NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
AARON BRUCE FELDMAN	:	
Appellant	:	No. 3713 EDA 2016

Appeal from the Judgment of Sentence October 21, 2016
In the Court of Common Pleas of Montgomery County Criminal Division
at No(s): CP-46-CR-0007929-2014

BEFORE: PANELLA, J., MURRAY, J., and STEVENS*, P.J.E.

MEMORANDUM BY MURRAY, J.: **FILED MAY 29, 2018**

Aaron Feldman (Appellant) appeals from the judgment of sentence of three to twelve months of imprisonment, followed by two years of probation, imposed after a jury convicted him of one count each of corruption of minors[1] and conspiracy to possess drug paraphernalia,[2] and two counts each of possession with intent to deliver drug paraphernalia to a person under age 18[3] and possession of drug paraphernalia.[4] We affirm.

The facts of this case are not in dispute. As stated by Appellant:

> Lower Moreland Police, in their investigation of [a] residential burglary and theft that had been committed by [a]

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[1] 18 Pa.C.S.A. § 6301(a)(1)(i).
[2] 18 Pa.C.S.A. § 903; 35 P.S. § 780-113(a)(32).
[3] 35 P.S. § 780-113(a)(33).
[4] 35 P.S. § 780-113(a)(32).

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* Former Justice specially assigned to the Superior Court.

> juvenile, obtained a search warrant for the residence at 843 Cardinal Lane, Huntington Valley, PA 19006. This was the residence of Appellant's son and his wife[5] and was also the location where the juvenile burglar stated that he had been smoking marijuana with Appellant and three other minors. . . .
>
> The residential burglary occurred on or around May 25, 2014, at the home of another minor. The minor who later admitted to those crimes was questioned on or around May 26, 2014, at which time the minor claimed he had been with Appellant and three other minors the prior day. The other three minors were also questioned by police and acknowledged they had been with [the juvenile burglar] on the day of the burglary and that [the juvenile burglar] had a large sum of cash. Appellant and his wife, the owners of the searched property, were also questioned by police in regard to the residential burglary that had occurred. Of the four minors, the Affidavit of Probable Cause, dated May 29, 2014, lists only [the juvenile burglar] and another minor as giving statements that Appellant purchased items from a smoke shop in Philadelphia. A search, based upon the warrant, took place and certain items were found in four different areas of the residence in which Appellant, his wife, and their minor son, "J.F.", all lived. Based upon the items recovered and the statements by [the juvenile burglar][6] and [another minor], as well as video from the smoke shop that showed Appellant purchasing an "ash catcher," Appellant was charged, on or about August 14, 2014, with a variety of crimes involving the use of the purchased paraphernalia with minors.

Appellant's Brief at 7-8.

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[5] As Appellant later concedes, it was his residence also.

[6] The juvenile burglar told police that he was friends with Appellant's son, to whom he gave some of the stolen money; he also stated that he gave Appellant some of the money to buy beer and the ash catcher for smoking marijuana. He testified at trial that Appellant drove him and the other juveniles to the "1 Stop Smoke Shop" where Appellant bought the ash catcher and a bong. N.T., 6/29/16, at 91. Afterwards, they returned to Appellant's home where Appellant cleaned the bong, and smoked marijuana and drank beer with the juveniles. ***See id.*** at 89-127.

A jury convicted Appellant of the aforementioned crimes on July 1, 2016, and the trial court sentenced him on October 21, 2016. On October 31, 2016, Appellant filed a post-sentence motion seeking modification of his sentence. The trial court denied Appellant's post-sentence motion, and on November 23, 2016, Appellant filed a timely notice of appeal. Both the trial court and Appellant have complied with Pa.R.A.P. 1925. On appeal, Appellant presents this Court with the exact issues he presented to the trial court in his Rule 1925(b) concise statement. ***See*** Appellant's Concise Statement, 4/24/17.

> I. Did the Trial Court err in failing to grant the Omnibus Pretrial Motion which sought the suppression of all fruits of the search warrant of [Appellant's] home. Specifically, the crimes listed as the basis for this warrant were listed as Theft and Burglary and the Commonwealth knew that [Appellant] was not the guilty party in the crimes that police officers stated they were investigating. The warrant was therefore not sufficient to justify the search and seizure of any items within [Appellant's] home. Further, the warrant does not describe what portion of the residence was to be searched and is therefore overly broad and impermissible as such?
>
> II. Did the Trial Court err when it failed to grant [Appellant's] trial counsel's motion for a mistrial during the actual jury trial in this matter. That Motion occurred when the Assistant District Attorney had a conversation with a testifying witness during a break in the proceeding and prior to that Witness's cross-examination, despite a specific instruction by the Trial Court that no such conversation should take place?
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> III. Was there insufficient evidence to support a conviction of [Appellant] for any of the crimes for which [Appellant] was convicted. This is particularly true since, absent physical evidence that was seized in the illegal search, the Commonwealth evidence was substantially reliant upon the testimony of a known repeat felon who was far from credible

> both as a result of *crimen falsi* prior actions and as a result of his actual testimony during the trial in this case. This is the same witness who had a conversation with the Assistant District Attorney during the witness's testimony that was the subject of the motion for mistrial?
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> IV. Did the testimony and evidence presented during the jury trial in this matter lack credibility to such a degree that the jury rendered a verdict that was against the weight of the evidence?

Appellant's Brief at 5–6.

Following a review of the certified record and the parties' briefs, we conclude that the opinion of the Honorable Gail A. Weilheimer adeptly analyzes Appellant's four issues and arguments, and applies the correct law to findings of fact that are supported by the record. We discern no abuse of discretion. Accordingly, we adopt Judge Weilheimer's August 17, 2017 opinion as our own and affirm Appellant's judgment of sentence based upon the trial court's well-reasoned and comprehensive opinion. ***See*** Trial Court Opinion, 8/17/17, at 11–21 (explaining, *inter alia*, that the search warrant was supported by probable cause because "the information contained within . . . the affidavit of probable cause was sufficient to enter a valid search warrant; specifically there was probable cause to believe that a search of Appellant's home would yield fruits of the burglary; specifically an 'ash catcher' and a glass 'pipe/bowl' purchased with some of the stolen cash, and other drug paraphernalia used by Appellant and the four (4) boys to smoke marijuana together"); ***id.*** at 21–23 (finding that although the prosecutor's private conversation with the witness during a recess was improper, it was not done in "bad-faith

overreaching" and did not deny Appellant a fair and impartial trial); ***id.*** at 23–30 (explaining that the evidence was "sufficient to prove Appellant guilty beyond a reasonable doubt of the crimes for which he was ultimately convicted") and ***id.*** at 31–36 (finding that the jury's verdict was not against the weight because the "evidence presented at trial that supported Appellant's convictions was credible, while the testimony of witnesses that attempted to exculpate Appellant was understandably biased and incredible").[7]

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/29/18

[7] We note our agreement with the Commonwealth and our supplemental finding that Appellant has waived his weight claim because he failed to raise it with the trial court prior to sentencing or in a post-sentence motion as required by Pa.R.Crim.P. 607. However, we reference the trial court's merits analysis because even in the absence of waiver, Appellant's weight claim does not warrant relief.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	Common Pleas Court No.: CP-46-CR-0007929-2014
v.	:	
AARON FELDMAN	:	Superior Court No.: 3713 EDA 2016

OPINION

WEILHEIMER, J. **August 17, 2017**

Appellant, Aaron Feldman (Defendant in the underlying matter), instantly appeals his the trial court's denial of his suppression motion, seeking to suppress the evidence that was seized by a search warrant obtained and executed on May 29, 2015, as well as, his subsequent convictions on July 1, 2016. For the reasons that follow, the trial court's ruling and Appellant's convictions should be affirmed.

FACTUAL HISTORY

Law enforcements' investigation into Appellant's crimes commenced as part of an ongoing investigation into a reported burglary on May 25, 2014, of which A.A.[1] was a likely suspect. Information provided in A.A.'s and M.F.'s statements led police to discover evidence amounting to probable cause that enabled the search of Appellant's residence, wherein drug paraphernalia and residue of controlled substances from Appellant's crimes were seized. (***See*** N.T. – Trial by Jury at 43, June 29, 2016 ("N.T. – Trial Day 1").) ***See also*** **Exhibit A** – Search Warrant Application, 5/29/2014; **Exhibit B** – Seized Items Inventory, 5/29/2014; **Exhibit C** – NMS Labs Drug Chemistry Report, 6/16/2016.[2]

On May 25, 2014, A.A. committed a burglary, the fruit of which was approximately $510.00 in cash. (N.T. – Trial Day 1 at 85, 100, 136; N.T. – Trial by Jury at 61-63, June 30, 2016 ("N.T. – Trial Day

[1] Abbreviations are used for all of the minor children (*i.e.*, A.A., M.F., A.B., and Appellant's son) in this matter, as they were all under the age of eighteen (18) at the time Appellant committed his crimes on May 25, 2014, and at the time of trial between June 29 and July 1, 2016.

[2] **Exhibits A** and **B** were marked collectively as Commonwealth's Exhibit C-1 at the March 29, 2016, Suppression Hearing, but were not admitted into evidence. (***See*** N.T. – Suppression Hr'g at 6-7, 3/29/2016.) **Exhibit C** was admitted at trial as Commonwealth's Exhibit C-17. (N.T. – Trial by Jury at 173, 6/30/2016 ("N.T. – Trial Day 2").)

2").) ***See also*** **Exhibit A** – Search Warrant Application at 1.[3] A.A.'s intention was to use some of the stolen cash to purchase marijuana and alcohol for the Memorial Day Weekend. (***See*** N.T. – Trial Day 1 at 85.) ***See also*** **Exhibit D** – A.A.'s Statement at 3, 5/26/2014.[4] So, after the burglary, A.A. met up with A.B., M.F., and Appellant's son to hang out and smoke marijuana. (***See*** N.T. – Trial Day 1 at 85.) ***See also*** **Exhibit D** – A.A.'s Statement at 3; **Exhibit E** – M.F.'s Statement at 1, 5/26/2014; **Exhibit F** – Appellant's Son's Statement at 1, 5/26/2014.[5] A.A. lied to the three (3) other boys about where he received the large amount of cash; so, the three (3) boys (and later, Appellant) did not necessarily know the cash was the fruit of a burglary on May 25, 2014. (***See*** N.T. – Trial Day 1 at 87, 114-15, 137, 157.)

