murphy***, 577 Pa. 275, 286, 844 A.2d 1228, 1234 (2004)). "There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so."

Brewer, supra at 1033 (quoting ***Murphy, supra*** at 286, 844 A.2d at 1234).

Instantly, Appellant and Co-Defendant went to Ms. Howard's apartment to purchase heroin from Victim. During the transaction, Appellant inspected the heroin. The heroin looked "[l]ike it was short," and Appellant accused Victim of providing an insufficient quantity. (***See*** N.T. Trial, 12/16/11, at 734.) Appellant and Victim began to scuffle and fell to the floor. During the scuffle, someone produced a firearm,[3] and it discharged. Fearing for his own safety and that of Appellant, Co-Defendant drew a weapon and fired multiple shots at Victim. After running out of ammunition, Co-Defendant fled the scene. Appellant fired an additional shot at Victim before fleeing.

Here, the testimony demonstrated that Appellant acted in concert with Co-Defendant to abort the drug transaction with Victim. Victim and Appellant began to struggle after Appellant accused Victim of trying to cheat Appellant out of heroin. At that point, Co-Defendant opened fire on Victim. After the struggle, Appellant fired an additional shot at Victim with his own

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[3] Ms. Howard claimed that Appellant produced the firearm. (***See*** N.T. Trial, 12/14/11, at 198, 250.) The other eyewitness, Clarence White, told police that Appellant pulled something out of his pants that "looked like" a firearm. (***See*** N.T. Trial, 12/15/11, at 564.) Co-Defendant confirmed that Appellant carried a firearm on the night in question, but Co-Defendant was unsure about whether Appellant actually drew the weapon during the scuffle. (***See*** N.T. Trial, 12/16/11, at 737.)

firearm. Regardless of which firearm produced the fatal shot, the testimony supported the jury's conclusion that Appellant intended to aid in the homicide and was an active participant. ***See Brewer, supra***. Based upon the foregoing, sufficient evidence supported Appellant's voluntary manslaughter conviction, and Appellant is not entitled to relief for his first issue. ***See Ventura, supra***; 18 Pa.C.S.A. § 2503(b).

In his second issue, Appellant asserts the Commonwealth presented Clarence White to testify about what happened inside the apartment at the time of the shooting. Following Mr. White's testimony, Appellant contends the Commonwealth requested to play a previously recorded police interview with Mr. White, arguing that the audiotape constituted a prior inconsistent statement. Although the trial court granted the Commonwealth's request, Appellant avers the previously recorded statement did not amount to a prior inconsistent statement, because Mr. White's trial testimony was consistent with the statements he had made to police. Appellant concludes the court erroneously admitted the previously recorded statement as substantive evidence. We disagree.

"Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." ***Commonwealth v. Drumheller***, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003) (quoting ***Commonwealth v. Stallworth***, 566 Pa. 349,

363, 781 A.2d 110, 117 (2001)).

> Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.

Drumheller, supra at 135, 808 A.2d at 904 (quoting ***Stallworth, supra*** at 363, 781 A.2d at 117-18).

"Our courts long have permitted non-party witnesses to be cross-examined on prior statements they have made when those statements contradict their in-court testimony. Such statements, known as prior inconsistent statements, are admissible for impeachment purposes." ***Commonwealth v. Carmody***, 799 A.2d 143, 148 (Pa.Super. 2002). "[M]ere dissimilarities or omissions in prior statements…do not suffice as impeaching evidence; the dissimilarities or omissions must be substantial enough to cast doubt on a witness' testimony to be admissible as prior inconsistent statements." ***Commonwealth v. Luster***, 71 A.3d 1029, 1056 (Pa.Super. 2013), *appeal denied*, ___ Pa. ___, 83 A.3d 414 (2013).

> Prior inconsistent statements…can be admitted as substantive evidence provided the declarant testifies at trial and is subject to cross-examination concerning the statement and one of the following is true: 1) the prior inconsistent statement was given under oath subject to the penalty of perjury at a trial, hearing, deposition, or other proceeding; 2) the prior inconsistent statement is contained within a signed writing adopted by the declarant; and/or, 3) the rendition of the statement offered is a verbatim contemporaneous recording of an oral statement.

Commonwealth v. Henkel, 938 A.2d 433, 442-43 (Pa.Super. 2007), *appeal denied*, 598 Pa. 756, 955 A.2d 356 (2008).

