NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
OBINA ONYIAH,	:	No. 3010 EDA 2013
Appellant	:	

Appeal from the Judgment of Sentence, May 31, 2013,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0001632-2011

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED SEPTEMBER 28, 2015**

Following a jury trial, Obina Onyiah was convicted of second-degree murder, three counts of robbery, conspiracy to commit robbery, and a violation of the Uniform Firearms Act. Herein, he appeals from the judgment of sentence entered on May 31, 2013, in the Court of Common Pleas of Philadelphia County. We affirm.

The facts, as aptly summarized by the trial court, are as follows.

> On Thursday, October 21, 2010, at about 10:30 a.m., William Glatz, Margaret Colbridge, Eric Stiess, and Paul Brewington were all inside the William Glatz Jewelers' store, located at 6435 Rising Sun Avenue. Mr. Glatz was the owner of this family establishment, which had been in business for about 63 years. Ms. Colbridge and Mr. Stiess were both long-time employees who had each worked at the store for about 25 years. On this morning, Mr. Brewington, an outside salesman, had a scheduled appointment to sell jewelry to Mr. Glatz.

> Appellant and Kevin Turner entered the jewelry store around 11:00 a.m. on October 21, 2010. They had been in the store days before posing as customers when they were really planning a robbery. On that Thursday, Turner and [appellant] approached Ms. Colbridge and asked her to remove a link from Turner's watch. Ms. Colbridge took the watch to Mr. Glatz, who was in the back room of the store. On her way to the back room, she noticed that Mr. Brewington had left two of his bags in the front of the store. She put one bag over the counter and dragged the other one to the back of the store. [Appellant] and Turner followed her as she entered the back room. In her testimony, Ms. Colbridge referred to the two men as "Fat" and "Skinny." "Fat" was Kevin Turner. "Skinny" was [appellant].
>
> When they reached the back room, Turner approached Mr. Stiess and put a gun to his head. Mr. Stiess complied with Turner's order to drop whatever was in his hand, and dropped his gun on the floor. [Appellant] grabbed Ms. Colbridge and put a gun to her head. However, Ms. Colbridge struck [appellant's] arm, knocked his gun away, and ran for help. As Ms. Colbridge fled, Turner yelled to [appellant]: "Get her, shoot her." [Appellant] chased Ms. Colbridge, but she ran from the store toward the pharmacy to her left, where she asked the attendant to call police. [Appellant] ran across the street, entered a waiting vehicle parked at Argyle and Levick Streets and fled the scene.
>
> Inside the jewelry store, Turner was holding a gun to Mr. Stiess's head. Mr. Brewington had his hands down and his back turned to show that he was not a threat. Turner ordered Mr. Stiess to approach him, and as Mr. Stiess complied with that command, Mr. Glatz reached for his gun. Turner and Mr. Glatz then exchanged gunfire. Turner shot Mr. Glatz four or five times, and Mr. Glatz shot Turner.
>
> During the shooting, a bullet whizzed by Mr. Stiess's head and another bullet nearly struck

Mr. Brewington. When the shooting was over, Mr. Glatz was on the floor gasping and holding his chest. Turner was also on the floor, but moving around with a gun in his hand. Mr. Stiess picked up his gun from the floor and shot Turner in the head. He then took the gun from Turner's hand. Despite their efforts, Mr. Stiess and Mr. Brewington were unable to revive Mr. Glatz. The men called 911 and police arrived within one to two minutes.

At about 10:51 a.m., Police Officers Donna Grebloski and Thomas Morrow responded to a radio call of robbery in progress at a jewelry store at 6435 Rising Sun Avenue. As Officer Grebloski entered the store, she saw Ms. Colbridge standing at the jewelry counter in a hysterical state. Ms. Colbridge told the officers that one of the men had fled from the store and requested an ambulance for Mr. Glatz. Mr. Stiess showed Officer Grebloski his gun and shouted: "I shot him. I shot him." As the officers continued to the rear of the store, they saw Turner lying face down on the floor. Officer Grebloski also observed a gun on top of a table behind Turner. Mr. Glatz was lying on his back on the other side of a table.

Officer Grebloski requested two ambulances and secured the crime scene. The rescue unit did not transport Turner to the hospital because it appeared that his condition was hopeless. Mr. Glatz, who was conscious but unresponsive, was transported to the hospital, where he underwent several medical procedures in an attempt to save his life. However, on October 21, 2010, at 11:40 a.m., Mr. Glatz was pronounced dead at Albert Einstein Medical Center in Philadelphia.