Following the burglary, A.A. gave approximately $100.00 of the stolen cash to A.B. (***See*** N.T. – Trial Day 1 at 87, 137-39.) ***See also*** **Exhibit D** – A.A.'s Statement at 3; **Exhibit E** – M.F.'s Statement at 3. The four (4) boys smoked marijuana together out of a one (1)-foot "bong" inside Appellant's residence. (***See*** N.T. – Trial Day 1 at 137-40; N.T. – Trial Day 2 at 205, 238-39 (Appellant's son admitted to history of smoking marijuana).) A.A. purchased sandals and a "G-Shock" watch from Appellant's son using more of the stolen cash. (N.T. – Trial Day 1 at 87, 137-40 (A.A's testimony); N.T. – Trial Day 2 at 242 (Appellant's son testifying he sold sandals and a watch to A.A.).) ***See also*** **Exhibit D** – A.A.'s Statement at 3; **Exhibit E** – M.F.'s Statement at 3. A.A. also gave Appellant's son $100.00, making the total amount of stolen cash Appellant's son obtained from A.A. approximately $250.00. (***See*** N.T. – Trial Day 1 at 87, 137-40 (A.A's testimony); N.T. – Trial Day 2 at 205, 229-30, 240-47 (Appellant's son testifying he previously lied to police in his statement about receiving the $100.00 from A.A. and about his history of smoking marijuana with A.A.).) ***See also*** **Exhibit D** – A.A.'s Statement at 3; **Exhibit E** – M.F.'s Statement at 3.

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[3] An ensuing search warrant was obtained and executed on May 29, 2014, after which law enforcement made an inventory of the property seized from Appellant's residence. ***See*** **Exhibit B** – Seized Property Inventory, 5/29/2014.

[4] **Exhibit D** was admitted at trial as Defense's Exhibit D-1. (N.T. – Trial Day 1 at 170.)

[5] **Exhibit E** was admitted at trial as Commonwealth's Exhibit C-6, (N.T. – Trial Day 2 at 32,) and **Exhibit F** was admitted at trial as Commonwealth's Exhibit C-18, (***id.*** at 265.)

Next, Appellant arrived home and sometime thereafter drove the four (4) boys to get pizza and to a "smoke shop" in Philadelphia, where Appellant purchased an "ash catcher" and a glass "pipe/bowl" with some of the cash that A.A. stole. (*See* N.T. – Trial Day 1 at 88, 101, 138-39; N.T. – Day 2 at 230.) ***See also*** **Exhibit** E – M.F.'s Statement at 1-3. After returning to Appellant's residence, the four (4) boys smoked marijuana again. (*See* N.T. – Trial Day 1 at 101-02.) At some point, Appellant and his son left the residence to obtain a three (3)-foot "bong". (*See* N.T. – Trial Day 1 at 96, 101-04, 140-43, 154; N.T. – Trial Day 2 at 82.) Appellant and the four (4) minors then smoked marijuana out of the three (3)-foot "bong" together at Appellant's residence. (*See* N.T. – Trial Day 1 at 106-07[6]; N.T. – Trial Day 2 at 104-06.) Appellant also allegedly[7] went to purchase alcohol with some of the stolen cash from A.A.'s burglary. (*See id.* at 88, 145; N.T. – Trial Day 2 at 141.) Appellant then allegedly returned home with two (2) mini-kegs of beer and began drinking with the four (4) minor boys in his garage area. (*See* N.T. – Trial Day 1 at 114-15, 145, 159; N.T. – Trial Day 2 at 141.) Around 11:00 P.M., A.A. left for home despite Appellant's pressuring him to stay and continue partying. (*See id.* at 115-16, 160-61 (A.A. testifying he made up the fact that he had a curfew to Appellant); N.T. – Trial Day 2 at 82 (A.A. told the affiant Appellant called him "a little pussy" for wanting to leave the party.)

The next day, May 26, 2014, detectives from the Lower Moreland Township Police Department confronted A.A. at his mother's house to advise him he was a suspect in the burglary. (N.T. – Trial Day 1 at 108, 128.) A.A. was not initially forthcoming with detectives but with the mounting evidence against him, including latent fingerprint evidence positively identifying him and ultimately leading to his arrest,

[6] Given the three (3)-foot "bong" was used and contained marijuana tar residue, Appellant cleaned and dried "bong" before he brought it into his living room bathroom, where Appellant and the four (4) boys smoked marijuana out of it together.

[7] The trial court notes that Appellant was found not guilty by the jury of selling or furnishing liquor or malt or brewed beverages to minors. (*See* Disposition – Deferred Sentence, 6/29/2016.) The affiant testified no physical evidence was found to corroborate Appellant purchased alcohol for the minors. (*See* N.T. – Trial Day 2 at 152.) However, the jury found Appellant guilty of the corruption of the morals of a minor, and part of the admitted testimony and evidence was that Appellant corrupted the morals of A.A. when he harassed A.A. to continue drinking with him, which the trial court discussed in further detail in Section IV, subsection A, *infra*.

A.A. changed his course and confessed to the burglary. (***Id.*** at 109, 128-30; N.T. – Trial Day 2 at 67-68.) ***See also*** **Exhibit D** – A.A.'s Statement at 1. Once A.A. arrived at the police station, he gave his oral and written statements to the affiant officer. (***See*** N.T. – Trial Day 2 at 130-32, 134-35.) Police also took written statements from M.F. and Appellant's son, though only M.F.'s statement tended to corroborate A.A.'s initial statement and implicated Appellant in his crimes. ***See*** **Exhibit D** – A.A.'s Statement; **Exhibit E** – M.F.'s Statement; **Exhibit F** – Appellant's Son's Statement. However, the affiant followed up with A.A. about the "smoke shop", at which time she learned Appellant purchased an "ash catcher" at the "smoke shop". (***See*** N.T. – Trial Day 2 at 78, 83-84, 138, 140, 149-50.) The affiant was able to confirm Appellant went to the "smoke shop" and purchased items from the same on May 29, 2014, by speaking with the shopkeeper and obtaining video surveillance of Appellant's transactions. (***See*** N.T. – Trial Day 1 at 56-57 (video evidence admitted at trial as Commonwealth's Exhibit C-1); N.T. – Trial Day 2 at 84-85.)

After further investigation into leads provided in A.A. and M.F.'s statements, law enforcement validly obtained and executed a search warrant around 3:00 P.M. on May 29, 2014, to search Appellant's residence and seize any remaining stolen cash; the items alleged to have been purchased with stolen cash from A.A.'s burglary, *i.e.*, an "ash catcher" and a glass "pipe/bowl"; and a one (1)-foot and three (3)-foot "bong" that were reportedly used by the four (4) boys on May 25, 2014, to smoke marijuana inside Appellant's home. ***See*** **Exhibit A** – Search Warrant Application. (***See also*** N.T. – Trial Day 2 at 85-86.) After law enforcement attempted for approximately a half-hour to get the attention of Appellant or anyone in Appellant's residence by loudly knocking, Appellant confronted law enforcement at a window where they were attempting to force entry. (***See*** N.T. – Trial Day 2 at 86-88, 118-19.) Appellant claimed to have been working out in the basement, but the affiant testified that did not appear to be the case. (***Id.*** at 119.) The actual search of Appellant's home commenced after law enforcement explained their presence and the search warrant to Appellant. (***See*** N.T. – Trial Day 2 at 87-90.) The completed search uncovered, *inter alia*, several items of drug paraphernalia, including an "ash catcher", a one (1)-foot and a three (3)-

foot "bong", a marijuana grinder, and nine (9) smoking pipes with marijuana residue. (***See id.*** at 90-127.) ***See also*** **Exhibit B** – Seized Property Inventory, 5/29/2014; **Exhibit C** – NMS Labs Drug Chemistry Report. Notably, the seized items were found in the first floor bathroom attached to the den where Appellant indicated he had been sleeping during his separation from his wife; the basement; the first floor den where Appellant slept; and the first floor office that Appellant identified as his office. (***See*** N.T. – Trial Day 2 at 96-120.) The $100.00 of stolen cash A.A. gave to Appellant's son was also recovered in Appellant's home from Appellant's son's wallet. (***See id.***)

PROCEDURAL HISTORY

On October 29, 2014, a criminal complaint and affidavit of probable cause were filed, charging Appellant, *inter alia*, with corruption of minors and possession with the intent to deliver drug paraphernalia. (***See*** Criminal Complaint, dated 8/14/2014, docketed 10/29/2014.) The Bill of Information was filed by the Commonwealth on December 19, 2014, indicating its intention to proceed on the following counts: Count 1 – Corruption of Minors, 18 Pa. C.S.A. § 6301(A)(1)(i); Counts 2 and 3 – Paraphernalia/Delivery, 35 P.S. § 780-113(a)(33); Count 4 – Selling or Furnishing Liquor or Malt or Brewed Beverages to Minors, 18 Pa. C.S.A. 6310.1(a); Count 5 – Criminal Conspiracy, 18 Pa. C.S.A. 903(a)(1); and Counts 6, 7, and 8 – Drug Paraphernalia, 35 P.S. § 780-113(a)(32). (Bill of Information, 12/19/2014.)

On March 17, 2016, Appellant filed his Omnibus Pre-Trial Motions, including his Motion to Suppress and Application to Suppress Evidence as to Prior Convictions[8]. (Appellant's Omnibus Pre Trial Motions, 3/17/2016.) In his Motion to Suppress, Appellant alleged, *inter alia*, his arrest on August 15, 2014 on the above charges was illegal for various reasons set forth therein; he further alleged a subsequent search of his person was also illegal for the various reasons set forth therein; and he alleged his statements he gave to police were obtained illegally for various reasons set forth therein. (***Id.***) A

[8] The Application to Suppress Evidence as to Prior Convictions was simply boilerplate language and was irrelevant to the instant case. (***See*** N.T. – Suppression Hr'g at 3, 3/29/2016, docketed 6/16/2016.)

hearing on said Defense Motions was held on March 29, 2016. (Court Order, 3/21/2016.) On April 11, 2016, after the March 29 hearing, Appellant's Motion to Suppress was denied, deeming the evidence recovered at his home at 843 Cardinal Lane, Huntingdon Valley, Pennsylvania, as a result of the search warrant, admissible at trial. (Court Order, 4/11/2016; ***see also*** N.T. – Suppression Hr'g, 3/29/2016, docketed 6/16/2016.)

