NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. GEORGE DAVID RAINEY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 491 MDA 2011

Appeal from the Judgment of Sentence February 14, 2011
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0002018-2008

BEFORE: BOWES, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY BOWES, J.: **FILED MAY 01, 2013**

George David Rainey appeals from the judgment of sentence of twenty-one and one-half to forty-three years incarceration that was imposed after he was convicted of third-degree murder and conspiracy to commit aggravated assault. After careful review, we affirm the convictions but vacate the judgment of sentence for an evidentiary hearing to be conducted in order to determine if a new trial is required based upon after-discovered evidence, and, if not, for the re-imposition of sentence.

Appellant's convictions arose from his participation in the January 9, 2008 death of Dion Williams, who was shot by Appellant's brother, Eugene Rainey. The events preceding the shooting involved two cars, an

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* Retired Senior Judge assigned to the Superior Court.

Escalade driven by Appellant wherein Eugene and Joseph Mallory were passengers and a Camry driven by Letikia Engram wherein Mr. Williams was the passenger. Joseph Mallory and Letikia Engram were among the witnesses who testified against Appellant at trial.

On January 9, 2008, Ms. Engram borrowed a green Toyota Camry from her friend, Ebony Evans, to attend a job interview. Mr. Williams, a mutual friend, was staying at a residence shared by Ms. Engram and Ms. Evans. Ms. Engram and Mr. Williams were running errands when the Escalade being driven by Appellant began to pursue them. Mr. Mallory confirmed that Appellant intentionally followed the Camry after spotting it on the street on the day in question. Ms. Engram attempted to avoid the Escalade by speeding, but Appellant continued to follow her closely.

At one point, Ms. Engram paused at a stop sign, and Appellant's brother exited the Escalade and approached the passenger side of the vehicle, where Mr. Williams was located. Ms. Engram quickly continued through the stop sign, and Appellant renewed the chase. He eventually cut in front of the Camry and blocked it in an alley. Appellant then leaned from his window and shouted at Mr. Williams, "[W]hat's good now, nigga," and "[W]hat's good now pussy, what's good now?" N.T. Trial, 12/13-16/10, at 83. Ms. Engram testified that she knew that the language was directed at Mr. Williams, and, when asked how she knew that Appellant was yelling at

Mr. Williams, she responded that Appellant and the victim "had like problems a long time ago, beef a long time ago." ***Id***. at 84.[1]

Appellant's brother Eugene exited the Escalade in possession of a handgun and ran to the passenger side of the Camry. He fired four bullets into the car's passenger side, striking Mr. Williams twice and killing him. During the shooting, Ms. Engram ducked, placed her car in reverse, and hit a building. Appellant screamed at Eugene to get back into the Escalade, and, once he did, Appellant sped away from the crime scene. Appellant immediately asked his brother, "[D]id you shoot him? [D]id you shoot him, Dion can take a leg shot, Dion can take a leg shot." ***Id***. at 159. Mr. Mallory informed the jury that the motive for the killing was that "Mr. Williams had robbed [Appellant] a couple years prior of his children's jewelry." ***Id***. at 184.

After the shooting, Ms. Engram immediately drove Mr. Williams to the hospital. While *en route*, she telephoned Ms. Evans about the shooting and informed her that Eugene Rainey shot Mr. Williams and that Appellant was driving the Escalade that pursued Mr. Williams prior to the crime.

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[1] Appellant did not object to this question and response. He objected to the next question, which was whether Ms. Engram was aware of "the nature of those problems?" N.T. Trial, 12-13-19-10, at 84. That objection was sustained since the basis of Ms. Engram's knowledge emanated from inadmissible hearsay. However, Appellant did not demand that Ms. Engram's response to the previous question be stricken or that the jury be instructed to disregard that answer.

Ms. Engram delivered the victim to the hospital, but did not stay. She then parked the Camry, which police discovered later that day. The front and rear passenger windows were shattered, there were bullet holes in the front and rear passenger doors, and the vehicle had a flat tire and damage to its bumper. Two bullets were found in the Camry, and there were four bullet casings at the scene of the shooting.

After Ms. Engram parked the car, she started to walk to her residence to calm herself. She saw police at her home and waited for them to leave before entering it. Appellant's girlfriend arrived at Ms. Engram's residence and asked for Ms. Engram's telephone number so that Appellant could speak with Ms. Engram. Appellant then telephoned Ms. Engram and said, "[F]uck it, if he live, he live, it is what it is. Tell that nigga I said to get at me, which I highly doubt that he's gonna do that if he dies." ***Id***. at 98. Thereafter, Appellant continuously called Ms. Engram and Ms. Evans and told them to talk to his lawyer rather than the police.

On January 9, 2008, Appellant offered Ms. Engram money not to speak to police, but Ms. Engram gave a statement to police at approximately 5:00 p.m. that day. Brandon Davis testified that, a few days following the murder, Appellant asked him to take care of Ms. Engram in exchange for $20,000. Mr. Mallory testified that Appellant and his brother called him and told him not to speak with police but to talk to their lawyer instead. Mr. Mallory gave his statement to police on January 11, 2008. Appellant and

his brother were apprehended in a hotel room in Maryland on January 18, 2008.

Appellant's first trial resulted in a mistrial. The Commonwealth retried Appellant on March 16 through March 18, 2009. At the conclusion of the second trial, Appellant was convicted of third-degree murder and criminal conspiracy to commit aggravated assault and sentenced to twenty-five to fifty years imprisonment. On direct appeal, we concluded that Appellant's trial counsel should have been permitted to withdraw due to an actual conflict of interest, reversed the judgment of sentence, and awarded Appellant a new trial. ***Commonwealth v. Rainey***, 4 A.3d 209 (Pa.Super. 2010) (unpublished memorandum).

Appellant's third trial began on December 6, 2010. On December 9, 2010, that jury convicted Appellant of conspiracy to commit aggravated assault but were deadlocked on the charge of third-degree murder. After a fourth trial commencing on December 13, 2010, Appellant was convicted on December 16, 2010, of third-degree murder. On February 14, 2011, the court sentenced Appellant to twenty to forty years incarceration on the murder count and a consecutive term of imprisonment of one and one-half to three years for the conspiracy offense. This timely appeal ensued. The court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the court authored its Pa.R.A.P. 1925(a) opinion. The matter is now ready for our review.