Dr. Samuel Gulino, Chief Medical Examiner, testified at trial as the Commonwealth's expert in forensic pathology. Dr. Gulino concluded to a reasonable degree of medical certainty that the cause of Mr. Glatz's death was one gunshot wound to his abdomen. He also concluded to a reasonable degree of medical certainty that the manner of

Mr. Glatz's death was homicide. Dr. Gulino determined that the bullet entered Mr. Glatz's front abdomen and struck the large intestine, mesentery, pancreas, aorta, and one side of his vertebral column. The bullet lodged in the soft tissues on the left side of his back. This slightly deformed bullet was recovered and submitted to police. Due to damage to the aorta, other organs and blood vessels, Mr. Glatz bled internally and a significant amount of blood was found in his abdominal cavity. Dr. Gulino stated that the blood loss caused Mr. Glatz's heart to stop beating, resulting in death.

Turner sustained two gunshot wounds, including one to the left back of his head administered by Mr. Stiess. A second gunshot wound was located to the left lower back, where the bullet travelled upward, struck his heart and left lung, and lodged in the left front part of his chest. Dr. Gulino concluded that such a wound would not be immediately incapacitating and that an individual would be able to move and speak until significant blood loss caused unconsciousness. In addition to these two gunshot wounds, Turner had one abrasion to the right side of his forehead and a second abrasion on the side of his right eye. Dr. Gulino concluded that these abrasions were consistent with Turner's face striking the floor after he collapsed from being shot.

At 1:50 p.m., Police Officer Christopher Reed responded to the location and processed the crime scene. Officer Reed found a bloody black hat with a red brim embossed with "New Era 59Fifty" and "Cincinnati Reds" in the doorway near Turner's body. Officer Reed also recovered three firearms: one .357 caliber Smith and Wesson revolver owned by Mr. Glatz, one .45 semi-automatic Ruger that had been possessed by Turner, and one .380 Walther owned by Mr. Stiess. The .357 caliber Smith and Wesson revolver contained one 9 millimeter live round and four fired cartridge casings. Officer Reed also recovered five .45 caliber fired cartridge casings, one copper jacket fragment, one copper

projectile, and two other projectiles. He later submitted the ballistics evidence to the Firearms Identification Unit. In addition to finding these fired cartridge casings, Officer Reed also observed several strike marks inside the store.

At trial, the parties stipulated to Police Officer Grandizio's expertise in tool marking firearms identification and ballistics evidence. He examined the submitted ballistics evidence and made the following findings. The .45 caliber semi-automatic weapon fired the five spent cartridge casings. The .380 Walther contained one live round and one fired cartridge casing, and used hydroshock ammunition. The .357 revolver contained four fired cartridge casings and one live round inside the chamber. Further, the Commonwealth introduced a certificate of non-licensure, which confirmed that [appellant] was not licensed to carry a firearm on October 21, 2010.

Officer Reed and other responding officers also dusted the jewelry store display cases for latent fingerprints and submitted them for further processing at the Records and Identification Unit. At trial, the parties stipulated to the latent fingerprint report prepared by Patrick Raytik, a fingerprint technician, who determined that the fingerprints could not be attributed to [appellant], Kevin Turner, or a third man, Jamal Hicks.

Homicide Detectives interviewed Mr. Brewington, Ms. Colbridge, and Mr. Stiess, who each provided a statement wherein they gave an account of what happened inside the jewelry store and a description of the second perpetrator. They also interviewed Suzanne Duffy, who saw the second man flee the crime scene. At approximately 1:45 p.m., Detectives Lucke and Dunlap arrived and recovered surveillance video from three security cameras inside the jewelry store. Based on information that Detective Lucke received from other detectives and witnesses at the scene, he narrowed his search to certain individuals and to the time

periods of October 19, 2010 between 10:30 a.m. and 10:45 a.m., October 20, 2010 between 2:50 p.m. and 3:00 p.m., and October 21, 2010 between 10:30 a.m. and 11:00 a.m.

Detective Lucke compiled the relevant timeframes chronologically into one video. On October 19, 2010, at 10:30 a.m., the video displayed two men entering the store. One of the men was Turner, who was significantly taller and had a bigger build than the other man. The second man was of a thin build, had a medium brown complexion, and was wearing a loose reddish orange hoodie. At 10:39 a.m., the two men are seen exiting the store. On October 20, 2010, at 2:54 p.m., the video showed an individual entering and exiting the store.