On May 11, 2016, a call of the trial list order scheduled the instant matter for a two (2) to three (3) day jury trial, to commence on June 29, 2016[9]; and released Appellant on bail. (Court Order, 5/11/2016.) On July 1, 2016, after the three (3) day jury trial was held, the twelve (12) jurors found Appellant guilty beyond a reasonable doubt on Counts 1, 2, 3, 5, 6, and 7, and not guilty on Counts 4 and 8. (Disposition – Deferred Sentence, 6/29/2016.) All remaining counts were *nol prossed* by motion of the Commonwealth. (***Id.***) Appellant was released on bail pending sentencing, and a Pre-Parole Investigation Evaluation ("PPI") and a Pre-Sentence Investigation and Report ("PSI") were ordered. (***Id.***)

On October 7, 2016, the trial court scheduled Sentencing for October 21, 2016. (Court Order, 10/7/2016, docketed 10/11/2016.) On October 21, 2016, Appellant was sentenced on Count 1 to imprisonment for not less than three (3) months nor more than twelve (12) months in the Montgomery County Correctional Facility ("MCCF"), commitment to date from November 11, 2016 at 6:00 P.M, and further to pay the costs of prosecution. (Disposition, 10/21/2016.) On Count 2, Appellant was sentenced to imprisonment for not less than three (3) months nor more than twelve (12) months in MCCF, concurrent to Count 1, and to pay costs of prosecution. (***Id.***) On Count 3, Appellant was sentenced to twelve (12) months' probation, consecutive to Count 2, and to pay costs of prosecution. (***Id.***) On Count 6, Appellant was sentenced to twelve (12) months' probation, consecutive to Count 3. (***Id.***) On Count 5 and 7, no further penalty was ordered. Appellant was made eligible for work release after thirty (30) days

[9] On the first day of trial, June 29, 2016, defense counsel orally moved for a mistrial after the prosecutor held a private conversation with A.A. during a break in his direct testimony, which the trial court denied because the private conversation did not amount to "bad-faith" overreaching by the prosecutor and the same did not deprive Appellant from a fair trial. (***See*** N.T. – Trial Day 1 at 118-22.)

from the imposition of his imprisonment at MCCF. (*Id.*) Finally, Appellant was ordered to attend dual diagnosis outpatient therapy to address his mental health and addiction needs. (*Id.*)

On October 28, 2016, Appellant filed a Motion to Set Bail Pending Appeal, which was denied on October 31, 2016, due to Appellant's use of marijuana post-verdict.[10] (Court Order, 10/31/2016, docketed 11/1/2016.)

On October 31, 2016, Appellant filed his Post-Sentence Motion to Modify Sentence, in which he challenged the discretionary aspects of his sentence. (Appellant's Post-Sentence Motion, 10/31/2016.) On October 31, 2016, Appellant's Post-Sentence Motion was denied. (Court Order, 10/31/2016, docketed 11/1/2016.)

On November 23, 2016, Appellant filed his Notice of Appeal from his October 21, 2016, sentence and from the October 31, 2016, denial of his Post-Sentence Motion. (Notice of Appeal, 11/23/2016.)

On December 8, 2016, the trial court appointed private conflict counsel, Thomas Carluccio, Esquire, for Appellant. (Court Order – Appt Private Counsel, 12/8/2016.) On the same day, Appellant was ordered to file a Concise Statement of Matters Complained of on Appeal ("Concise Statement") within twenty-one (21) days of the date of the docketing of said Order, pursuant to Pennsylvania Rule of Appellant Procedure (Pa. R.A.P.) 1925(b). (1925(b) Order for Concise Statement, 12/8/2016, docketed 12/12/2016.) On December 28, 2016, defense counsel filed a Motion for Continuance/Extension of Time, specifically requesting an extension to February 3, 2017. (Appellant's Motion for Continuance, 12/28/2016.) On January 3, 2017, defense counsel's request for an extension was granted. (Court Order, incorrectly docketed as Concise Statement, 1/3/2017, docketed 1/4/2017.)

On January 19, 2017, new conflict counsel, Bonnie-Ann Brill Keagy, Esquire, was appointed for Appellant. (Court Order – Appt. Private Counsel, 1/19/2017.) On January 24, 2017, Appellant was granted another extension of time to file his Concise Statement; this time to February 23, 2017. (1925(b)

[10] Appellant's Pre-Sentence Investigation ("PSI") indicated Appellant self-medicated with marijuana and continued to do so post-verdict.

Order for Concise Statement, 1/24/2017.) On February 23, 2017, Appellant was granted another extension of time to file his Concise Statement due to defense counsel not having received the trial transcript; this time extending the deadline to March 27, 2017. (1925(b) Order for Concise Statement, 2/23/2017, docketed 2/24/2017.)

On February 28, 2017, the trial court scheduled a status conference for March 14, 2017, due to Appellant's allegations of conflict with new defense counsel. (Court Order, 2/28/2017, docketed 3/1/2017.) On March 17, 2017, after the March 14 conference whereupon it was determined Appellant made a knowing and intelligent decision to continue with defense counsel, Ms. Keagy, Esquire, on direct appeal, and upon consideration of Ms. Keagy's subsequent oral motion for another extension of time to file Appellant's Concise Statement, the trial court granted another thirty (30) day extension, making the deadline April 28, 2017. (1925(b) Order for Concise Statement, 3/17/2017.) On April 24, 2017, Appellant filed his Concise Statement, alleging the following four (4) issues:

1. THE TRIAL COURT ERRED IN FAILING TO GRANT THE OMNIBUS PRETRIAL MOTION WHICH SOUGHT THE SUPPRESSION OF ALL FRUITS OF THE SEARCH WARRANT OF [APPELLANT'S] HOME. SPECIFICALLY, THE CRIMES LISTED AS THE BASIS FOR THIS WARRANT WERE LISTED AS THEFT AND BURGLARY AND THE COMMONWEALTH KNEW THAT [APPELLANT] WAS NOT THE GUILTY PARTY IN THE CRIMES THAT POLICE OFFICERS STATED THEY WERE INVESTIGATING. THE WARRANT WAS THEREFORE NOT SUFFICIENT TO JUSTIFY THE SEARCH AND SEIZURE OF ANY ITEMS WITHIN [APPELLANT'S] HOME. FURTHER, THE WARRANT DOES NOT DESCRIBE WHAT PORTION OF THE RESIDENCE WAS TO BE SEARCHED AND IS THEREFORE OVERLY BROAD AND IMPERMISSIBLE AS SUCH.

2. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT [APPELLANT'S] TRIAL COUNSEL'S MOTION FOR A MISTRIAL DURING THE ACTUAL JURY TRIAL IN THIS MATTER. THAT MOTION OCCURRED WHEN THE ASSISTANT DISTRICT ATTORNEY HAD A CONVERSATION WITH A TESTIFYING WITNESS DURING A BREAK IN THE PROCEEDING AND PRIOR TO THAT WITNESS'S CROSS-EXAMINATION, DESPITE A SPECIFIC INSTRUCTION BY THE TRIAL COURT THAT NO SUCH CONVERSATION SHOULD TAKE PLACE.

3. ABSENT THE EVIDENCE GAINED IN RELIANCE OF THE IMPROPER WARRANT, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF [APPELLANT] FOR ANY OF THE CRIMES FOR WHICH [APPELLANT] WAS CONVICTED. THIS IS PARTICULARLY TRUE SINCE, ABSENT PHYSICAL EVIDENCE THAT WAS SEIZED IN THE ILLEGAL SEARCH, THE COMMONWEALTH EVIDENCE WAS SUBSTANTIALLY RELIANT UPON THE TESTIMONY OF A KNOWN REPEAT FELON WHO WAS FAR FROM CREDIBLE BOTH AS A RESULT OF *CRIMEN FALSI* PRIOR ACTIONS AND AS A RESULT OF HIS ACTUAL TESTIMONY DURING THE TRIAL IN THIS CASE. THIS IS THE SAME WITNESS WHO HAD A CONVERSATION WITH THE ASSISTANT DISTRICT ATTORNEY DURING THE WITNESS'S TESTIMONY THAT WAS THE SUBJECT OF THE MOTION FOR MISTRIAL.

4. THE TESTIMONY AND EVIDENCE PRESENTED DURING THE JURY TRIAL IN THIS MATTER LACKED CREDIBILITY TO SUCH A DEGREE THAT THE JURY RENDERED A VERDICT THAT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

(Appellant's Concise Statement, 4/24/2017.)

DISCUSSION

I. STANDARD OF REVIEW

The "standard of review of a trial court's decision to admit or exclude evidence is well-settled: When [the Superior Court of Pennsylvania ("Superior Court")] review[s] a trial court ruling on admission of evidence, [it] must acknowledge that decisions on admissibility are within the sound discretion of the trial court and will not be overturned absent an abuse of discretion or misapplication of law." ***Stumpf v. Nye***, 950 A.2d 1032, 1035-36 (Pa. Super. 2008). "In addition, for a ruling on evidence to constitute reversible error, it must have been harmful or prejudicial to the complaining party." ***Id. See also Commonwealth v. Zugay***, 745 A.2d 639 (Pa. Super. 2000), *appeal denied,* 795 A.2d 976 (Pa. 2000) (explaining abuse of discretion standard of review is the same for motions *in limine* and motions to suppress). The Supreme Court of Pennsylvania clarified the standard of review for suppression matters as follows:

> Our review is limited to determining whether the record supports the findings of fact of the suppression court and whether the legal conclusions

> drawn from those findings are correct. [...] We are bound by the factual findings of the suppression court, which are supported by the record, but we are not bound by the suppression court's legal rulings, which we review *de novo*.

Commonwealth v. James, 69 A.3d 180, 186 (Pa. 2013) (citing ***Commonwealth v. Briggs***, 12 A.3d 291, 320–21 (Pa. 2011) (some citations omitted)).

The Supreme Court of Pennsylvania has also "carefully enunciated the standard of review when an [a]ppellant is alleging that a mistrial was improperly denied:

> [T]he remedy of a mistrial is an extreme one.... It is primarily within the trial court's discretion to determine whether Appellant was prejudiced by the event that forms the substance of the motion. Finally, it must be remembered that a mistrial is required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial trial.

Commonwealth v. Lease, 703 A.2d 506, 508 (Pa. Super. 1997) (citing ***Commonwealth v. Montgomery***, 626 A.2d 109, 112-13 (Pa. 1993)). The Superior Court's "review of the resulting order is constrained to determining whether the court abused its discretion." ***Commonwealth v. Hogentogler***, 53 A.3d 866, 877–78 (Pa. Super. 2012), *appeal denied*, 69 A.3d 600 (Pa. 2013) (some citations omitted).

In applying the standard of review for sufficiency of evidence claims, the Superior Court, "must view all evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth, as the verdict winner, and consider whether the trier of fact could have found that each element of the offense charged was supported by evidence and inference[s] sufficient to prove guilt beyond a reasonable doubt." ***Commonwealth v. Brown***, 701 A.2d 252, 254 (Pa. Super. Ct. 1997) (citations omitted); ***Commonwealth v. Cousar***, 928 A.2d 1025, 1032-1033 (Pa. 2007), *cert. denied*, 171 L. Ed. 2d 235 (U.S. 2008). Moreover, the Superior Court, "may not substitute its judgment for that of the fact-finder; if the record contains support for the convictions they may not be disturbed." ***Commonwealth v. Stokes***, 78 A.3d 644, 649 (Pa. Super. 2013).

"An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court." ***Commonwealth v. Stokes***, 78 A.3d 644, 650-51 (Pa. Super. 2013) (citing

Commonwealth v. Widmer, 744 A.2d 745, 751-52 (Pa. 2000)). An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. ***Commonwealth v. Cousar***, 928 A.2d 1025, 1035-36 (Pa. 2007) (citing ***Commonwealth v. Keaton***, 729 A.2d 529, 540-41 (Pa. 1999)). Thus, the trial court's determination whether to grant a new trial will not be disturbed on appeal absent an abuse of discretion. ***See Stokes***, *supra*.