Appellant raises eleven issues for this Court's consideration:

1. Whether the Court erred in instructing the jury that it could find Mr. Rainey guilty of third degree murder based on a conspiracy theory when it is legally impossible to conspire to commit a unintentional crime? [meritorious—but must address all sufficiency claims first and there is a conflict in precedent—Supreme Court considering issue currently]

2. Whether the evidence was legally sufficient to support a conviction for criminal conspiracy to commit aggravated assault, 18 Pa.C.S.A. § 2702, where the evidence only establish Mr. Rainey's, mere presence at the scene of the crime?

3. Whether the evidence was legally sufficient to support a conviction for murder in the third degree, 18 Pa.C.S.A. § 2502, where the evidence only established Mr. Rainey's mere presence at the scene of the crime?

4. Whether the court erred in denying Mr. Rainey's motion for judgment of acquittal made at the close of the Commonwealth's case during the December 6th and December 13th trials where the evidence proved only Mr. Rainy's [sic] mere presence at the scene of the crime?

5. Whether the court erred in denying Mr. Rainey's post-trial motion to dismiss where the Commonwealth's evidence was clearly was [sic] insufficient to support a conviction?

6. Whether the court abused its discretion by interrogating witnesses including Mr. Rainey in an admittedly argumentative and biased manner?

7. Whether the court erred in denying Mr. Rainey's request for an involuntary manslaughter jury instruction where the Commonwealth introduced evidence supporting such a charge?

8. Whether the court erred in denying Mr. Rainy [sic] his right to counsel by ordering a retrial when lead counsel was unavailable and before transcripts of the December 6th trial

were available for impeachment and cross-examination purposes?

9. Whether the court erred by denying Mr. Rainy's [sic] motions for a mistrial based on the facts that the jury saw a memorial to the victim, felt threatened by a [sic] spectators the jury associated with Mr. Rainey, and heard references about prior trials?

10. Whether the court erred in its accomplice liability instruction by using an example which improperly conveyed the law and closely mirrored the facts of Mr. Rainey's case?

11. Whether the court's erroneous evidentiary ruling combined to prejudice the defendant where it admitted excluded testimony, prevented proper cross-examination of the Commonwealth's chief witness, permitted the Commonwealth's leading questions on direct and redirect, and allowed speculative testimony?

Appellant's brief at 6-7.

Appellant's fourth and fifth positions, that he was entitled to judgment of acquittal both prior to and after the jury verdict,[2] must be treated as sufficiency claims. ***Commonwealth v. Abed***, 989 A.2d 23, 26 (Pa.Super.

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[2] Appellant observes that his post-verdict request for judgment of acquittal also "raised double jeopardy and due process concerns because of the repeated re-prosecutions" of Appellant. Appellant's brief at 34. However, Appellant fails to developed these two contentions to any extent. He does not delineate the facts surrounding his successive trials nor does he cite a single Pennsylvania case on the subject of retrials, instead referencing a single case from Vermont that expressed concerns when a defendant is tried multiple times. Due to a lack of appropriate development, we decline to examine whether there were double jeopardy or due process concerns in this matter. ***Commonwealth v. Briggs***, 12 A.3d 291, 326 n.34 (Pa. 2011) (undeveloped due process argument was not addressed); ***Ford v. Ford***, 878 A.2d 894, 906 (Pa.Super. 2005) ("Issues that are not properly developed by citation to pertinent legal authority are waived.").

2010) ("A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge."). Appellant's second and third issues also raise sufficiency averments. Since these positions, if meritorious, would result in discharge, we will address them first. ***Commonwealth v. Dale***, 836 A.2d 150 (Pa.Super. 2003). "In conducting our review, we consider all of the evidence actually admitted at trial and do not review a diminished record." ***Id***. at 152. We employ the following principles as to the sufficiency of the evidence supporting a conviction:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Knox, 50 A.3d 749, 754 (Pa.Super. 2012) (quoting ***Commonwealth v. Brown***, 23 A.3d 544, 559–60 (Pa.Super. 2011) (*en banc*)).

Appellant first maintains that the Commonwealth failed to establish that his brother Eugene and he conspired to commit aggravated assault. He claims he did not know that his brother would engage in an assault on Mr. Williams, that the attack was spontaneous, and that he was merely present at the scene.[3] The crime of conspiracy is set forth in 18 Pa.C.S. § 903(a):

> 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.

Thus, § 903 mandates that the Commonwealth establish that "1) the defendant entered into an agreement with another to commit or aid in the commission of a crime; 2) he shared the criminal intent with that other

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[3] We note that in ***Commonwealth v. (Eugene) Rainey***, 15 A.3d 533 (Pa.Super. 2010) (unpublished memorandum), we upheld the sufficiency of the evidence supporting Eugene's conviction of conspiracy with Appellant to commit aggravated assault with a deadly weapon.

person; and 3) an overt act was committed in furtherance of the conspiracy." ***Commonwealth v. Knox***, 50 A.3d 749, 755 (Pa.Super. 2012). The Commonwealth does not have to prove that there was an express agreement to perform the criminal act. Rather, a shared understanding that the crime would be committed is sufficient:

> The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation. The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. Even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators in furtherance of the conspiracy.

Id. (quoting ***Commonwealth v. McCall***, 911 A.2d 992, 996-97 (Pa.Super. 2006)).

While it is true that mere presence at the scene of the crime is insufficient to establish entry into a conspiracy with the perpetrator, ***Knox***, ***supra***, these factors are considered relevant in determining the existence of a common understanding: the "relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode." ***Commonwealth v. Devine***, 26

A.3d 1139, 1147 (Pa.Super. 2011). Additionally, flight from apprehension with the perpetrator following the commission of the crime is relevant in establishing the existence of a conspiracy. ***Commonwealth v. Marquez***, 980 A.2d 145 (Pa.Super. 2009).

In this case, the following facts are pertinent. Appellant was with his brother and Mr. Mallory in an Escalade when they spotted the victim located in the Camry. Appellant, the driver, began to chase that car. Eugene exited the Escalade and started to approach the victim at a stop sign, but the Camry sped away. Appellant continued to pursue the Camry after his brother returned to his car. Appellant then blocked the Camry with his Escalade, and his brother, who possessed a firearm, immediately exited the car that Appellant was driving. As Eugene shot at the victim, Appellant yelled offensive terms to that man that clearly indicated that Appellant had a personal *animus* against Mr. Williams.[4]

Immediately after the attack, Appellant asked Eugene whether he shot Mr. Williams and noted that a leg shot would not have killed the victim. As we observed in ***Commonwealth v. (Eugene) Rainey***, 15 A.3d 533 (Pa.Super. 2010) (unpublished memorandum), the inference created by these inquiries was that Appellant was asking whether the brothers' mission,

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[4] Mr. Mallory did not testify at the third trial that Appellant thought that Mr. Williams stole jewelry from him. Hence, we do not consider that proof in assessing the sufficiency of the evidence to sustain Appellant's conviction of conspiracy to commit aggravated assault.

i.e., the victim's shooting, was accomplished. We are aware that, on appeal, Appellant maintains that when he asked Eugene whether he shot Mr. Williams, it was an expression of anger and surprise. However, pursuant to our standard of review, we scrutinize the inferences flowing from the evidence in the light most favorable to the Commonwealth. The inference created by Appellant's questions, when viewed in Commonwealth's favor and in light of Appellant's ensuing observation that a shot to the leg would not have been sufficient to kill Mr. Williams, supports that Appellant was confirming that the victim was shot, as he and his brother had intended. This interpretation of the questions is further confirmed by Appellant's post-shooting statements to Ms. Engram to the effect that, if Mr. Williams survived, then Mr. Williams should seek out Appellant to exact his revenge.