Instantly, Mr. White testified that Ms. Howard was his girlfriend, and Victim was Ms. Howard's cousin. On November 13, 2010, Mr. White arranged for two buyers, who were Ms. Howard's acquaintances, to purchase drugs from Victim. Mr. White claimed to have never met the buyers prior to the day of the transaction. Mr. White and Ms. Howard personally picked up the buyers and drove them to Ms. Howard's apartment to complete the purchase. At trial, Mr. White did not identify Appellant and Co-Defendant as the buyers, stating: "I mean, that might be them, but I don't remember. I met them one time. It was dark. I was intoxicated." (***See*** N.T. Trial, 12/15/11, at 457.)

At trial, Mr. White testified that once inside the apartment, the parties waited for Victim to arrive with the drugs. When Victim arrived, he immediately spoke with Ms. Howard. Mr. White could not recall any details from this conversation. After Victim spoke to Ms. Howard, he began to negotiate with the buyers in the living room of the apartment. At that point, Mr. White exited the living room and entered a bedroom. While inside the bedroom, Mr. White heard approximately six to ten shots fired. Mr. White did not see who fired the shots, and he did not have a view into the living room. When the gunfire ceased, Mr. White returned to the living room and saw Victim on the floor.

Mr. White testified that he recalled participating in a police interview on the day after the shooting. Although Mr. White did not remember any of the specific questions posed during the interview, he said he could not identify the shooters to police. At that point, the Commonwealth confronted Mr. White with a photo array that he viewed during the interview. Mr. White had circled Appellant's photo in the array, and he wrote, "pulled from pocket" on the array. (***Id.*** at 469). Mr. White conceded he had viewed the array, circled Appellant's photo, and signed the array, but he would not confirm that he actually saw Appellant remove something from his pocket immediately before the shooting. The prosecutor pressed Mr. White about this detail, but Mr. White provided evasive responses.

Following Mr. White's testimony, the Commonwealth asked to play the audiotaped interview Mr. White had given to police on the day after the shooting. The Commonwealth argued the tape included statements which were inconsistent with Mr. White's trial testimony. Appellant objected to admission of the tape, but the court ultimately permitted the Commonwealth to play it.

In the taped statement, Mr. White claimed an individual known to him as "BG"[4] had contacted Ms. Howard on Facebook about one month prior to the shooting. BG asked Ms. Howard to put him into contact with Mr. White.

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[4] Co-Defendant's testimony revealed that "BG" was a nickname for Appellant.

Subsequently, Mr. White instructed Ms. Howard to give his phone number to BG. BG contacted Mr. White and inquired about making a heroin purchase. Mr. White agreed to make "a few calls" on BG's behalf. (***Id.*** at 559). Mr. White did not find a seller right away, but BG persisted with his requests. After about a month, Mr. White called Victim, who agreed to conduct a drug transaction with BG at Ms. Howard's apartment. After receiving Victim's approval, Mr. White contacted BG. Mr. White instructed BG that Mr. White and Ms. Howard would pick up BG and transport him to the site of the transaction.

On the day of the transaction, Mr. White and Ms. Howard picked up BG and another individual at a gas station in Carnegie. Having never personally met BG, Mr. White did not know which of the individuals BG was, and neither of the buyers identified himself as BG. Mr. White and Ms. Howard transported the buyers to Ms. Howard's apartment, and the parties waited for Victim to arrive. While inside the apartment, one of the buyers asked to use the bathroom. When the buyer exited the bathroom, Mr. White watched the buyer pull something out of his pants. Mr. White stated, "And he look[ed] like he pulled out—something out of his pants that may have looked like a gun."[5] (***Id.*** at 564). Thereafter, Mr. White entered Ms. Howard's

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[5] Later in the statement, Mr. White confirmed he had viewed a photo array prior to the interview and identified Appellant as the individual who removed the gun from his pants.

bedroom and heard shots fired. When Mr. White returned to the living room, he saw Victim on the floor.

The trial court evaluated the differences between Mr. White's trial testimony and his prior statement to the police as follows:

> Here, the [t]rial [c]ourt found enough significant differences between what [Mr. White] testified to at trial and his prior taped statement to admit the taped statement as a prior inconsistent statement. For example, at trial White consistently said that he did not know what Appellant pulled out of his pocket, but on the taped statement he indicated otherwise…. The [c]ourt outlined other inconsistencies as follows:
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> > In this instance, for example, in the taped statement he indicates a more long-standing, not necessarily monetary, relationship, but the contact between him and [Appellant] began a month before [the shooting]. In his trial testimony he said he never heard of the guy until that day. Then the details of the phone calls back and forth between himself, Jasmine Howard and the persons involved in the drug deal, the alleged drug deal, the details of the events in the apartment, his presence, his position, what he saw and what he heard.