"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, as shown by the evidence or the record, discretion is abused." ***Nye***, 950 A.2d at 1035-36. In ***Widmer***, *supra*, the Supreme Court of Pennsylvania reiterated the well-known definition of 'abuse of discretion' as follows:

> The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents *not merely an error of judgment*, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Widmer, 744 A.2d at 753 (emphasis added).

II. THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE THAT WAS SEIZED FROM APPELLANT'S RESIDENCE AFTER LAW ENFORCEMENT VALIDLY OBTAINED AND EXECUTED A SEARCH WARRANT ON MAY 29, 2014.

Instantly, the trial court did not err in denying Appellant's Omnibus Pretrial Motion which sought the suppression of all fruits of the validly obtained and executed search warrant of Appellant's home. (***See*** Concise Statement ¶ 1.)

Pennsylvania's Constitution reads, in part, "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." Pa. Const. of 1968, art. I, § 8

(1968). "[T]he particularity requirement of the state constitutional search and seizure provision is more stringent than in the Fourth Amendment, [and as such,] if a warrant is satisfactory under the state constitution it will also be satisfactory under the federal constitution." ***Commonwealth v. Orie***, 88 A.3d 983, (Pa. Super. 2014), *appeal denied* 99 A.3d 925, (Pa. 2014), *habeas corpus dismissed* No. 2:15-CV-1153, 2016 WL 1069097 (W.D. Pa. 2016). In order "[t]o determine whether a search passes constitutional muster under state constitution, courts consider four factors: (1) nature of the privacy interest; (2) nature of the intrusion created by the search; (3) notice; and (4) overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search." ***Minich v. County of Jefferson***, 919 A.2d 356, 359 (Pa. Commw. 2007), *appeal denied* 932 A.2d 1290 (Pa. 2007).

The Supreme Court of Pennsylvania has further opined:

> The focus of the court in reviewing constitutionality of general search always centers on the reasonableness of the decision to conduct a search of such a broad nature. The determination of whether a general search is reasonable requires balance of competing concerns. Where the objective of the search outweighs intrusion occasioned by search it will be reasonable, and thus, constitutional to conduct a general search.

Commonwealth v. Cass, 709 A.2d 350, 360 (Pa. Super. 1998), *cert. denied* 142 L.Ed.2d 70 (U.S. 1998).

Pennsylvania Rules of Criminal Procedure (Pa. R. Crim. P.) provides further guidance to the courts on the validity of search warrants. Rule 203 provides, *inter alia*, that "[n]o search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. Pa. R. Crim. P. 203(B). "The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits." ***Id.*** "Probable cause exists where the facts and circumstances within the affiant's knowledge and of which [s]he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." ***Commonwealth v. Leed***, 142 A.3d 20, 25 (Pa. Super. 2016), *reargument denied* (Aug. 11, 2016), *appeal granted sub nom.* 2016 WL

7470019 (Pa. Dec. 28, 2016). Furthermore, [a]t any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (B). Pa. R. Crim. P. 203(D) ("four corners rule")[11]

Rule 206 enumerates the required contents for the application of a search warrant. ***See*** Pa. R. Crim. P., Rule 206. "Each application for a search warrant shall be supported by written affidavit(s) signed and sworn to or affirmed before an issuing authority, which affidavit(s) shall:"

> (1) state the name and department, agency, or address of the affiant;
>
> (2) identify specifically the items or property to be searched for and seized;
>
> (3) name or describe with particularity the person or place to be searched;
>
> (4) identify the owner, occupant, or possessor of the place to be searched;
>
> (5) specify or describe the crime which has been or is being committed;
>
> (6) set forth specifically the facts and circumstances which form the basis for the affiant's conclusion that there is probable cause to believe that the items or property identified are evidence or the fruit of a crime, or are contraband, or are or are expected to be otherwise unlawfully possessed or subject to seizure, and that these items or property are or are expected to be located on the particular person or at the particular place described;
>
> [...]

Pa. R. Crim. P. 206(1)-(6).

Moreover, the Rules of Criminal Procedure also provide a means for defendants to challenge evidence obtained by a search warrant. ***See*** Pa. R. Crim. P. 581. Specifically, "[t]he defendant's attorney, or the defendant if unrepresented, may make a motion to the court to suppress any evidence alleged to have been obtained in violation of the defendant's rights." Pa. R. Crim. P. 581(A) Such a "[m]otion shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in support thereof." Pa. R. Crim. P. 581(D). "A hearing shall be scheduled in

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[11] ***See*** Comment to Pa. R. Crim. P. 203: "Paragraph (D) changes the procedure discussed in ***Commonwealth v. Crawley***, 223 A.2d 885 (Pa. Super. 1966), *aff'd per curiam* 247 A.2d 226 (Pa. 1968). (citing ***Commonwealth v. Milliken***, 300 A.2d 78 (Pa. 1973)).

accordance with Rule 577 (Procedures Following Filing of Motion) [..., and] shall be held in open court [, and ...] outside the presence of the jury. [...]" Pa. R. Crim. P. 581.(E)-(F). Additionally, "[a] record shall be made of all evidence adduced at the hearing." Pa. R. Crim. P. 581(G). "The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights [by a preponderance of the evidence]." Pa. R. Crim. P. 581(H); ***see also Commonwealth ex rel. Butler v. Rundle***, 239 A.2d 426 (1968) (establishing preponderance of the evidence as standard.) Pa. R. Crim. P. 581. "At the conclusion of the [suppression] hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's rights, or in violation of these rules or any statute, and shall make an order granting or denying the relief sought [; and,] [i]f the court determines that the evidence shall not be suppressed, such determination shall be final, conclusive, and binding at trial, except upon a showing of evidence which was theretofore unavailable, but nothing herein shall prevent a defendant from opposing such evidence at trial upon any ground except its suppressibility." Pa. R. Crim. P. 581(I)-(J).

Here, the trial court properly denied Appellant's Omnibus Pretrial Motion that sought the suppression of all fruits of the search warrant of Appellant's home, as the Commonwealth proved by a preponderance of evidence that the evidence obtained was not in violation of Appellant's constitutional rights. (***See*** *generally* N.T. – Suppression Hr'g.) The May 29, 2014, search warrant of Appellant's residence[12] was validly obtained and executed based upon the probable cause within the "four corners" of the affidavit attached to the search warrant application. ***See*** **Exhibit A** – Search Warrant Application. (***See also*** *generally* N.T. – Suppression Hr'g.)

[12] ***See*** **Exhibit A** – Search Warrant Application & Affidavit (previously marked as C-1 for purposes of 3/29/2016 Suppression Hearing).

A. The application for the search warrant in question met the requirements of Rule 206.

The application for the search warrant in the instant matter, dated May 29, 2014, met the requirements set out in Pa. R. Crim. P., Rule 206. The following are the requirements of Rule 206 with the bolded text reflecting the actual information in the application for the search warrant:

> (1) state the name and department, agency, or address of the affiant;
>
> **Ptl Holly J Halota, Lower Moreland Twp Police Dept;**
>
> (2) identify specifically the items or property to be searched for and seized;
>
> **An "ash catcher", a slide piece for a bong that adds a second water filtration or a mini bubbler that slides in and out, a 1 foot long smoking device (bong) and a three foot smoking device (bong) with a clear tube and red and green design on the bottom.**
>
> (3) name or describe with particularity the person or place to be searched;
>
> **843 Cardinal Lane, Huntingdon Valley, PA 19006, a single, two story home with white siding, brown shutters on the front 2nd floor windows and next to the front door. The house also has a brown wooden front door and a two car garage. A white mailbox is posted out front of the home which bears the numbers "843".**
>
> (4) identify the owner, occupant, or possessor of the place to be searched;
>
> **Aaron and Illana Feldman (Appellant and Appellant's wife, respectively)**
>
> (5) specify or describe the crime which has been or is being committed;
>
> **PACC 3502(a)(2) Burglary, 3921(a) Theft, 05-25-2014 (date of violation), 3925(a) RSP, 780-113(a)32 Possession of Drug Paraphernalia**
>
> (6) set forth specifically the facts and circumstances which form the basis for the affiant's conclusion that there is probable cause to believe that the items or property identified are evidence or the fruit of a crime, or are contraband, or are or are expected to be otherwise unlawfully possessed or subject to seizure, and that these items or property are or are expected to be located on the particular person or at the particular place described;
>
> ***See* Exhibit A** – Search Warrant Application.
>
> [...]

See Pa. R. Crim. P. 206(1)-(6); **Exhibit A** – Search Warrant Application.

B. The trial court's review for probable cause is limited to the "four corners" of the affidavit supporting the application for the search warrant.

Appellant, in his Pre-Trial Omnibus Motion, and specifically his Motion to Suppress, alleged the search of Appellant and his property was illegal because, *inter alia*, "it was made without probable cause to believe that [...] other evidence was present." (*See* Appellant's Omnibus Pre Trial Motions ¶ 5(b), 3/17/2016.) This type of allegation amounts to a "generic, global challenge to the sufficiency of the affidavit," as opposed to a specific challenge. ***See**, e.g.*, ***Commonwealth v. James***, 69 A.3d 180, 188-90 (Pa. 2013) (distinguishing specific and general challenges to affidavit sufficiency). Notably, Appellant did not specifically raise any issues in his Motion as to the veracity of information contained within the Affidavit of Probable Cause; Appellant's main issue is he that he does not agree with the trial court's finding of probable cause within the "four corners" of the affidavit. (***See*** Appellant's Omnibus Pre Trial Motions ¶ 5(b), 3/17/2016.) Former defense counsel, Patricia Cassidy, Esquire, supplemented the written motion on the record, in part, as follows:

> DEFENSE: Your Honor, basically we're proceeding under pretty much No. 5 here, that the search of [Appellant] or [Appellant's] property was illegal because it's not incident to a lawful arrest, it was made without probable cause to believe other evidence was present, the scope of the search was illegally broad, [...] pursuant to an illegally issued search warrant, which would be the main thrust of this argument [...] We are contending that [the search warrant] was overly broad and illegally broad and illegally issued.

(N.T. – Suppression Hr'g at 5-6.) The Commonwealth also noted the argument was simply on the "four corners" of the search warrant affidavit, and offered only the search warrant itself as evidence. (***Id.*** at 7.) Thus, the trial court's review of the "four corners" of the affidavit in determining whether sufficient probable cause existed for a valid search warrant to issue did not involve considerable analysis into the veracity of the information contained therein.

C. Upon review of the "four corners" of the affidavit, the trial court determined there was probable cause sufficient to issue a search warrant of Appellant's residence for the fruits of the burglary committed by A.A., as well as, the other drug paraphernalia used by Appellant and the four (4) minors therein.