Additionally, after the shooting, Appellant attempted to bribe Ms. Engram, an eyewitness, and, when that action proved unsuccessful, Appellant asked Mr. Davis to kill her in exchange for $20,000. Appellant then fled the jurisdiction with his brother and was apprehended with him in a hotel room in another state. Hence, Appellant actively participated in the crime from its inception to the escape. He also attempted to subvert the police investigation. The relation and association between Eugene and Appellant, coupled with Appellant's own actions, were sufficient to establish beyond a reasonable doubt that Appellant engaged in a conspiracy to assault Mr. Williams. ***Knox***, ***supra***; ***Marquez***, ***supra***. Hence, we affirm his conviction of conspiracy to commit aggravated assault.

Appellant next assails his conviction of third-degree murder. He maintains that he did not display the malice necessary to sustain his third-degree murder conviction in that "the Commonwealth simply established that [Appellant] was driving his car when one of his passengers jumped from the vehicle and shot the victim." Appellant's brief at 30; ***see also id.*** at 25, 31. Appellant suggests that he was merely present at the scene of his brother's unexpected killing of Mr. Williams. We disagree with Appellant's characterization of the evidence.

"Third-degree murder is defined 'all other kinds of murder' other than first degree murder or second degree murder. 18 Pa.C.S. § 2502(c). The elements of third-degree murder, as developed by case law, are a killing done with legal malice." ***Marquez***, ***supra*** at 148 (citation and quotation marks omitted). Malice is present when there is either ill-will or "wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences and a mind regardless of social duty." ***Id***. (citation omitted).

In this case, as extensively analyzed above, Appellant was not merely present at the scene of a spontaneous shooting committed by his brother. He actively hunted down the victim and then blocked him in so that his brother, who was in possession of a firearm, could exit the car with that weapon to assault the victim. Additionally, as observed *infra*, Appellant displayed animosity toward Mr. Williams by shouting offensive phrases at him. At Appellant's fourth trial, the Commonwealth established that Appellant disliked Mr. Williams because Appellant thought Mr. Williams had

stolen jewelry from him, and thus, established the specific motive for the shooting.

As soon as Eugene re-entered the Escalade, Appellant asked Eugene whether he had succeeded in shooting Mr. Williams and then observed that a leg wound would be insufficient to kill him. After the murder, Appellant engaged in multiple activities to obstruct the police's investigation into the murder, including attempting to bribe Ms. Engram and telling her not to cooperate with police, demanding that Mr. Mallory consult with Appellant's lawyer rather than cooperate with police, and soliciting Mr. Davis to kill Ms. Engram after she did give police a statement. Thereafter, Appellant fled the jurisdiction to avoid apprehension. Appellant's conviction of third-degree murder therefore rests on sufficient evidence. ***Id***.

We now consider Appellant's first issue, which is that the trial court erred in instructing the jury that he could be guilty of third-degree murder based upon conspiratorial liability.[5] In this case, the trial court instructed the jury,

> In order to find the Defendant guilty of Third Degree Murder, you must find that the following three elements have been proven beyond a reasonable doubt:

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[5] Appellant objected to submission of his liability for third-degree murder based upon conspiratorial liability throughout these proceedings, including during discussion of the jury instructions. N.T. Trial, 12/13/10, at 460. Thus, we disagree with the position of the trial court and Commonwealth that this contention was not preserved.

> First, that the victim in this case is dead; second that the Defendant killed the victim or the Defendant was an accomplice or co-conspirator with the person who did the killing; third, that the Defendant did so with malice.

N.T. Trial, 12/13-16-10, at 601.[6] The court then defined malice and reiterated that the elements of third-degree murder were: "First, that the victim is dead; second, that either the Defendant killed the victim or the Defendant was a co-conspirator or an accomplice to the individual who actually performed the killing; third, that the Defendant acted with malice." Thereafter, the court outlined the legal definition of a conspiracy. ***Id***. at 602. The trial court then repeated the definition of malice as well as the three elements of third-degree murder. ***Id***. at 602-03. Finally, the court noted that, in order to be found guilty as a conspirator, the person must intend that the crime be committed.

Appellant does not object to the wording of the charge in question. He maintains that "it is legally impossible to conspire to commit third degree murder." Appellant's brief at 17. Appellant suggests that third-degree murder premised upon a conspiratorial agreement is untenable because one cannot intentionally agree to commit third-degree murder, an unintentional act. Thus, Appellant contests the validity of the trial court's instruction that

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[6] We note that our Supreme Court has specifically confirmed that an individual can be adjudicated guilty of third-degree murder based upon accomplice liability. ***Commonwealth v. Roebuck***, 32 A.3d 613 (Pa. 2011).

he could be found guilty of third-degree murder based on the fact that he entered into a conspiracy with the actual shooter of Mr. Williams.

In connection with his position, Appellant references a single Pennsylvania case. ***Commonwealth v. Clinger***, 833 A.2d 792 (Pa.Super. 2003). Therein, the defendant pled guilty to conspiracy to commit third-degree murder after he and his brother viciously beat a man, who did not die from his injuries. The defendant moved to withdraw his guilty plea prior to sentencing, but that request was denied.