(***See*** Trial Court Opinion at 21) (internal citations to the record omitted). We agree that Mr. White's statement to the police contradicted his trial testimony regarding his role in arranging the drug transaction as well as his observations of a firearm on Appellant's person. Therefore, the court properly admitted the previously recorded statement over Appellant's objection. ***See Luster, supra***; ***Carmody, supra***.

In his third issue, Appellant maintains the court contravened a fundamental norm of the sentencing process by imposing a sentence for

voluntary manslaughter, above the aggravated range of the sentencing guidelines, without providing sufficient reasons to support the deviation from the guidelines. Appellant argues the court failed to articulate why the circumstances surrounding this particular voluntary manslaughter conviction were so much more egregious than a typical voluntary manslaughter case. Moreover, Appellant claims that the court substantially deviated from the sentencing guidelines without considering all relevant sentencing factors. Appellant concludes the court abused its discretion by imposing an excessive sentence. Appellant's challenge is to the discretionary aspects of his sentence. ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

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

> [W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

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

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases." ***Commonwealth v. Phillips***, 946 A.2d 103, 112 (Pa.Super. 2008), *cert. denied*, 556 U.S. 1264, 129 S.Ct. 2450, 174 L.Ed.2d 240 (2009) (quoting ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*)) (emphasis in original) (internal quotation marks omitted).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the

sentencing process." ***Sierra, supra*** at 912-13. "[C]laims that a penalty is excessive and/or disproportionate to the offense can raise substantial questions." ***Commonwealth v. Malovich***, 903 A.2d 1247, 1253 (Pa.Super. 2006). Additionally, "An allegation that a judge 'failed to offer specific reasons for [a] sentence does raise a substantial question.'" ***Commonwealth v. Dunphy***, 20 A.3d 1215, 1222 (Pa.Super. 2011) (quoting ***Commonwealth v. Reynolds***, 835 A.2d 720, 734 (Pa.Super. 2003)).

Here, Appellant's post-sentence motions, voluntary Rule 1925(b) statement, and Rule 2119(f) statement properly preserved his claim that the court imposed an excessive sentence and failed to provide adequate reasons. As presented, Appellant's claim appears to raise a substantial question as to the discretionary aspects of his sentence. ***See Dunphy, supra***. ***See also Commonwealth v. Davis***, 737 A.2d 792 (Pa.Super. 1999) (stating claim that sentencing court imposed unreasonable sentence outside guideline ranges raises substantial question).

Our standard of review concerning the discretionary aspects of sentencing is as follows:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for

> reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Coulverson, 34 A.3d 135, 143 (Pa.Super. 2011) (quoting ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa.Super. 1999) (*en banc*)).

"[A] court is required to consider the particular circumstances of the offense and the character of the defendant." ***Commonwealth v. Griffin***, 804 A.2d 1, 10 (Pa.Super. 2002), *cert. denied*, 545 U.S. 1148, 125 S.Ct. 2984, 162 L.Ed.2d 902 (2005). "In particular, the court should refer to the defendant's prior criminal record, his age, personal characteristics and his potential for rehabilitation." ***Id.*** "If the court imposes a sentence outside of the sentencing guidelines, it must provide a written statement setting forth the reasons for the deviation and the failure to do so is grounds for re-sentencing." ***Commonwealth v. Walls***, 592 Pa. 557, 567, 926 A.2d 957, 963 (2007). A court's "on-the-record statement of reasons for deviation stated in the defendant's presence" satisfies the requirement of a contemporaneous written statement. ***Commonwealth v. Styles***, 812 A.2d 1277, 1278 (Pa.Super. 2002).

"[U]nder the Sentencing Code an appellate court is to exercise its judgment in reviewing a sentence outside the sentencing guidelines to assess whether the sentencing court imposed a sentence that is 'unreasonable.'" ***Walls, supra*** at 568, 926 A.2d at 963. In making this "unreasonableness" inquiry, this Court must consider four factors:

> **§ 9781. Appellate review of sentence**
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> **(d) Review of record.—**In reviewing the record the appellate court shall have regard for:
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> (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
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> (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
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> (3) The findings upon which the sentence was based.
>
> (4) The guidelines promulgated by the commission.