Instantly, the information contained within the "four corners" of the affidavit of probable cause was sufficient to issue a valid search warrant; specifically, there was probable cause to believe that a search of Appellant's home would yield fruits of the burglary committed by A.A.; specifically an "ash catcher" and a glass "pipe/bowl" purchased with some of the stolen cash, and other drug paraphernalia used by Appellant and the four (4) boys to smoke marijuana together on May 29, 2014. ***See* Exhibit A** – Search Warrant Application.[13] Again, "[p]robable cause exists where the facts and circumstances within the affiant's knowledge and of which [s]he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." ***Leed***, 142 A.3d at 25. Within the "four corners" of the affidavit of probable cause, there were alleged facts and circumstances from A.A.'s and M.F.'s statements and from video surveillance from the "smoke shop" that captured Appellant making a purchase from the same on May 25, 2014, which sufficiently showed probable cause to believe some of the fruits of the burglary (stolen cash and purchases made with stolen cash) committed by A.A. were located at Appellant's residence. ***See* Exhibit A** – Search Warrant Application.[14] Ultimately, some of the fruit of A.A.'s burglary, in addition to other drug paraphernalia and controlled substances' residue, were found and seized from Appellant's residence and supported Appellant's convictions. ***See* Exhibit B** – Inventory of Seized Property, 05/29/2014.

Specifically, the supporting affidavit of probable cause stated the affiant was searching for evidence relating to the crimes of burglary and theft (committed by A.A.), receiving stolen property

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[13] Pages 1 and 5 of the Search Warrant Application list the criminal statutes the affiant believed to be violated; page 1 lists burglary and theft, while page 5 is a continuation page that includes receiving stolen property and possession of drug paraphernalia (the crimes directly relevant to the search of Appellant's residence).

[14] Pages 1 and 5 of the Search Warrant Application list the criminal statutes the affiant believed to be violated; page 1 lists burglary and theft, while page 5 is a continuation page that includes receiving stolen property and possession of drug paraphernalia (the crimes directly relevant to the search of Appellant's residence).

(committed by Appellant), and possession of drug paraphernalia (committed by Appellant); evidence which the affiant had probable cause to believe would be found at Appellant's residence based upon law enforcement's interrogations of the four (4) minor boys, Appellant, and the shopkeeper of the "smoke shop". ***See*** **Exhibit A** – Search Warrant Application, 5/29/2014. The information received via law enforcement was trustworthy based upon the admission by A.A. to committing burglary and theft; the corroboration amongst the statements given by A.A. and M.F.; the corroboration of those statements by the video surveillance evidence that was obtained; and A.A.'s detailed descriptions of the drug paraphernalia used by Appellant and the four (4) boys in Appellant's residence. ***Id.***[15]

A.A. admitted to the underlying burglary (of $510.00), and also told officers he met with the three (3) others boys involved in this matter, giving some of the stolen cash to two (2) of the boys; namely, A.B. and Appellant's son. ***Id.*** A.A., when describing the drug paraphernalia that was ultimately found at Appellant's residence, included the approximate sizes of the "bongs" and even described one's coloring and design. Appellant's son, A.B., and M.F. corroborated that A.A. met with them on May 25, 2014, sometime after the burglary had been committed. ***Id.*** M.F. further corroborated that A.A. met with them and provided some of the stolen cash to Appellant's son and A.B. ***Id.*** M.F. and A.A. both told law enforcement that on the day they all met, May 25, 2014, Appellant drove all four (4) boys to a Philadelphia smoke shop to purchase an "ash catcher." ***Id.*** The affiant not only found the "smoke shop" where the two (2) of the witnesses indicated Appellant took them to purchase an "ash catcher", but also retrieved video surveillance of Appellant making said purchase on May 25, 2014; a statement from the shop owner recalling an "ash catcher" being purchased on said date; and a copy of the sales receipt. ***Id.*** In reviewing all this information contained within the "four corners" of the affidavit of probable cause, it

[15] ***See, e.g., Commonwealth v. Schilling***, 458 A.2d 226, (Pa. Super. 1983) ("Where informants on whose information affidavit for search warrant is prepared are not paid, unknown tipsters, but actual identified eyewitnesses to transaction, their trustworthiness is presumed."); ***Commonwealth v. Yohn***, 414 A.2d 383, (Pa. Super. 1979) (Affidavit stating that police officer had been personally informed by participant in criminal act as to involvement of defendant and location of fruits of illegal conduct and specifically describing premises to be searched supplied probable cause for issuance of search warrant.)

was clear to the trial court that the search warrant was properly issued by the magisterial district justice. (*See* Court Order, 4/11/2016.) Thus, the trial court did not err in denying suppression of the evidence seized from Appellant's home on May 29, 2014, *i.e.*, fruits of A.A.'s burglary, including drug paraphernalia used by Appellant and the four (4) boys on May 25, 2014.

D. Former defense counsel's supplemental oral arguments for suppression likewise failed to persuade the trial court that the "four corners" of the affidavit of probable cause did not contain sufficient, credible facts for the issuance of a valid search warrant.

During argument on Appellant's Pre-Trial Motion to Suppress, defense counsel, Patricia Cassidy, Esquire, argued that the items searched for in the warrant were not illegal items and thus a search warrant should not have been issued pursuant to Pa. R. Crim. P., Rule 201. (*See* N.T. – Suppression Hr'g at 22.) Defense counsel is correct; cash, "bongs", "pipes/bowls", and "ash catchers" are all items that are not illegal to own or purchase (assuming the purchaser is the appropriate age); however, defense counsel's argument failed because she failed to recognize the search warrant sought these items, *i.e.*, drug paraphernalia, because they were believed to be fruit of the burglary committed by A.A., and to have been delivered and used illegally by Appellant with the four (4) boys for smoking marijuana. ***See* Exhibit** A – Search Warrant Application, 5/29/2014. As explained in the subsection C, *supra*, law enforcements' beliefs and alleged facts as to the origin and location of these items amounted to probable cause under the rules regarding valid search warrants. Thus, with a showing of probable cause, these items were believed to be evidence of burglary, theft, receiving stolen property, and possession of drug paraphernalia, and were further believed to be located within Appellant's residence.

While there were no specific allegations by Appellant in his Motion to Suppress that the information contained within the "four corners" of the affidavit lacked veracity, former defense counsel argued on the record that the information within the affidavit specifically deriving from A.A. was incredible and insufficient to support a finding of probable cause. (*See* N.T. – Suppression Hr'g at 23-25.) However, defense counsel neglected to address the corroborating portions of the other boys' statements indicating A.A. met with them sometime after the burglary, or the corroborating video

surveillance retrieved from the "smoke shop" showing Appellant purchasing the "ash catcher" that the four (4) boys later used to smoke marijuana at Appellant's residence. (***See id.***; N.T. – Trial Day 1 at 56-57[16].) Defense counsel was also unable to provide the trial court with law that supported her contention that information provided to police by a criminal, alone, can never support the issuance of a search warrant. (***See id.*** at 25.) In fact, previous case holding by the Superior Court suggest otherwise. ***See, e.g.***, ***Commonwealth v. Schilling***, 458 A.2d 226, (Pa. Super. 1983) ("Where informants on whose information affidavit for search warrant is prepared are not paid, unknown tipsters, but actual identified eyewitnesses to transaction, their trustworthiness is presumed."); ***Commonwealth v. Yohn***, 414 A.2d 383, (Pa. Super. 1979) (Affidavit stating that police officer had been personally informed by participant in criminal act as to involvement of defendant and location of fruits of illegal conduct and specifically describing premises to be searched supplied probable cause for issuance of search warrant.)

Defense counsel further argued the affidavit did not allege a crime was committed by Appellant, and thus, nothing tied to the search of Appellant's home. (***See id.*** at 25-26 ("[...] the preexisting crime here is not a crime that my client (Appellant) had anything to do with") (defense counsel's reference to "preexisting crime" was to the burglary and theft committed by A.A.).) Defense counsel was right that there was no mention of a crime of purchasing paraphernalia for minors, but she was incorrect that the only crimes listed in the application were burglary and theft. (***See id.***) ***See also*** **Exhibit A** – Search Warrant Application.[17] In fact, the application also included the crimes of receiving stolen property and possession of drug paraphernalia, which at the time, law enforcement suspected were committed by Appellant, *i.e.*, receiving stolen cash and purchasing an "ash catcher" to use to smoke marijuana out of a "bong". ***See*** **Exhibit A** – Search Warrant Application, 5/29/2014.[18] Moreover, even if the crimes of burglary and theft were the only listed crimes on the application, there was still probable cause that fruits

[16] The video surveillance evidence was admitted at trial as Commonwealth's Exhibit C-1.
[17] As stated in an earlier footnote, the Search Warrant Application lists the burglary and theft crimes on the first page of the application, whilst the crimes of receiving stolen property and drug paraphernalia (relating to Appellant) were listed in the continuation section on page 5 of the application.
[18] ***See*** fn. 17, *supra*.

of those crimes, *e.g.*, the stolen cash or purchases made with the stolen cash, would still be found at Appellant's residence. ***See id.*** Thus, defense counsel's supplemental arguments for suppression of evidence likewise failed to persuade the trial court that the "four corners" of the affidavit did not contain sufficient information to establish probable cause necessary for a valid search warrant to issue.

III. THE TRIAL COURT PROPERLY DENIED THE DEFENSE'S ORAL MOTION FOR A MISTRIAL, AS THE PRIVATE CONVERSATION HELD BETWEEN THE PROSECUTOR AND THE COMMONWEALTH'S WITNESS DURING A BREAK IN DIRECT EXAMINATION, THOUGH IMPROPER, WAS NOT BAD FAITH OVER-REACHING, AND DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL.

Instantly, the trial court did not err in denying Appellant's oral motion for a mistrial after it was discovered the prosecuting attorney, Matthew Brittenburg, Esquire, had a private conversation with Commonwealth witness, A.A., outside the purview of the jury during a break in said witness' direct examination. (***See generally*** N.T. – Trial Day 1 at 118-22.) The trial court was well within its discretion in finding the prosecuting attorney's misconduct was not bad faith over-reaching; in determining Appellant was not denied a fair and impartial trial due to the alleged private conversation; and in denying Appellant's motion for a mistrial.

"When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise the trial judge may declare a mistrial only for reasons of manifest necessity." Pa. R. Crim. P. 605(B) "The decision to grant or deny a motion for mistrial is within the sound discretion of the trial court[,]" ***Commonwealth v. Boxley***, 838 A.2d 608, 615 (Pa. Super. 2003) (citation omitted), "and will not be reversed absent a flagrant abuse of [that] discretion." ***Commonwealth v. Reardon***, 542 A.2d 572, 574 (Pa. Super. 1988) (citation omitted), *affirmed in part, vacated in part* 552 A.2d 248, (Pa. 1989). "A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial." ***Commonwealth v. Fetter***, 770 A.2d 762, 768 (Pa. Super. 2001) (citation omitted), *reargument denied, appeal granted in part* 790 A.2d 988, affirmed 810 A.2d 637 (Pa. 2002). ***See also Commonwealth v.***

Hernandez, 446 A.2d 1268, 1273 (Pa. 1982) ("A mistrial is required only when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial.") (citations omitted).