On appeal, we reversed the trial court's refusal to permit the defendant to withdraw his guilty plea. We stated, "Under the unique facts of this case," we felt obligated to conclude "that it was impossible under the law to commit the crime of conspiracy to commit murder in the third degree, and that, as a result, appellant actually pleaded guilty to an offense that did not exist and, therefore, a crime that did not occur." ***Id***. at 795. We noted that to be guilty of conspiracy, a person must have the intent of promoting or facilitating the commission of the crime in question. We then observed that, historically, third-degree murder is defined as a killing done with malice that ***is neither intentional*** nor committed in the course of a felony." ***Id***. at 796 (emphasis in original; citation omitted). We continued, "Since a conviction for conspiracy requires an intention to promote or facilitate the commission of a crime, the crime that is the object of the conspiracy must ***either*** be intended to be accomplished, ***or*** have been accomplished." ***Id***. (emphases in original). We noted that, in that case, "the crime of third

degree murder was not accomplished" and thus, the defendant "could only be guilty of conspiracy to commit a crime if he intended that crime to be accomplished." ***Id***. We observed that "[l]ogic dictates, . . . that it is impossible for one to intend to commit an unintentional act." ***Id***. We thus concluded that the guilty plea entered in that case was to a charge of conspiracy to commit third-degree murder that did not have a factual basis. We permitted the defendant to withdraw his guilty plea.

Initially, we observe that the present case is readily distinguishable from ***Clinger*** in that the object of the conspiracy to commit murder, the death of Mr. Williams, actually occurred herein. Moreover, the question herein is whether a third-degree murder conviction can be upheld based upon the existence of conspiratorial liability. If it can, then the trial court herein did not err in instructing the jury that Appellant could be found guilty of third-degree murder based upon the existence of a conspiracy.

There is a significant amount of controlling Pennsylvania precedent that permits a conviction of third-degree murder to be sustained based upon co-conspirator liability. In ***Commonwealth v. Johnson***, 719 A.2d 778 (Pa.Super. 1998), this Court, acting *en banc*, upheld a conviction of conspiracy to commit third-degree murder. The defendant in ***Johnson*** was involved in a series of events and the victim died during those events. The defendant did not actually participate in the victim's killing. The facts follow. The defendant was recruited into a group that intended to exact revenge on another gang for an event that occurred about a week prior to the murder.

He then enlisted other young men to engage in the anticipated fight, expressed his desire to kick down on someone's head while the head was placed against a street curb, and obtained two baseball bats that were used in the ensuing attack. The defendant then traveled with his posse to the other group's location, and he assaulted one person. Thereafter, the defendant watched as the victim, who died from his injuries, was struck in the head with a bat and kicked in the head with steel-toed boots by other members of the defendant's band.

The defendant was found guilty of one crime, conspiracy with respect to the victim who died during the attack, but was acquitted of homicide, reckless endangerment, aggravated assault, and conspiracy to commit aggravated assault. After the verdict was rendered, the trial court ruled that the defendant was convicted of the offense of conspiracy to commit third-degree murder. The *en banc* Court in ***Johnson*** confronted the question of whether the evidence was sufficient to convict the defendant of the offense of conspiracy to commit third-degree murder, and we answered in the affirmative.

The ***Johnson*** Court reasoned as follows. To sustain a verdict for third-degree murder, the Commonwealth must prove a killing committed with malice, which we described as "the death of another brought about by an intentional act which indicates a wickedness of disposition, hardness of heart, wantonness, cruelty, recklessness of consequences, or a mind lacking regard for social duty." ***Id***. at 785. We continued, "Malice is established

where the defendant's intentional act indicates that the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm," and noted that malice can "be inferred from all of the circumstances surrounding the defendant's conduct, and may be inferred from the use of a deadly weapon on a vital part of the body." ***Id***. Finally this Court concluded that the Commonwealth's "circumstantial evidence amply establishes that [the defendant] was guilty of conspiracy to commit third-degree murder."

In ***Johnson***, we noted that the defendants and his cohorts planned to violently attack members of the other group, the defendant expressed his intent to commit a vicious assault and obtained weapons used in the criminal episode, and the defendant participated in the assault of one member of the other gang. This Court stated that "[u]nder these circumstances, we do not hesitate to find that [the defendant] possessed and shared an intent to act intentionally and with malice," and that his "conduct on the night in question demonstrated a tacit agreement to commit such intentional and malicious acts." ***Id***. (emphasis omitted). We thus upheld the defendant's conviction of conspiracy to commit third-degree murder. ***See also Commonwealth v. King***, 990 A.2d 1172, 1177 (Pa.Super. 2010) (evidence was sufficient to support defendant's third-degree murder conviction "under conspiratorial liability" even though the defendant did not shoot the victim and was acquitted of conspiracy); ***Marquez***, ***supra*** (upholding conspiracy and third-degree murder convictions where, during crime, defendant aided shooter of

the murder victim); ***Commonwealth v. La***, 640 A.2d 1336 (Pa.Super. 1994) (defendant's conviction of conspiracy to commit third-degree murder upheld when he participated in knife attack on member of another group, even though defendant did not personally participate in assault of the victim who died).

As outlined in these cases, a conviction of third-degree murder can be supported based upon a theory of conspiratorial liability. Such a conviction will be sustained where the defendant entered an agreement with another individual to commit an intentional or malicious act, the act that the co-actors agreed to commit evidenced conscious disregard of an unjustified and extremely high risk that death might result from its commission, and the victim died as result of the agreed-upon intentional act. The Commonwealth's evidence herein supported that Appellant conspired with his brother to assault Mr. Williams with a gun, which was an act that evidenced malice. Thus, under prevailing authority, the trial court did not err in giving an instruction that Appellant could be found guilty of conspiracy to commit third-degree murder. ***Commonwealth v. Patton***, 936 A.2d 1170, 1176 (Pa.Super. 2007) (citation omitted) (trial court should "instruct on an offense where the offense has been made an issue in the case and where the trial evidence reasonably would support such a verdict").

We are aware that our Supreme Court is currently considering this question, as evidenced by its grant of allowance of appeal to consider, "Is conspiracy to commit third-degree murder a cognizable offense under

Pennsylvania law?" ***Commonwealth v. Fisher***, 38 A.3d 767 (Pa. 2012). Nevertheless, until our Supreme Court decides otherwise, we are bound by the published cases upholding a conviction of third-degree murder based upon conspiratorial liability. ***Commonwealth v. Knox***, 50 A.3d 749, 768 n.27 (Pa.Super. 2012) (absent the existence of contrary, intervening United States or Pennsylvania Supreme Court precedent, Superior Court panels are "bound by prior panel decisions of the Superior Court[.]"). ***Commonwealth v. Pepe***, 897 A.2d 463, 465 (Pa.Super. 2006) ("It is beyond the power of a Superior Court panel to overrule a prior decision of the Superior Court, . . . except in circumstances where intervening authority by our Supreme Court calls into question a previous decision of this Court."); ***Commonwealth v. McCormick***, 772 A.2d 982, 984 n.1 (Pa.Super. 2001) (one Superior Court "panel may not overrule [a] prior panel's decision").