42 Pa.C.S.A. § 9781(d)(1)-(4).

In ***Walls, supra***, our Supreme Court said "the concept of unreasonableness" is "inherently a circumstance-dependent concept that is flexible in understanding and lacking precise definition." ***Id.*** at 568, 926 A.2d at 963.

> Thus, given its nature, we decline to fashion any concrete rules as to the unreasonableness inquiry for a sentence that falls outside of applicable guidelines under Section 9781…. We are of the view, however, that the Legislature intended that considerations found in Section 9721 inform appellate review for unreasonableness. That is, while a sentence may be found to be unreasonable after review of Section 9781(d)'s four statutory factors, in addition a sentence may also be unreasonable if the appellate court finds that the sentence was imposed without express or implicit consideration by the sentencing court of the general standards applicable to sentencing found in Section 9721, *i.e.*, the protection of the public; the gravity of the offense in relation to the impact on the victim and

> the community; and the rehabilitative needs of the defendant. 42 Pa.C.S. § 9721(b). **Moreover, even though the unreasonableness inquiry lacks precise boundaries, we are confident that rejection of a sentencing court's imposition of sentence on unreasonableness grounds would occur infrequently, whether the sentence is above or below the guideline ranges, especially when the unreasonableness inquiry is conducted using the proper standard of review.**

Id. at 568-69, 926 A.2d at 964 (emphasis added).

Instantly, the court had the benefit of a PSI report at sentencing. Therefore, we can presume it considered the relevant factors when sentencing Appellant. ***See Commonwealth v. Tirado***, 870 A.2d 362, 366 n.6 (Pa.Super. 2005) (stating where sentencing court had benefit of PSI, law assumes court was aware of and weighed relevant information regarding defendant's character and mitigating factors). The court announced it had considered Appellant's expression of remorse, the victim impact testimony,[6] and the PSI report. The court emphasized that the PSI report included incidents which occurred when Appellant was a juvenile; therefore, the incidents did not affect Appellant's prior record score. The court detailed Appellant's lengthy juvenile record, which included multiple adjudications for

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[6] Significantly, Victim's mother testified about Appellant's demeanor at trial, explaining that Appellant talked to Victim's family and smiled at them throughout the proceedings. Victim's mother explained, "He did this to us all five days we were here, smiling and grinning, like he feels no remorse. It just hurts. I don't know if he understands that. It hurts." (***See*** N.T. Sentencing Hearing, 3/28/12, at 10.)

acts such as terroristic threats, criminal mischief, disorderly conduct, fleeing or attempting to elude police, escape, and theft.

Thereafter, the court stated:

> The [c]ourt has taken into account his family history, his education, his background, as consistent with the state law, his rehabilitative needs.
>
> The [c]ourt has noted [Appellant] has had multiple opportunities in terms of the juvenile system for therapy, rehabilitation, educational skills, vocational skills, and he has never really availed himself to any of that except to get a G.E.D. But otherwise he failed to adjust at these various commitments, and actually, I noted…one of those cases involved [an] escape and ramming a State Police vehicle.
>
> The [c]ourt finds an extensive juvenile history that is unaccounted for in his prior record score. That history is permeated with threats or acts of violence and disrespect for lawful authority.
>
> The [c]ourt finds the factors positive in his background, so to speak, that have been presented through [defense counsel], and his comment today of remorse and expression to [Victim's] family members.
>
> The [c]ourt has weighed all of this, and the [c]ourt finds in terms of his function in terms of protection of the public and gravity of the offense as it relates to the impact of this offense on the community, the surviving family members, is heavily weighted and significant.

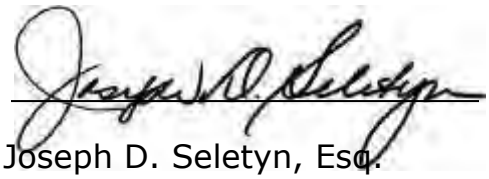
(***See*** N.T. Sentencing Hearing at 19-20.)

Here, the sentencing court stated with particularity its reasons for imposing Appellant's sentence. Regarding the "reasonableness" of Appellant's sentence, the court considered the nature and circumstances of the offenses, recognizing Appellant's history of violence. The court also

noted previous attempts at rehabilitation as a juvenile had proven unsuccessful. The court observed Appellant, evaluated the PSI, and announced its findings at the time of sentencing. Under these circumstances, the court's upward departure from the sentencing guidelines was not unreasonable under Section 9781(d). ***See Walls, supra***. Based upon the foregoing, we see no reason to disturb the judgment of sentence. ***See Coulverson, supra***. Accordingly, we affirm.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/29/2014