The "test to be applied in [determining whether a mistrial was caused by misconduct on the part of the prosecutor] is whether the Commonwealth engaged in either intentional or bad-faith 'overreaching'." ***Commonwealth v. Ross***, 441 A.2d 1298, 1299 (Pa. Super. 1982) (citing and quoting ***Commonwealth v. Lee***, 416 A.2d 503 (Pa. 1980)); ***see also Commonwealth v. Palmer***, 419 A.2d 555, 557 (Pa. Super. 1980) (misconduct must intend to provoke motion for mistrial "or otherwise be motivated by bad faith."). "The prosecuting lawyer, judged by an objective standard, must be deemed to have been substantially certain that a mistrial would be declared as result of his questions to witness or other conduct at trial." ***Palmer***, 419 A.2d at 557 (citing ***Commonwealth v. Potter***, 386 A.2d 918, 926 (Pa. 1978)).

In ***Commonwealth v. Bradley***, the trial court *sua sponte* declared a mistrial by "manifest necessity" after it was discovered defense counsel held a private conversation with a Commonwealth witness during a lunch recess that interrupted the witness' direct testimony. 457 A.2d 911 (Pa. Super. 1983). Upon appeal, the Superior Court in ***Bradley***, "held that defense counsel's conversation with [the] Commonwealth witness, which was unrelated to events about which witness was testifying and did not amount to tampering with witness, did not create a "manifest necessity" sufficient to justify declaration of mistrial without [the] defendant's consent[.]" ***Id.*** ***See also, e.g., Positano v. Wetzel***, No. 93 C.D. 2016, 2016 WL 4206370, at *5 (Pa. Commw. Aug. 10, 2016) (citing ***Commonwealth v. Doughty***, 126 A.3d 951 (Pa. 2015)) ("intimidation of or tampering with a witness involve conduct intended to compel [...] a witness to withhold testimony regarding the commission of a crime from a law enforcement officer, prosecuting official or a judge."). ***See also*** 18 Pa. C.S.A. § 4952 (Intimidation of witnesses).

Here, the trial court did not err in denying Appellant's motion for a mistrial because the private conversation between the Commonwealth's attorney and witness during a break in direct examination was not directly related to the events about which witness was testifying, and did not deny Appellant a fair and impartial trial. (***See*** N.T. – Trial Day 1 at 118-22.) The private conversation in question, which occurred

outside the presence of the jury, essentially entailed the prosecuting attorney introducing A.A. to his Fifth Amendment counsel (George Yacoubian, Esquire) and advising A.A. that if anything came up regarding any of his criminal cases, that Fifth Amendment counsel was present in the courtroom. (***See id.*** at 119-20.) Nevertheless, prior to the break in the trial, the trial court instructed A.A. was not to speak to anyone during the break about his testimony and that "his counsel" (Fifth Amendment counsel) was available if A.A. had any specific questions for him unrelated to his testimony. (***See id.*** at 116:24-25, 117:2-6.) Defense counsel did not add anything to the factual basis of the private conversation in her argument for a mistrial. (***See id.*** at 121:13-25, 122:2-4.) With that, the trial court found that, while it was improper for the Commonwealth's attorney to hold any private conversation with A.A., the misconduct was not the result of bad-faith overreaching meant to provoke a motion for mistrial, and such did not deny Appellant a fair and impartial trial. (***See id.*** at 124.) Thus, the trial court's denial of Appellant's motion for a mistrial was proper.

IV. GIVEN THE SEARCH WARRANT OF APPELLANT'S RESIDENCE WAS VALIDLY OBTAINED AND EXECUTED ON MAY 29, 2014, THE EVIDENCE SEIZED THEREFROM, ALONG WITH THE OTHER CORROBORATING EVIDENCE AND TESTIMONY ADMITTED AT TRIAL, IS SUFFICIENT TO PROVE APPELLANT GUILTY BEYOND A REASONABLE DOUBT OF THE CRIMES FOR WHICH HE WAS ULTIMATELY CONVICTED.

The evidence presented at trial, including that which was gained in reliance of the properly executed search warrant of Appellant's residence, was sufficient to sustain Appellant's convictions for Corruption of Minors, Possession with Intent to Deliver Drug Paraphernalia, Criminal Conspiracy, and Possession with Intent to Use Drug Paraphernalia. (***See*** Disposition – Deferred Sentence, 6/29/2016.) More specifically, the physical evidence seized from Appellant's home was admissible because the search warrant was valid, as explained in Section II, subsections (A) through (D), *supra*; A.A.'s statements to police were corroborated, in part, by the other juveniles' statements and ultimately led to the successful seizure of evidence in Appellant's home; and A.A.'s testimony at trial was credible. Moreover, the fact that A.A. had a private conversation with the prosecutor during a break in his direct examination does not

in any way undermine A.A.'s credibility, as the private conversation was not directly related to his testimony (explained in greater detail in Section III, *supra*).

"When considering whether evidence introduced at trial is sufficient to sustain a conviction, [the Superior Court] must view all evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth, as the verdict winner, and consider whether the trier of fact could have found that each element of the offense charged was supported by evidence and inference[s] sufficient to prove guilt beyond a reasonable doubt." ***Commonwealth v. Brown***, 701 A.2d 252, 254 (Pa. Super. Ct. 1997) (citations omitted); ***Commonwealth v. Cousar***, 928 A.2d 1025, 1032-1033 (Pa. 2007), *cert. denied*, 171 L. Ed. 2d 235 (U.S. 2008). "The Commonwealth may sustain its burden by proving the crime[s'] elements with evidence which is entirely circumstantial and the trier of fact, who determin[e] credibility of witnesses and the weight to give the evidence produced, is free to believe all, part, or none of the evidence." ***Brown***, 701 A.2d at 254. ***See also Commonwealth v. Stokes***, 78 A.3d 644, 649 (Pa. Super. 2013) (reasonable doubt necessarily entails that a conviction "must be based on more than mere suspicion or conjecture;" however, "the Commonwealth need not establish guilt to a mathematical certainty.") (citations omitted). Moreover, "when reviewing the sufficiency of the evidence, [the Superior Court] may not substitute its judgment for that of the fact-finder; if the record contains support for the convictions they may not be disturbed." ***Stokes***, 78 A.3d at 649.

Instantly, the properly admitted evidence in the record is sufficient to support Appellant's convictions beyond a reasonable doubt. Physical evidence was obtained both through law enforcements' investigation of Appellant's crimes and interrogation of witnesses before and after the search warrant was validly obtained and executed. ***See*** **Exhibit A** – Search Warrant Application, 5/29/2014; **Exhibit B** – Inventory of Seized Property, 5/29/2014. Witness statements and A.A.'s credible testimony, in large part, corroborated A.A.'s statements to law enforcement that Appellant had taken the four (4) minor boys to a "smoke shop" to purchase an "ash catcher" and a glass "pipe/bowl", and later smoked with the four (4) minors at his residence using a three (3)-foot "bong". ***See*** **Exhibit A** – Search Warrant Application,

5/29/2014; **Exhibit D** – A.A.'s Statement; **Exhibit E** – M.F.'s Statement. (***See also generally*** N.T. – Trial Day 1, 2.) Thus, Appellant's allegation that the evidence in this matter is insufficient fails.

For purposes of clarity, the remaining subsections (A) through (D) of this Section IV are organized in such a way that the statutory definitions for each crime of which Appellant was convicted are given *in tandem* with the evidence presented by the Commonwealth that fulfill the elements defined for the respective crimes.

A. The evidence was sufficient to prove Appellant guilty beyond a reasonable doubt of Corrupting of Minors, as defined under 18 Pa. C.S.A. § 6301(A)(1)(i).

The evidence was sufficient to prove Appellant guilty beyond a reasonable doubt of Corruption of Minors, which is defined under under 18 Pa. C.S.A. § 6301(A)(1)(i), as follows:

> [W]hoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.

Here, Appellant was over the age of eighteen (18) at the time of the incidents (May 25, 2014) leading to his convictions; in fact Appellant was fifty-one (51) years at that time (DOB: March 27, 1963). (***See***, *e.g.*, Criminal Complaint, dated 8/14/2014, docketed 10/29/2014.) The acts committed by Appellant, specifically buying drug paraphernalia to deliver to the four (4) minor boys, including Appellant's son, and using various drug paraphernalia owned by Appellant to smoke marijuana with these minor children (less than eighteen (18) years of age), corrupted or tended to corrupt the morals of these minors and necessarily encouraged their commission of a crime (*i.e.*, use of drug paraphernalia to inhale a controlled substance). (***See*** N.T. – Trial Day 1 at 36, 43, 77, 80; N.T. – Trial Day 2 at 198.[19]) The recorded video surveillance from the "smoke shop" on May 25, 2014, showed Appellant in the "smoke shop"; exiting with unpaid merchandise in order to ensure with A.A., who was waiting in Appellant's

[19] At trial, the Commonwealth asked each witness their date of birth and respective ages on May 25, 2014, which confirmed they were in fact minors at the time Appellant committed his crimes.

vehicle, that Appellant was purchasing the correct "piece"; then returning to make the purchase of an "ash catcher" and a "pipe/bowl". (***See*** N.T. – Trial Day 1 at 56-57[20], 60-61, 68-70, 88, 92-96, 101, 138-40, 147, 150-51, 165-66; N.T. – Trial Day 2 at 230.) The four (4) boys used the "ash catcher" (that Appellant purchased) in conjunction with a one (1)-foot "bong" to smoke marijuana at Appellant's residence on May 25, 2014, while the "pipe/bowl" that was purchased by Appellant was specifically for A.A.'s future personal use.[21] (***See id.*** at 56-57[22], 99, 101, 137-40; ***see also*** N.T. – Trial Day 2 at 83-84, 205, 238-39 (Appellant's son testifying as to his history of smoking marijuana.) Later on that same day, Appellant and his son left his residence to obtain a used three (3) foot "bong", which was then used by Appellant and the four (4) boys to smoke marijuana together at his residence. (***See*** N.T. – Trial Day 1 at 88, 96, 101-07, 138-39; N.T. – Trial Day 2 at 82, 104-06, 230.) ***See also*** **Exhibit D** – A.A.'s Statement at 3-4.

Appellant did not just deliver drug paraphernalia to the four (4) minor boys; he encouraged their use of the same to inhale marijuana (a controlled substance). Appellant used a three (3)-foot "bong" to smoke marijuana with the four (4) boys as well on May 25, 2014. (***See*** N.T. – Trial Day 1 at 88, 96, 101-07, 138-39; N.T. – Trial Day 2 at 82, 104-06, 230.) Appellant, having inappropriately treated his son and the other three (3) boys as Appellant's own peers, was admired for his actions. (***See***, *e.g.*, N.T. – Trial day 1 at 106-08, 106:20-21, 108:7 ("He (Appellant) just went crazy on it, just smoked heavy on it"; A.A. testifying excitedly[23] about Appellant's uncanny ability to "clea[r] the entire" three (3)-foot "bong" tube full of heavy marijuana smoke with only one (1) inhale without much coughing afterward); N.T. – Trial Day 2 at 82 (A.A. told the affiant Appellant "hit" the large, three (3)-foot "bong", "like a champ when he was smoking that bong".) In addition, Appellant went as far as harassing (A.A.) to continue partying on

[20] The video surveillance evidence was admitted at trial as Commonwealth's Exhibit C-1.