Appellant additionally maintains that, at his fourth trial, the trial court was not permitted to give an instruction that Appellant could be convicted of third-degree murder based upon conspiratorial liability due to application of the doctrine of the law of the case. Appellant argues that prior to the beginning of his second trial, the trial court ruled "that conspiracy to commit third degree murder was not an appropriate charge in this case" and that became the law of the case. Appellant's brief at 22 (emphasis omitted).

In connection with this position, Appellant relies upon ***Commonwealth v. Starr***, 664 A.2d 1326 (Pa. 1995), as well as

Commonwealth v. King, 999 A.2d 598, 600 (Pa.Super. 2010), wherein we noted:

> The coordinate jurisdiction rule, put simply, states that "judges of coordinate jurisdiction should not overrule each other's decisions." ***Zane v. Friends Hosp.,*** 575 Pa. 236, 836 A.2d 25, 29 (2003). The rule, applicable in both civil and criminal cases, "falls within the ambit of the 'law of the case doctrine.'" ***Riccio v. American Republic Ins. Co.,*** 453 Pa.Super. 364, 683 A.2d 1226, 1230 (1996) (citing ***Commonwealth v. Starr,*** 541 Pa. 564, 664 A.2d 1326, 1331 (1995)). Our Supreme Court explained in ***Starr*** that the law of the case doctrine "refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter." ***Id.*** at 1331.

First, the record does not bear out Appellant's portrayal of the events occurring prior to his second trial. Simply put, the second trial court never ruled on that question. Appellant filed a *habeas corpus* petition seeking dismissal of the charge of conspiracy to commit third-degree murder, and the Commonwealth, prior to the trial court's consideration of that motion, agreed to withdraw the charge. The transcript of the *habeas corpus* hearing indicates that at the inception of the proceeding, the Commonwealth noted that Appellant had been charged with: "Count 1 is murder in the first degree, Count 2, murder in the third degree, Count 3, conspiracy to commit murder in the first degree, and Count 4 is conspiracy to commit murder in the third degree." N.T. *Habeas Corpus* Hearing, 6/12/08, at 2. The subject matter of the hearing related to Appellant's request to dismiss count four. The Commonwealth then indicated that the parties reached an accord to dismiss count four, conspiracy to commit third-degree murder, and to add

conspiracy to commit aggravated assault as count five. ***Id***. (the district attorney informed that court that it was "going to ask the Court when . . . [the Commonwealth's] secretary gets here, to *nol pros* Count 4, I believe, criminal conspiracy to commit murder of the third degree, and we'll add as Count 5, criminal conspiracy to commit aggravated assault[.]"). The trial court responded that, "So Attorney Graff [the district attorney] has agreed to drop the conspiracy to commit third degree murder, so that's a done deal." ***Id***. at 3. Thus, contrary to Appellant's present contention, the trial court never actually held that the charge of conspiracy to commit third-degree murder should be dismissed. Rather, the parties themselves reached an agreement. Moreover, we do not agree with Appellant's characterization of the trial court's off-hand comment that conspiracy to commit aggravated assault was the correct charge as constituting a ruling on the merits of this issue. Hence, the coordinate jurisdiction rule is not implicated herein.

Appellant's sixth objection to the proceedings involves questioning conducted by the trial court. At trial, Appellant maintained that, just prior to the shooting, he merely parked next to the stopped Camry when Mr. Mallory and Eugene exited it. Appellant continued that he thereafter heard shots but was completely unaware of who fired them. Appellant recounted that after the shots were fired, Eugene and Mr. Mallory re-entered his car, and he drove away, dropped off the two men at another vehicle, parked his Escalade in a rental spot, and went home. He then started to use his girlfriend's car.

Appellant complains about the trial court's following line of questioning:

> The Court: Why didn't you take your car?
>
> The Witness: Because I figured it was involved with something and people was going to say it was involved with the shooting or - -
>
> The Court: You don't know whether - - because, remember, you haven't asked anybody. You don't know if somebody shot your brother and your friend or your brother and friend shot at them.
>
> The Witness: I knew - - I know shots was fired. My car was there. And I zoomed out of there.
>
> The Court: Even though you have got this in your mind that something happened, somebody is looking for my car, at any time during the course of these various turns and twists you have taken, you did not lean back and say what happened, who shot at you?
>
> The Witness: Yes.

N.T. Trial, 12/6-9/10, at 428.

At that point, Appellant objected, and the trial court agreed that it was "probably getting a little bit argumentative with the Defendant." ***Id***. at 429. It sustained the objection and discontinued its interrogation. Appellant also suggests that the trial court improperly asked one of his arresting officers how close the nearest airport was to the hotel room where Appellant was arrested. The officer did not know the answer to that inquiry, and the question went unanswered. N.T. Trial, 12/6-9/10, at 284.

Appellant suggests that through its questioning of Appellant and the inquiry posed to the arresting officer, the trial court assumed the role of

advocate for the Commonwealth. Appellant maintains that the trial court's actions herein are akin to those examined in ***Commonwealth v. Mims***, 392 A.2d 1290 (Pa. 1978). In ***Mims***, our Supreme Court awarded the defendant a new trial because the trial court improperly injected itself into the proceedings. In that case, the defendant and seven other men entered a furniture store and robbed its employees. They also shot two employees, one of whom died, and set fire to a third man. Only two of the store employees were able to identify Appellant as one of the criminals. One of them, Louis Gruby, helped police create a composite sketch of Appellant. At trial, defense counsel, rather than have the defendant sit at the defense table, placed him in the front row of the courtroom seats along with seven other men who resembled the defendant. When asked to identify the person who participated in the crime, Mr. Gruby improperly identified another man rather than the defendant as the guilty party.

In an effort to correct Mr. Gruby, the Commonwealth showed the witness the composite sketch. At that point, the trial court began to question the witness in a manner that was highly favorable to the Commonwealth. Specifically, the trial court brought out the fact that the sketch was created at the time of the crime, that the witness had not viewed the defendant since that time, that the criminal incident transpired over four years prior to trial, and that the in-court identification procedure was performed hurriedly. Then, the court asked the witness to carefully look at the people in the front row and perform a second identification. At that

point, Mr. Gruby pointed out the defendant as the individual who participated in the robberies, shootings, assault, and murder.

Our Supreme Court noted that a trial court is not permitted to question a witness in a manner that reveals to the jury its views as to the witness's credibility or to act as an advocate on behalf of a party. It concluded that the trial court in that case had improperly acted as an advocate for the Commonwealth, questioned the witness in a biased manner, and created the existence of an in-court identification that was unduly suggestive.