The October 21, 2010 video showed Turner and a tall, thin man who appeared close to Turner's height. The tall, thin man, later identified as [appellant], was wearing a dark hat, dark hoodie, dark pants, and white sneakers. The video further showed that Turner pulled out a large dark silver semi-automatic gun and [appellant] retrieved an item from his waistband. It also showed Ms. Colbridge running toward the front door and [appellant] chasing her with a gun in his right hand.

As the above transpired, a cloud of dust, consistent with the exchange of gunfire, appeared in the video. Ms. Colbridge can be seen running left toward the store next door, as [appellant], who chased her, turned right after exiting the jewelry store. Another employee then moved to the front door of the store. The video then showed activity in the back of the store. One man was in the back behind a workstation. Detective Lucke believed that this man was Mr. Glatz, who was shot and killed. Another individual fell to the floor. When Detective Lucke arrived on location, he saw Turner lying on the floor about several feet inside the rear work area.

> During Detective Lucke's review of his video compilation, he viewed each frame and identified the clearest one from which to extract a still photograph. The best frame depicted a man wearing a dark hoodie and a dark fitted hat with a dark brim. The man had a brown complexion, full lips, and a slight mustache. He did not appear to have tattoos, piercing, jewelry, or scars. The man carried a dark colored handgun. Detective Lucke extracted a second frame of the man from the same angle. This man was later identified as [appellant].
>
> On October 23, 2010, Raneisha Carter provided a statement to Homicide Detectives after viewing a newspaper article that showed the side profile of a man wearing a hat and a hoodie. Ms. Carter thought that the man depicted in the photograph resembled Donte Waters, her son's father. On the same day that Ms. Carter identified Waters, detectives visited the respective homes of Ms. Colbridge and Mr. Stiess and interviewed them a second time. After being shown a photographic array, Ms. Colbridge and Mr. Stiess each identified Waters, as a man bearing a close resemblance to the perpetrator. This man had similar facial characteristics as [appellant] such as prominent lips and nose and a dark complexion. However, police later determined that Waters was not involved in this incident, and identified [appellant] as the second perpetrator.
>
> At trial, Detective Lucke compared the still photograph that was extracted from the jewelry store surveillance video to a photograph of Donte Waters taken on April 20, 2011. Detective Lucke noted that Waters had a lighter complexion and had distinctive tattoos on his right neck. Detective Lucke stated that those tattoos would have been shown in the surveillance video if Waters had been in the jewelry store. Waters's height was listed as 5 feet 9 inches tall and his weight was 155 pounds. Detective Lucke also compared the still photograph to a photograph of [appellant] taken on November 10, 2010. In the

November 10, 2010 photograph, [appellant]'s height was listed as 6 feet 3 inches and his weight was 195 pounds. Detective Lucke stated that the individuals depicted in the two photographs had similar facial features including the nose, the lips, and complexion.

On November 4, 2010, Donnell Cheek provided a statement to Detectives Cummings and Glenn. Mr. Cheek provided this statement after he saw a still photograph on television news while he was in a Camden County prison. He saw this photograph three (3) times. After he saw this still photograph, he called a friend and asked her to contact the news station. Mr. Cheek also spoke with his attorney. After consulting with his attorney, Mr. Cheek was interviewed by the detectives in this case.[Footnote 1]

> [Footnote 1] On September 29, 2010, Mr. Cheek entered into a federal plea agreement and a cooperation agreement with the United States Attorney's Office. As a result of Mr. Cheek's cooperation in this case, the United States Attorney's Office offered to file a motion to reduce his federal sentence.

During his interview, Mr. Cheek identified [appellant] as the man depicted in the still photograph. Mr. Cheek was shown a second photograph that depicted a man with an afro and a prominent mustache and beard and identified [appellant] as the man depicted therein. At trial, Mr. Cheek testified that he was 100 percent certain of his identifications of [appellant], whom he has known since 1997. Mr. Cheek attended the same school as [appellant] from middle school until the first year of high school, when [appellant] transferred to another school. The two men had been friends during that period and played basketball together. The last time that Mr. Cheek had seen [appellant] was sometime in 2005. From 1997 to

2005, Mr. Cheek had seen [appellant] over 200 times.