[21] The affiant testified the glass "pipe/bowl" was not recovered at Appellant's residence upon execution of the search warrant, but that A.A.'s mother had brought the "pipe/bowl" into the police station. Though, the "pipe/bowl" was apparently destroyed by another detective within the department. (***See*** N.T. – Trial Day 2 at 153-54.)

[22] The video surveillance evidence confirming Appellant's purchases at the "smoke shop" was admitted at trial as Commonwealth's Exhibit C-1.

[23] (***See also*** N.T. – Trial by Jury at 36-37, July 1, 2016 ("N.T. – Trial Day 3") (Commonwealth's closing argument).)

the night of May 25, 2014, when the minor expressed wanting to leave Appellant's house. (***See*** N.T. – Trial Day 1 at 115, 160-61 (in response, A.A. lied to Appellant about having a curfew); N.T. – Trial Day 2 at 82 (A.A. told the affiant Appellant called him a "little pussy" for wanting to leave the party at Appellant's residence).)

The jury, as the fact-finder, was able to consider this evidence, along with other corroborating evidence and testimony (that the trial court will discuss in greater detail Section V, *infra*); assign weight and credibility to the same; and to ultimately find each and every element of the crime of Corruption of Minors, as defined under 18 Pa. C.S.A. § 6301(A)(1)(i), beyond a reasonable doubt.

B. The evidence was sufficient to prove Appellant guilty beyond a reasonable doubt of possession of drug paraphernalia with intent to deliver the same, as defined under 35 P.S. § 780-113(a)(33).

The evidence was sufficient to prove Appellant guilty beyond a reasonable doubt of possession of drug paraphernalia with the intent to deliver the same, which is defined under 35 P.S. § 780-113(a)(33), as follows:

> The delivery of, possession with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this act.

Here, Appellant delivered drug paraphernalia, *i.e.*, an "ash catcher", a glass "pipe/bowl", and a three (3)-foot "bong" to minor children, knowing they would be used by the four (4) boys to inhale marijuana; particularly as Appellant, himself, smoked marijuana with these minors using the three (3)-foot "bong". (***See*** N.T. – Trial Day 1 at 56-70[24], 88, 96, 101-02, 106-07, 140-43, 154; N.T. – Trial Day 2 at 84-85, 105-06.) Corroborative evidence proved Appellant indeed went to a Philadelphia "smoke shop" and purchased an "ash catcher" on May 25, 2014, that was used later the same day by the four (4) minors

[24] The video surveillance evidence confirming Appellant's purchases at the "smoke shop" was admitted at trial as Commonwealth's Exhibit C-1.

in conjunction with a one (1)-foot "bong" to smoke marijuana at Appellant's residence. (***See*** N.T. – Trial Day 1 at 58, 99 (shopkeeper positively identified Appellant as purchaser of "ash catcher" in-court); N.T. – Trial Day 2 at 84-85 (affiant obtained video surveillance[25] of "smoke shop" purchases, and confirmed purchases with shopkeeper).) In addition, Appellant purchased a glass "pipe/bowl" from the "smoke shop" specifically for A.A.'s future, personal use. (***See*** N.T. – Day 1 at 56-57, 60-61, 68-70, 92, 96, 140, 144-45 (A.A. told affiant Appellant had to make the purchase because the boys were minors[26].) Appellant and his son separately obtained on the same day the three (3)-foot "bong" that was used by Appellant and the four (4) boys to smoke marijuana together. (***See id.*** at 106-08; N.T. – Trial Day 2 at 105-06.) This evidence proved Appellant delivered the drug paraphernalia to the four (4) minor boys.

After a search warrant was validly obtained and executed on May 29, 2014, the one (1)-foot and three (3)-foot "bongs", the "ash catcher" purchased by Appellant on May 25, 2014, among other drug paraphernalia, were seized from Appellant's residence, some of which tested positive for residue of marijuana and cocaine. ***See*** **Exhibit A** – Search Warrant Application, 5/29/2014; **Exhibit B** – Inventory of Seized Property, 5/29/2014; **Exhibit C** – NMS Labs Drug Chemistry Report. (***See also*** N.T. – Trial Day 1 at 44.) A majority of this evidence seized from the den area of the residence where Appellant slept; the bathroom adjoining the den where Appellant slept[27]; and Appellant's office. ***See*** **Exhibit B** – Inventory of Seized Property, 5/29/2014. (***See also*** N.T. – Trial Day 2 at 96-97, 101, 103, 108-112, 115-120.) This seized evidence proved Appellant was the party responsible for possessing the drug paraphernalia.

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[25] The video surveillance from the "smoke shop" on May 25, 2014, showed Appellant in the "smoke shop", exiting with unpaid merchandise in order to ensure with a minor that he was purchasing the correct "piece", then returning to make the purchases of the "ash catcher" and the "pipe/bowl". (***See*** N.T. – Trial Day 1 at 56-57, 60-61, 68-70, 95, 147, 165-66 (video admitted as Commonwealth's Exhibit C-1).)

[26] A.A.'s statement to the affiant that Appellant had to make the purchases at the "smoke shop" because anyone younger than eighteen (18) years of age is prohibited from entering the "smoke shop" was corroborated by video surveillance and the shopkeeper's testimony regarding store policy and a cautionary sign on the door the "smoke shop". (***See*** N.T. – Trial Day 1 at 56-58, 68-70.)

[27] A particular piece of evidence seized from this bathroom, a "pipe/bowl" was located next to Appellant's wallet, and was admitted at trial as Commonwealth's Exhibit C-19. (***See*** N.T. – Trial Day 2 at 108-120, 122, 125, 250-51.)

The jury, as the fact-finder, was able to consider this evidence, along with other corroborating evidence and testimony, to find each and every element of the crime of possession of drug paraphernalia with the intent to deliver the same (to the minor boys) beyond a reasonable doubt.[28]

C. The evidence was sufficient to prove Appellant guilty of Criminal Conspiracy, as defined under 18 Pa. C.S.A. 903(a)(1).

The evidence was sufficient to prove Appellant guilty beyond a reasonable doubt of Criminal Conspiracy; a crime defined under 18 Pa. C.S.A. 903(a)(1), as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
>
> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Here, Appellant promoted and facilitated the commission of the crime of possession of drug paraphernalia with the intent to use the same for inhaling marijuana, per an agreement with his minor son to engage in conduct (*i.e.*, smoking marijuana with various paraphernalia) with three (3) other minor children that constituted such a crime. Appellant purchased an "ash catcher" that the four (4) boys used with the one (1)-foot "bong" to smoke marijuana at Appellant's residence. (***See*** N.T. – Trial Day 1 at 92, 96, 99, 140; N.T. – Trial Day 2 at 84-85.) ***See also*** **Exhibit B** – Inventory of Seized Property, 5/29/2014. Appellant also agreed with A.A. to purchase a glass "pipe/bowl" for A.A.'s personal use in the indefinite future. (***See*** N.T. – Day 1 at 144-47, 165-66; N.T. – Trial Day 2 at 84-85.) Appellant and his son agreed to obtain a three-(3) foot "bong" that was used by Appellant and the four (4) boys to smoke marijuana. (***See*** N.T. – Trial Day 1 at 106-08; N.T. – Trial Day 2 at 82.) ***See also*** **Exhibit B** – Inventory of Seized Property, 5/29/2014.

[28] The trial court will discuss weight and credibility of the evidence in greater detail in Section V, *infra*.

The jury, as the fact-finder, was able to consider this evidence, along with other corroborating evidence and testimony to find each and every element of the crime of Criminal Conspiracy beyond a reasonable doubt.

D. The evidence was sufficient to prove Appellant guilty beyond a reasonable doubt of the use of drug paraphernalia, as defined under 35 P.S. § 780-113(a)(32).

The evidence was sufficient to prove Appellant guilty beyond a reasonable doubt of the use of drug paraphernalia, which is a crime defined under 35 P.S. § 780-113(a)(32), as follows:

> The use of, or possession with intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this act.

Law enforcement's execution of the valid search warrant on May 29, 2014, uncovered and seized drug paraphernalia possessed by Appellant in his residence that was used for processing, storing, and inhaling marijuana. ***See*** **Exhibit B** – Inventory of Seized Property, 5/29/2014. Many of the seized items were found in the place in which Appellant slept; the bathroom attached to where Appellant slept; and Appellant's office. (***See*** N.T. – Day 2 at 119-128.) Some of the items were sent to NMS Labs for further testing, which revealed traces of marijuana and cocaine. (***See*** N.T. – Trial Day 1 at 44.) ***See also*** **Exhibit C** – NMS Labs Drug Chemistry Report. A.A.'s subsequent statements to police and his testimony indicated the three (3)-foot "bong" that Appellant obtained with his son was used by Appellant and the four (4) boys to smoke marijuana together on May 25, 2014. (***See*** N.T. – Day 1 at 106-08; N.T. – Day 2 at 82.[29])

[29] The three (3)-foot "bong" was not brand new and had marijuana tar build-up, and so Appellant first took the paraphernalia into the kitchen, and cleaned the same with a salt and water mixture in the sink; Appellant's intent being to use the same with the four (4) boys to smoke marijuana afterward. (***See*** N.T. – Trial Day 1 at 106.)

The jury, as the fact-finder, was able to consider this evidence, along with other corroborating evidence and testimony to find each and every element of the crime of possession of drug paraphernalia with the intent to use (*i.e.*, to inhale marijuana) beyond a reasonable doubt.

V. APPELLANT'S CONVICTIONS ARE NOT AGAINST THE WEIGHT OF THE EVIDENCE.

Contrary to Appellant's position, the admitted testimony and evidence presented at trial that supported Appellant's convictions were credible, while the testimony of witnesses that attempted to exculpate Appellant was understandably biased and incredible. (***See*** Appellant's Concise Statement ¶ 4.) Thus, the jury's verdict was consistent with the weight of this evidence.

"An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court." ***Stokes***, 78 A.3d at 650-51 (citing ***Widmer***, 744 A.2d at 751-52). "An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence." ***Cousar***, 928 A.2d at 1035-36 (citing ***Keaton***, 729 A.2d at 540-41). "The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." ***Id.*** Trial judges, then, must "determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." ***Widmer***, 744 A.2d at 751–52 (citations and quotations omitted). The Superior Court shall only grant relief, "where the facts and inferences of record disclose a palpable abuse of discretion[,]" in reaching this determination. ***Cousar***, 928 A.2d at 1035-36.