The present case bears no resemblance to that of ***Mims***. As we noted in ***Commonwealth v. Stamm***, 429 A.2d 4, 7-8 (Pa.Super. 1981):

> While the practice of a judge in entering the case as an advocate is disapproved, ***Commonwealth v. Mims***, 481 Pa. 275, 392 A.2d 1290 (1978); ***Commonwealth v. Toombs***, 269 Pa.Super. 256, 409 A.2d 876 (1979), nonetheless it remains the trial court's inherent right to question a witness so as to clarify existing facts and elicit new information where necessary. . . . In questioning a witness, however, and in injecting itself into the trial, the court should be ever so careful not to demonstrate bias or an opinion concerning credibility of a witness.

In this case, the court did not demonstrate bias toward Appellant. The trial court merely asked Appellant why he did not use his own car after the shooting, and Appellant had a reasonable explanation for that action. The court then wanted to know whether Appellant had not asked Eugene and Mr. Mallory about who had fired the shots during the criminal episode. While Appellant answered the ambiguously worded question in the affirmative, he later clarified that he indeed had asked his brother and friend who had shot

and why. ***See*** N.T. 12/6-9-10, at 430.[7] The trial court, even if it conceded that it had become argumentative with Appellant, did not assume the role of advocate for the Commonwealth. Additionally, the question posed to the arresting officer was not answered; the witness said that he did not know the distance from the locale of the arrest to the nearest airport. Hence, we conclude that Appellant is not entitled to a new trial based upon the four questions posed by the trial court.

Appellant's next averment is that the trial court erred in denying him a requested instruction on involuntary manslaughter. "Our standard of review when considering the denial of jury instructions is one of deference—an appellate court will reverse a court's decision only when it abused its discretion or committed an error of law." ***Commonwealth v. Baker***, 24 A.3d 1006, 1022 (Pa.Super. 2011) (citation omitted). It is settled that an instruction on a mitigated form of homicide is "warranted only where the offense is at issue and the evidence would support such a verdict." ***Commonwealth v. Montalvo,*** 986 A.2d 84, 100 (Pa. 2009). The crime of involuntary manslaughter is defined as follows: "A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful

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[7] Specifically, the district attorney asked Appellant, "If someone is shooting at you, possibly at you or possibly at your brother or possibly at your friend, wouldn't you want to know who or why." ***See*** N.T. 12/6-9-10, at 430. Appellant responded: "I did. I asked them when they got in. I said, what the fuck happened." ***Id***.

act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person." 18 Pa.C.S. § 2504(a). Thus, "involuntary manslaughter requires 1) a mental state of either recklessness or gross negligence, and 2) a causal nexus between the conduct of the accused and the death of the victim." ***Commonwealth v. Fabian***, 60 A.3d 146, 151 (Pa.Super. 2013) (citation omitted).

In the present case, neither the Commonwealth nor Appellant suggested that he performed an unlawful act in a negligent or reckless manner. Appellant claimed that he was completely unaware that his brother was going to shoot Mr. Williams and that Eugene acted completely on his own and spontaneously. The Commonwealth countered that Eugene and Appellant desired to shoot the victim. Neither scenario supports a claim of negligence or recklessness. Hence, the trial court did not abuse it discretion in refusing the instruction.

Appellant's eighth allegation is that he was denied his right to counsel at his fourth trial since one of his two attorneys, Dennis E. Boyle, Esquire, was unavailable, and his other attorney, Joshua M. Autry, Esquire, had to conduct the fourth trial alone. Appellant also claims denial of the right to counsel since, at the fourth trial, Mr. Autry did not have access to the transcripts of Appellant's third trial.

We reject Appellant's position that he was denied his right to counsel as it is premised on a number of incorrect underlying assumptions. First, the argument itself suggests that he did not have competent counsel at this fourth trial, when that fact is simply untrue. Additionally, Appellant characterizes Mr. Boyle as lead counsel at the third trial, ***see*** Appellant's brief at 43, which is also incorrect. Our review of the transcript from the third trial reveals that Mr. Autry operated in the role of lead counsel. He conducted the opening and closing arguments and cross-examination of seven of eight Commonwealth witnesses. He also performed the direct examination of all six defense witnesses. Finally, he interacted with the trial court by raising objections and conducting discussions. ***Accord*** N.T. Trial, 12/6-9/10, at 531 (Mr. Autry "has done the bulk and the lion's share of the work in this case.").

Appellant employed both Mr. Boyle and Mr. Autry and therefore had counsel of his own choosing present at his fourth trial; he was represented by his lead attorney Mr. Autry. Moreover, the fact that Mr. Autry did not have transcripts of another trial does not mean that Appellant did not enjoy representation by counsel during his fourth trial. While Appellant avers in a very general manner that he could have used the transcript of the third trial to cross-examine witnesses, he fails to specify, to any extent, what was available from the third trial that could have been used to his benefit at the fourth trial.

Appellant's true complaint is that the trial court should have granted his request for a continuance and scheduled trial when both Mr. Boyle and Mr. Autry were available and had reviewed the transcript of the third trial.[8] This issue is subject to the following standard of review:

> The grant or denial of a motion for a continuance is within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of that discretion. An abuse of discretion is not merely an error of judgment. Rather, discretion is abused when the law is over-ridden or misapplied, or the result of partiality, prejudice, bias, or ill-will as shown by the evidence or the record. The grant of a continuance is discretionary and a refusal to grant is reversible error only if prejudice or a palpable and manifest abuse of discretion is demonstrated.
>
> ***Commonwealth v. Griffin****,* 804 A.2d 1, 12 (Pa.Super. 2002), *appeal denied,* 582 Pa. 671, 868 A.2d 1198 (2005) (internal citations and quotation marks omitted). "In reviewing a denial of a continuance, the appellate court must have regard for the orderly administration of justice, as well as the right of the defendant to have adequate time to prepare a defense." ***Commonwealth v. Wesley****,* 562 Pa. 7, 28, 753 A.2d 204, 215 (2000).

Commonwealth v. Hansley, 24 A.3d 410, 418 (Pa.Super. 2011).

In this case, the fourth trial was scheduled immediately after the third trial because the Commonwealth had secured the presence of "a number of witnesses [who were] brought down from various state correctional institutions." N.T. Trial, 12/6-9/10, at 530. The witnesses were still in York

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[8] When the trial court was scheduling the fourth trial for the Monday December 13, 2010, Appellant did ask that it be delayed until the following term because Mr. Boyle was unavailable.