On December 20, 2010, Detective Bill Urban conducted a lineup that included five men and [appellant], who was in the Number 4 position. Ms. Colbridge, Mr. Stiess, and Mr. Brewington were present and viewed the lineup. Mr. Brewington could not identify anyone, but he further described the second man as a black male in his 20s who was about 5 feet and 7 to 8 inches tall and had no facial hair and no tattoos. Mr. Stiess immediately identified [appellant]. Ms. Colbridge identified [appellant], stating "I think it was Number 4." Detective Urban considered Ms. Colbridge's statement to be a positive identification of [appellant] because she did not choose anyone else. At trial, Ms. Colbridge confirmed her identification of [appellant].

On November 8, 2010, at 10:10 a.m., Detective Pitts interviewed Chioma Christine Onyiah, [appellant's] sister, at the Homicide Unit. As a result of this interview, Ms. Onyiah arranged for [appellant] to meet her outside a McDonald's near Bridge and Pratt Streets. At about 2:50 p.m., Police Officer Brian Ward detained [appellant] at the intersection of Saul Street and Cheltenham Avenue and transported him to the Homicide Unit.

[Appellant] arrived at the Homicide Unit at about 3:20 p.m. on November 8, 2010. At 10:55 p.m., Detective Pitts took a verbatim statement from [appellant]. During this interview, [appellant] was in good physical condition. He did not appear to be under the influence of drugs or alcohol. [Appellant] appeared to be oriented to time and space, and his answers were responsive. [Appellant] did not appear to be sleepy. He did not request to use the bathroom. He did not request food or drink. [Appellant] spoke English and stated that he could read, write and understand English. There were no threats or promises made to

[appellant] before, during, or after the statement. He was not physically abused in any way.

Before [appellant] provided his statement, Detective Pitts advised him of his ***Miranda*** rights and informed him that he was being questioned about the robbery at Glatz Jewelry Store and the murder of William Glatz. Detective Pitts and [appellant] then engaged in an informal conversation. Before the formal interview began, Detective Pitts again advised [appellant] of his ***Miranda*** rights. On the second page of his statement, [appellant] stated that he understood his ***Miranda*** rights and voluntarily waived them.

In his statement, [appellant] explained that a week prior to the robbery, he was playing basketball with another male named Jamal, who proposed that they rob a store for quick and easy money. [Appellant] agreed and met Jamal in a parking lot near the Frankford Terminal, where he entered the rear passenger seat of a dark green car with tinted windows with Kevin Turner sitting inside. When the two men arrived at the jewelry store, Turner entered first and [appellant] followed.

In his statement, [appellant] further explained what happened inside the jewelry store on October 21, 2010; how he chased Ms. Colbridge and how he fled the scene. [Appellant] also informed police that he discarded the hoodie, jeans and skull cap he wore that day, and that he left the gun in Jamal's car. During this interview, [appellant] identified a photograph of Jamal Hicks. He identified Turner as "[t]he guy in the store with me." At the end of his interview, [appellant] signed the appropriate form to indicate that he declined to have his statement videotaped. On November 10, 2010, at 3:15 p.m., [appellant] was arrested and charged with murder, robbery and related offenses.

On November 16, 2010, at 11:20 a.m., Jeremy Carrion provided a statement to police after he was contacted by the Homicide Unit. At that time,

> Mr. Carrion identified [appellant] from the still photographs and news captions from the Internet. Mr. Carrion also identified [appellant] at trial and noted that [appellant] looked the same as he did the last time that they met. Jeremy Carrion knew [appellant] in a professional capacity from March 2009 to July 2010. During that time, he met with [appellant] once or twice per month for anytime between five (5) minutes to one (1) hour in standard lighting conditions. In fact, Mr. Carrion was [appellant's] probation officer, but that fact was not disclosed to the jury.
>
> On February 9, 2011, Ms. Colbridge identified [appellant] at his preliminary hearing. At trial, she confirmed her prior identifications of [appellant]. Mr. Stiess also identified [appellant] at the preliminary hearing and at trial. Mr. Brewington did not testify at [appellant's] preliminary hearing. At trial, he identified [appellant]. He explained that he was able to make this identification after he independently viewed videotapes of the incident.

Trial court opinion, 5/30/14 at 2-12 (citations to the record omitted).

Appellant filed a motion to suppress his confession, contesting the voluntariness of his confession; the Honorable Sandy L.V. Byrd denied the motion, and a jury trial commenced on May 23, 2013. On May 31, 2013, appellant was convicted of the above-stated offenses. Appellant was sentenced to life in prison without parole. A post-sentence motion was timely filed; on October 8, 2013, the motion was denied. A timely notice of appeal was filed. Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion. Thereafter, on January 15, 2014, appellant filed a motion for remand due to

newly discovered evidence; a panel of this court denied the motion without prejudice to appellant's right to re-apply for such relief in appellant's brief.