Here, A.A.'s statement to police and testimony at trial were reasonably consistent and credible. A.A. While A.A. did not initially confess to the underlying robbery when questioned by police, he eventually admitted to taking the cash in the sum of about $510.00, understandably after police informed him that latent fingerprints were lifted from the scene of the crime. (***See*** N.T. – Trial Day 1 at 43; N.T. – Trial Day 2 at 66-68.) Moreover, this was not A.A.'s first encounter with the law; the affiant was familiar with A.A. from a prior CVS retail theft and an investigation of a PS3 theft, and A.A.'s initial claim of

innocence was unsurprising to the affiant. (*See* N.T. – Trial Day 2 at 64-65.) The Commonwealth and A.A. had an agreement, such that A.A. would be released earlier from a juvenile boys' detention center, where he was placed after he admitted guilt to the underlying, juvenile burglary, in exchange for his testimony at Appellant's trial in this matter. (*See* N.T. – Trial Day 1 at 51, 111-14, 126.) ***See also*** **Exhibit G** – A.A.'s Juvenile Disposition. However, this agreement was made *after* A.A.'s statements to police implicating Appellant of his crimes; and so it did not serve as a motivation for Appellant to fabricate claims in his testimony at trial. (*See id.* at 114.) Appellant's testimony at trial was reasonable consistent with his statements to police, and was corroborated by other evidence. (*See* N.T. – Trial Day 1 at 77.) ***See also*** **Exhibit A** – Search Warrant Application, 5/29/2014; **Exhibit B** – Seized Property Inventory, 5/29/2014; **Exhibit D** – A.A.'s Statement. A.A.'s consistency is even more noteworthy given Appellant's trial commenced over two (2) years after the date of the underlying burglary and Appellant's crimes occurred, and A.A. was high and had slower perception of time from smoking marijuana for a large part of the day in question. (*See* N.T. – Trial Day 1 at 163-64.) Thus, while A.A. may not be the most trustworthy person, the jury could reasonably believe his statements and testimony at trial because of the way in which he testified and the corroboration of the other evidence in this case. (*See* N.T. – Trial Day 1 at 41-43.)

There were no obvious reasons why A.A. would falsely implicate Appellant in his crimes unrelated to the burglary; in fact, the evidence shows A.A. simply informed police of Appellant's crimes somewhat inadvertently when the affiant spoke with A.A. as follow-up to law enforcement's taking of M.F.'s statement.[30] (*See* N.T. – Trial Day 2 at 68-80.) Specifically, M.F. confirmed that A.A. was in fact

[30] Notably, M.F.'s statement was taken by another detective at the same time affiant took A.A.'s statement, and the first time the affiant learned of the four (4) boys' trip with Appellant to the "smoke shop" on May 25, 2014, was from M.F.'s statement, not from A.A.'s statement. A.A.'s initial statement attached hereto as **Exhibit D** only mentions money being used for a new "bong" and new "piece"; however, A.A. gave subsequent statements to law enforcement and testified in more detail about the "smoke shop" and the subsequent purchases made therein by Appellant. (***See also*** N.T. – Trial Day 2 at 78, 83-84, 138, 140, 149-50 (the affiant testified initially learning of "smoke shop" from M.F.'s statement

with the three (3) other boys at some point on May 25, 2014, but lied that A.A. was "ditched" before the three (3) other boys returned to Appellant's residence and that A.A. went into the "smoke shop" to purchase the "ash catcher". (***See id.*** at 72.) With this "new" information from M.F. about a "smoke shop", the affiant spoke with A.A. again and asked him about the "smoke shop" and only then, in the interest of not getting into more trouble, did A.A. implicate Appellant, as A.A. explained he could not have gone into a "smoke shop" because he was less than eighteen (18) years of age. (***See*** N.T. – Trial Day 1 at 109-10, 143-44; N.T. – Trial Day 2 at 72.)

A.A.'s statement to police led to further investigation and discovery of corroborating evidence. ***See*** **Exhibit D** – A.A.'s Statement. The affiant, prior to applying for the search warrant in this case, went to the "smoke shop" where A.A. indicated Appellant had taken the four (4) boys to purchase an "ash catcher" and a glass "pipe/bowl". ***See*** **Exhibit B** – Search Warrant Application. The affiant was able to confirm with the shopkeeper that the sale of the same occurred on May 25, 2014, and was able to obtain video surveillance on the date in question showing Appellant purchasing the paraphernalia in the manner in which A.A. described.[31] (***See*** N.T. – Trial Day 1 at 52, 56-58, 65-67, 92, 96, 140.) Moreover, the shopkeeper positively identified Appellant at trial as the person who purchased the paraphernalia in question on May 25, 2014. (***See*** N.T. – Trial Day 1 at 58.) ***See also, e.g., Commonwealth v. Schilling,*** 458 A.2d 226, (Pa. Super. 1983) ("Where informants on whose information affidavit for search warrant is prepared are not paid, unknown tipsters, but actual identified eyewitnesses to transaction, their trustworthiness is presumed.") Given this corroborating evidence, and the trustworthiness of the same, Appellant's convictions are not against the weight of the evidence.

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and then following-up with A.A).) Thus, A.A. did not initially implicate Appellant in his crimes, but became obliged when the affiant followed-up with A.A. after M.F.'s reference to the "smoke shop".

[31] A.A. explained that Appellant came out of the "smoke shop" before ultimately purchasing the glass "pipe/bowl" in order to ensure it was the "piece" that A.A. desired; the video surveillance confirms this; and A.A.'s testimony that he did not have a clear view into the store from Appellant's vehicle would explain the necessity of Appellant having to physically come out of the "smoke shop" to confirm with A.A. (***See*** N.T. – Trial Day 1 at 56-61, 93-95, 150-51.)

M.F.'s statement to police was mostly consistent with A.A.'s statements and with the other circumstantial evidence in this case. ***See*** **Exhibit E** – M.F.'s Statement. M.F.'s testimony, on the other hand, was an incredible attempt of M.F. to exculpate Appellant. (***See generally*** N.T. – Trial Day 2 at 4-44 (M.F.'s testimony).) M.F.'s testimony was incredible because he was biased, albeit understandably, in favor of Appellant, as M.F. testified he was good friends with Appellant's son and did not want his friend's father (Appellant) to get into trouble. (***See id.*** at 8, 41- 42.) M.F. testified he was no longer friends with A.A. at the time of trial and the last time he hung out with A.A. was around the time of May 25, 2014. (***Id.***) It is also apparent from the record that M.F. did not want to be in court testifying on behalf of the Commonwealth and was there because a subpoena directed his appearance. (***Id.*** at 42.) The trial court eventually declared M.F. a "hostile witness" after a brief sidebar conference was held outside the purview of the jury and off the record; the main reason being M.F.'s argumentative and non-cooperative behavior during direct examination. (***Id.*** at 28.) M.F.'s testimony was also incredible because he struggled with dates and details on direct, (*e.g.*, explaining whether Appellant' son lived at Appellant's residence at the time of the burglary and Appellant's crimes, explaining the last time he "hung out" with A.A.), and often had to be corrected by the Commonwealth. (***Id.*** at 15-19.) For example, M.F. incredibly testified that he did not smoke with the "ash catcher" that was purchased at the "smoke shop" until weeks after May 25, 2014, despite evidence showing law enforcement seized the "bong" and "ash catcher" four (4) days after, on May 29, 2014. (***Id.*** at 40-41; ***see also*** N.T. – Trial by Jury at 21, July 1, 2016 ("N.T. – Trial Day 3").) When confronted with this inconsistency by the Commonwealth, M.F. retracted his testimony and instead testified he was "not sure" if he smoked from the "ash catcher" on May 25, 2014. (***See*** N.T. – Trial Day 2 at 44.) M.F. also admitted to lying in his statement to police that A.A. entered the "smoke shop" to purchase the "ash catcher", and attempted to minimize the ensuing damage to his credibility by coining the phrase "unintentional lie," which is somewhat of an oxymoron. (***Id.*** at 32-34.)

Appellant's son's testimony was likewise incredible and understandably biased in favor of Appellant. (*See* N.T. – Trial Day 3 at 21 (the Commonwealth discussing bias in Appellant' son's and M.F.'s testimonies; arguing incredibility of those witnesses in closing argument.) Appellant's son's demeanor, like his friend, M.F., was argumentative and excited, particularly during examination by the Commonwealth, and the transcript reads that way as well. (*See generally* N.T. – Trial Day 2 at 198-260.) Appellant's son testified to having lied in his statement to police that he had not received $100.00 from A.A., that he had no personal history of marijuana usage, and that he did not know if A.A. had smoked marijuana on May 25, 2014, or otherwise. (***See id.*** at 239-40, 247, 265.) ***See also*** **Exhibit F** – Appellant's Son's Statement. Appellant's son also tried to incredibly claim ownership of all the paraphernalia seized on May 29, 2014, from Appellant's residence. (*See* N.T. – Trial Day 2 at 248-55.) However, when the Commonwealth pointed out that cocaine residue was detected on some of the seized evidence[32], Appellant's son testified that he knew nothing about cocaine and never used it before. (***See id.*** at 254.) Appellant's son then peculiarly tried to blame A.A. for any cocaine that might have been found in Appellant's residence. (***Id.*** at 255.) The Commonwealth also pointed out a "pipe/bowl" that was seized was found in the bathroom attached to the den where Appellant admittedly slept in the residence, next to Appellant's wallet; after which Appellant's son testified that police "could have" taken the "pipe/bowl" from another room and planted it by Appellant's belongings. (***See id.*** at 250-51.) Though, Appellant's son offered no basis for this incredible hypothesis of police misconduct. (***Id.***) Appellant's son testified as to Appellant taking the four (4) boys to the pizza shop, but even when confronted with the video surveillance of his father (Appellant) purchasing the "ash catcher" and glass "pipe/bowl", would not admit that Appellant took the boys to the "smoke shop". (***See id.*** at 233-34.)

Finally, upon agreement of counsel, the trial court specifically instructed the jury on, *inter alia*, prior inconsistent statements as to A.A. and M.F., as well as, on "false in one, false in all", using the

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[32] NMS Labs tested some of the seized items and determined marijuana and cocaine residue were found on the tested items. (*See* N.T. – Trial Day 2 at 173, 186.) ***See also*** **Exhibit C** – NMS Labs Drug Chemistry Report.

model jury instructions 4.08(a) and 4.15, respectively. (*See* N.T. – Trial Day 2 at 161-68 (trial court reviewing closing jury charges with counsel); N.T. – Trial Day 3 at 41 (trial court's instructions commence).) With these instructions and closing argument by both parties' counsel, the jury was certainly aware of the inconsistencies in the witnesses' testimony and among their initial statements to law enforcement, and was able to appropriately assign weight and credibility, if any, to the same. Thus, Appellant's convictions are not against the weight of the evidence.

CONCLUSION

Wherefore, the reasons stated above, the trial court's rulings on admissibility of evidence, Appellant's convictions, and his subsequent sentence should be affirmed.

BY THE COURT:

GAIL A. WEILHEIMER, J.

Copy mailed on August 17, 2017, to:
Superior Court Prothonotary
DA's Office – Appellate Division
Defense Counsel, Bonnie-Ann Keagy, Esquire

Marian McDonnell