County. Resolution of this matter already had been significantly delayed due to a mistrial during the first trial and the award of a new trial by this Court. Thus, the denial of a continuance promoted the orderly administration of justice. Additionally, Mr. Autry, having just completed the third trial as lead counsel, obviously had his defense well-prepared. Under the circumstances, the trial court did not abuse its discretion in refusing a continuance until the next trial term so that Mr. Boyle could aid Mr. Autry.

Appellant's ninth allegation is that his requests for mistrial should have been granted because: 1) the jury saw a memorial to Mr. Williams while it was viewing the crime scene; 2) the jury felt threatened by spectators at his trial; and 3) the jury improperly heard references about prior trials. As we observed in ***Commonwealth v. Hogentogler***, 53 A.3d 866, 877-78 (Pa.Super. 2012) (citation and quotation marks omitted), our standard of review with respect to the denial of a mistrial is as follows:

> In criminal trials, the declaration of a mistrial serves to eliminate the negative effect wrought upon a defendant when prejudicial elements are injected into the case or otherwise discovered at trial. By nullifying the tainted process of the former trial and allowing a new trial to convene, declaration of a mistrial serves not only the defendant's interests but, equally important, the public's interest in fair trials designed to end in just judgments. Accordingly, the trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. In making its determination, the court must discern whether misconduct or prejudicial error actually occurred, and if so, assess the degree of any resulting prejudice. Our review of the resulting order is constrained to determining whether the court abused its discretion.

> The remedy of a mistrial is an extreme remedy required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial tribunal.

We conclude that none of the events described by Appellant deprived him of a fair and impartial tribunal. First, the jury was aware that Mr. Williams died at the crime scene so that its viewing of any memorial was inconsequential. Moreover, we simply cannot perceive how the fact that Appellant had been previously tried subjected the jury to prejudicial or unfair information.

Appellant's second mistrial request concerned the following. Jurors reported to the trial court that they felt uncomfortable because certain individuals who were associated with Appellant had stared at them. N.T. Trial, 12/13-16/10, at 510 ("It's come to my attention" that "as the jurors were leaving at the end of the day, there have been some concerns that they were trying to be intimidated by members of the Defendant's family, or the people [who] are sitting on the Defendant's side."). Thereafter, the trial court proceeded to question each juror individually. The record reveals that associates of Appellant had stared at the jury. Most of the jurors reported that they merely felt uncomfortable by that activity but two jurors indicated that they felt intimidated or frightened. All the jurors stated that, despite the event, they could fairly and impartially decide the case. Since two jurors expressed that they felt threatened, those jurors were replaced with alternates. N.T. Trial, 12/13-16/10, at 568. Appellant's claim that these

events deprived him of a fair and impartial tribunal is unfounded. All the jurors were individual questioned and indicated that, despite being made uncomfortable by glares from the spectators, they could fairly and impartially decide the matter. The two jurors who actually verbalized feeling intimidated were replaced. The trial court resolved this matter admirably.

Appellant's tenth issue is that the trial court's instructions as to accomplice liability require the grant of a new trial. We review this contention pursuant to the following principles:

> When reviewing a challenge to jury instructions, the reviewing court must consider the charge as a whole to determine if the charge was inadequate, erroneous, or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. A new trial is required on account of an erroneous jury instruction only if the instruction under review contained fundamental error, misled, or confused the jury.

Commonwealth v. McRae, 5 A.3d 425, 430-431 (Pa.Super. 2010) (quoting ***Commonwealth v. Fletcher****,* 986 A.2d 759, 792 (Pa. 2009)). Accomplice liability is defined in 18 Pa.C.S. § 306 (c):

> A person is an accomplice of another person in the commission of an offense if:
>
> > (1) with the intent of promoting or facilitating the commission of the offense, he:
> >
> > > (i) solicits such other person to commit it; or
> > >
> > > (ii) aids or agrees or attempts to aid such other person in planning or committing it; or

> (2) his conduct is expressly declared by law to establish his complicity.

Herein, Appellant's objection is to the following example contained in the trial court's description of accomplice liability:

> Now, let's say - - I'll give you an example of accomplice liability. The classic example from law school is the wheel man at a robbery. Let's say we're driving along, me and my buddy. Apparently I have some nefarious buddies. Me and my buddy are driving along and I say to my buddy, hey, let's stop off at the bank here and I walk into the bank. My buddy is sitting out there waiting for me to come out. And while I'm in the bank, my buddy looks through the windows and he sees me with a gun and I'm holding up the bank. He's like, oh, my God.
>
> He just stays there and waits for me and I get in the car, and when I jump in the car I say to my buddy, take off, let's get out of here, and my buddy takes off. I tell him where to go and I say drop me off right here and I get out of the car and run away with the bootie from the bank robbery. That's like a classic example of an accomplice.

N.T. Trial, 12/13-16/10, at 609-610.

We do not agree with Appellant's assertion that the example in question implied that mere knowledge of the crime and presence at the scene could impose accomplice liability. Nevertheless, to the extent that the example suggested that a person can be liable as an accomplice without displaying the necessary intent to promote or facilitate the crime, that implication was dispelled by other clear and unambiguous instructions given by the trial court. The court noted that a person can be criminally culpable for a crime committed by another based on either conspiratorial or

accomplice liability. It first outlined actions that constitute a conspiracy and then stated:

> The second and separate way that a Defendant can be proved liable for the conduct of another person or persons is when that person is an accomplice to the person who actually commits the offense. When the Defendant is an accomplice to the person who actually commits the crime at issue, the Defendant can be liable for the actions of his fellow accomplices.
>
> . . . .
>
> The person is an accomplice if he or she on his or her own acts to help the other person commit the crime. More specifically, the Defendant is an accomplice of another for a particular crime if the following two elements are proven beyond a reasonable doubt:
>
> One, that **the Defendant had the intent of promoting or facilitating the commission of the crime**, and the Defendant either solicited, commanded, encouraged or requested the other person to commit the crime, or the Defendant aided, agreed to aid or attempted to aid the other person in the planning or the commission of the offense.

Id. at 604-05 (emphasis added). Additionally, immediately before it gave the portion of the charge to which Appellant objects, the trial court repeated that the Commonwealth had to establish that the accomplice intended to promote or facilitate the commission of the crime:

> Now, let me give you an example with regard to accomplice liability. Accomplice liability is where someone can be liable for the actions of another if he aids, agrees to aid, solicits or otherwise assists the other individual in the commission of the crime.
>
> **Now, in order for a person to be an accomplice, the person has to have the intent of promoting or facilitating the crime**, and facilitating is enabling the crime, or the person has to solicit, command, encourage, request the other person to

> commit it or aid, agree to aid or attempt to aid the other person in the planning or the actual commission of the offense.