The following issues have been presented for our review.

> I. Were the verdicts of guilty as to 2nd degree murder, three counts of robbery, conspiracy to commit robbery and carrying a firearm without a license against the weight of the evidence?
>
> II. Did the trial court err in not striking the testimony of Paul Brewington identifying the appellant as one of the perpetrators of the crimes?
>
> III. Did the trial court err in allowing the witnesses Jeremy Car[r]ion, Donnel [Cheek] and Detective Thurston Lucke to give their respective opinions that the pictures taken f[ro]m the surveillance video of the incident were pictures of the appellant?
>
> IV. Is the [appellant] entitled to an evidentiary hearing because of newly discovered evidence that Detective Pitts and Detective Jenkins, the Detectives who secured the alleged confession from the appellant had one [sic] three previous occasions coerced statements from murder suspects?

Appellant's brief at 2.[1]

Appellant first challenges the weight of the evidence. Specifically, appellant argues he should be awarded a new trial because the evidence establishing his identity was vague, conflicting, contradictory, and

[1] Additional issues contained in his Rule 1925(b) statement have not been presented by appellant to our court in his brief; hence, we deem them to have been abandoned.

impeached. (Appellant's brief at 12.) The Commonwealth asserts that the record reveals appellant has failed to raise this claim before the trial court pursuant to Pa.R.Crim.P. 607. We disagree. A review of appellant's post-trial motion reveals that the second issue therein challenges the weight of the evidence. (Docket #12.)

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (emphasis omitted) (citations omitted).

Appellant avers that he is 6'3" tall; he argues that because eyewitnesses described a shorter person and the video surveillance depicted a shorter person, it was physically impossible for him to have been the individual in the store with Turner. Appellant, however, ignores his own confession and other identification testimony introduced by the Commonwealth.

Appellant presented this argument to the jury, and the Commonwealth addressed the apparent discrepancies as to appellant's height. (Notes of

testimony, 5/31/13 at 63-73.) The trial court provided an instruction to the jury regarding how to evaluate identification testimony. (***Id.*** at 127-129.) Here, the jury obviously accepted the version of the facts presented by the Commonwealth's witnesses. For instance, Brewington testified that his statement to the police regarding appellant's height of approximately 5'7" or 5'8" was a "guesstimate"; Brewington also testified that his identification of appellant did not waver upon knowing appellant was 6'3". (Notes of testimony, 5/28/13 at 243-245.) Certainly, the jury's verdict does not shock one's sense of justice. The trial court did not abuse its discretion in denying appellant's motion for a new trial based on the weight of the evidence.

Next, appellant claims that the trial court abused its discretion in refusing to strike the testimony of Paul Brewington, who failed to identify appellant at the line-up but identified him at trial. (Appellant's brief at 14.) On cross-examination, Brewington testified he was able to identify appellant after watching a YouTube video that contained footage of the robbery that jogged his memory. Appellant argues that Brewington's testimony violated the "best evidence rule" because the video Brewington watched was not admitted into evidence.

Our standard of review is well settled. Questions of the admission and exclusion of evidence are within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. ***Commonwealth v. Freidl***, 834 A.2d 638, 641 (Pa.Super. 2003). The best

evidence rule is embodied in Pa.R.E. 1002, which provides: "An original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise."

In the present case, the rule was inapplicable because the Commonwealth never attempted to establish the contents of the videotape, and Brewington did not testify as to the contents of the video. Rather, Brewington's identification was based on his direct observation of appellant during the robbery. ***Compare Commonwealth v. Lewis***, 623 A.2d 355 (Pa.Super. 1993) (under best evidence rule, police officer who did not view crime of retail theft was prohibited from testifying about what he observed on the videotape of incident since that tape was best evidence of what transpired), with ***Commonwealth v. Steward***, 762 A.2d 721, 723 (Pa.Super. 2000) (best evidence rule was inapplicable where "witness observed the theft himself and did not rely on the videotape" in describing the incident).

Here, Brewington personally observed and testified about appellant's actions, and the best evidence rule was not offended. "An opportunity to observe, even for a limited moment, can form an independent basis for an in-court identification[.]" ***Commonwealth v. Baker***, 614 A.2d 663, 669 (Pa. 1992). Thus, although Brewington saw appellant for a brief moment, he had sufficient time to view appellant during the commission of the crime.