Id. at 609 (emphasis added). Finally, the trial court specifically delineated that "mere presence, mere presence alone without those additional elements of vicarious liability is not enough." ***Id***. at 612. Hence, when reading the instructions as a whole, as we must, we conclude that the jury was not misled about the elements of accomplice liability.

Appellant's final issue involves four challenges to evidentiary rulings rendered by the trial court. In this setting, we employ a deferential standard of review:

> The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.

Commonwealth v. Hernandez, 39 A.3d 406, 411 (Pa.Super. 2012) (quoting ***Commonwealth v. Herb***, 852 A.2d 356, 363 (Pa.Super. 2004)).

Appellant first maintains that the trial court should not have allowed the Commonwealth to introduce evidence at the fourth trial of his motive to kill Mr. Williams. He relies upon the law of the case doctrine, which we outline *infra*. This contention relates to the following facts. During direct examination, Mr. Mallory was asked, "Did [Appellant] ever communicate to you why he did not like Dion Williams?" N.T. Trial, 12/13-16/10, at 169. Mr. Mallory responded affirmatively. Appellant objected because Mr. Mallory

never testified about motive in any prior proceeding and "there's a discovery violation with a new motive and a new witness statement." ***Id***. at 169-70.

The motive was that on October 26, 2006, there was a burglary at the residence of Appellant's girlfriend, jewelry belonging to Appellant's children was taken during that crime, and Appellant thought that Dion Williams committed the burglary. The trial court concluded that there was no discovery violation because Mr. Mallory's police statement contained that information and Appellant was provided the statement years prior to trial.

Appellant then claimed that the trial judge at the second trial had ruled that evidence of motive was inadmissible and that the issue was thus law of the case. However, the doctrine of the law of the case is inapplicable in this context. Since Appellant was granted a new trial following his conviction at the second trial, the trial judge at the third trial was not bound by the evidentiary rulings rendering during the second trial. As our Supreme Court observed in ***Commonwealth v. Paddy***, 800 A.2d 294, 311 (Pa. 2002) (citation omitted), the grant of a new trial "wipes the slate clean" so that "a previous court's ruling on the admissibility of evidence generally does not bind a new court upon retrial." ***See also Commonwealth v. A.G.***, 955 A.2d 1022 (Pa.Super. 2008).

Appellant's second evidentiary challenge pertains to the trial court's refusal to allow him to cross-examine Mr. Mallory about the fact that Mr. Mallory had a motive to kill Mr. Williams. This impeachment was

prohibited as beyond the scope of direct examination because there was not a scintilla of evidence, at that point, that Mr. Mallory was the shooter. The trial court, however, expressly stated that Appellant could present this evidence as part of his case-in-chief. It told Appellant that he could either recall Mr. Mallory to the stand during his defense and impeach him with motive. The court also gave Appellant the option of presenting Eugene to provide evidence that Mr. Mallory had a motive to kill the victim. Based on these facts, the evidentiary ruling in question was not an abuse of discretion.[9]

Appellant also alleges that the Commonwealth was improperly allowed to lead its witness, Ms. Engram, during redirect examination when it asked whether there was any doubt in her mind as to the existence of certain events that she had described during her direct examination, those being

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[9] Relying upon antiquated case law, Appellant suggests that he could not have used leading questions to adduce proof of his motive if he had presented Mr. Mallory as a witness. However, his position is not in accord with the current precedent:

> The Pennsylvania Rules of Evidence, Rule 611(c) now provides for the use of leading questions with the court's permission by a party who has called a hostile witness, an adverse party or a witness identified with an adverse party. P.R.E. 611 and Comment—1998.

Commonwealth v. Lambert, 765 A.2d 306, 359 n. 21 (Pa.Super. 2000). In this case, the trial court, in light of its ruling, would have permitted Appellant to use leading questions to conduct his examination of Mr. Mallory had Mr. Mallory proved hostile to Appellant. Moreover, Eugene could have testified about Mr. Mallory's motive to kill Mr. Williams.

that Appellant made the statements that he did during the shooting, that Eugene shot the victim, and that Eugene was the only person outside the car. "The trial judge has wide discretion in controlling the use of leading questions." ***Commonwealth v. Lambert***, 765 A.2d 306, 360 (Pa.Super. 2000). The questions posed merely summarized evidence already before the jury. A new trial is not required on this basis.

Appellant's final position is that Mr. Davis was improperly permitted to offer speculative, opinion evidence. Specifically, Mr. Davis testified that a few days after the murder, Appellant telephoned Mr. Davis. Appellant asked Mr. Davis, "If I could do him a favor and the favor was to take care of a witness for him and that he would give me 20 grand if I did." N.T. Trial, 12/13-19/10, at 256. Appellant then said Ms. Engram was the witness in question. After this testimony, the district attorney asked Mr. Davis "what take care of meant," and Mr. Davis responded, "What I got out of it was to kill her." ***Id***. at 257. We do not believe that the response was either speculative or opinion testimony. The clear import of "to take care of" a witness to a murder in return for a significant amount of money, in this case $20,000, means to kill that person. Accordingly, we dismiss Appellant's final claim.

We now address a pending motion filed by Appellant on November 9, 2012.[10] In that document, Appellant seeks remand for a hearing based on the existence of after-discovered evidence. That evidence consists of a recantation by Commonwealth witness Ebony Evans, whose affidavit is attached to the motion. Under Pa.R.Crim.P. 720 (C), "A post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery." When, on appeal, a defendant avers that he has discovered new evidence that is exculpatory in nature, we remand for an evidentiary hearing so that the trial court can consider whether the evidence is such that a new trial is warranted. ***Commonwealth v. Rivera***, 939 A.2d 355, 358-59 (Pa.Super. 2007). Accordingly, we grant Appellant's petition to remand for an evidentiary hearing. If the trial court determines that a new trial is not necessitated by the recantation evidence from this witness, it can reinstate the judgment of sentence imposed on February 14, 2011.

Judgment of sentence vacated. Case remanded for the conduct of an evidentiary hearing consistent with this adjudication so that the trial court can determine if a new trial is required based upon after-discovered evidence, and, if not, for the re-imposition of sentence. Jurisdiction relinquished.

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[10] The Commonwealth did not respond to the November 9, 2012 motion.

Judgment Entered.

Mary A. Hrabchell

Deputy Prothonotary

Date: 5/1/2013