The video merely jogged his memory of the events he had witnessed, and he was able to identify appellant at trial.

Furthermore, we agree with the Commonwealth that appellant could not have been prejudiced by any such error. The Commonwealth has the burden of establishing that an error is harmless beyond a reasonable doubt. ***Commonwealth v. Story***, 383 A.2d 155 (Pa. 1978). "[A]n error cannot be held harmless unless the appellate court determines that the error could not have contributed to the verdict." ***Id.*** at 164. An error is harmless where:

> (1) the error did not prejudice the [appellant] or the prejudice was ***de minimis***; or (2) the erroneously admitted evidence was merely cumulative of other, untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Foy, 612 A.2d 1349 (Pa. 1992) (citations omitted).

In the case ***sub judice***, we find any such error would have been ***de minimis***. Defense counsel aggressively attacked Brewington's identification testimony, and the court instructed the jurors to view it with caution. The overwhelming evidence against appellant included his own confession, the testimony of two other eyewitnesses, and the surveillance video that captured the robbery. We cannot find that the outcome would have changed if Brewington's testimony had been stricken.

The third issue presented is whether the trial court abused its discretion by allowing two people who knew him to identify him as one of the robbers in the surveillance video. We find no error with the trial court's holding. After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the trial court, it is our determination that there is no merit to the questions raised on appeal. The trial court's opinion, filed on May 30, 2014, comprehensively discusses and properly disposes of the question presented, and we affirm on that basis. (***See*** trial court opinion, 5/31/14 at 16-18.)

In his final claim, appellant asserts that Detective Pitts and Detective Jenkins, the detectives who secured the alleged confession from appellant, had on three previous occasions coerced statements from murder suspects. Appellant seeks a remand to the trial court for a hearing on alleged after-discovered evidence under Pennsylvania Rule of Criminal Procedure 702(C), which we assume reflects a transposition of digits, and that appellant, in fact, intended to cite Rule 720(C).

Rule 720(C) provides that "[a] post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing ***promptly after such discovery***." (Emphasis added.) We have held that such a claim may be raised for the first time on direct appeal. ***Commonwealth v. Rivera***, 939 A.2d 355, 358 (Pa.Super. 2007). We conclude, however, that appellant's proffer is insufficient to warrant a remand.

> The four-prong test for awarding a new trial because of after-discovered evidence is well settled. The evidence: (1) could not have been obtained prior to trial by exercising reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach a witness's credibility; and (4) would likely result in a different verdict.

Commonwealth v. Castro, 93 A.3d 818, 821 n.7 (Pa. 2014).

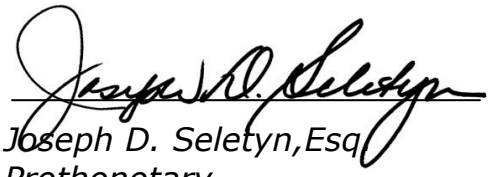
Appellant's assertions are insufficient to meet the benchmarks necessary to warrant a new trial based upon after-discovered evidence. Appellant neglects to explain when he obtained the information alleged or how he could not have obtained the evidence prior to trial by exercising due diligence. Appellant does not explain any time-frame regarding when Nafis Pinkey, Amin Speaks, or Unique Drayton's cases were decided. Thus, we cannot find that appellant has complied with the prompt filing requirement. ***C.f. Commonwealth v. Trinidad***, 90 A.3d 721 (Pa.Super. 2014) (defendant's post-sentence motion based on alleged newly discovered evidence was filed promptly after discovery of the evidence where defendant filed post-sentence motion within seven days of receiving an affidavit from a witness stating that he was a witness to the crime and had exculpatory evidence to offer on behalf of defendant).

Judgment of sentence affirmed.

Judge Wecht joins the Memorandum.

Judge Olson concurs in the result.

Judgment Entered.



Joseph D. Seletyn,Esq
Prothonotary

Date: 9/28/2015

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0001632-2011
v.	:	SUPERIOR COURT
OBINA ONYIAH	:	3010 EDA 2013

OPINION

Byrd, J. May 30, 2014

On May 31, 2013, defendant Obina Onyiah was convicted by a jury of second-degree murder, robbery (three counts), conspiracy to commit robbery, and carrying a firearm without a license in violation of Section 6106 of the Uniform Firearms Act. Thereafter, on that same day, defendant was sentenced to a term of life imprisonment without the possibility of parole. After his post-sentence motion was denied on October 8, 2013, defendant filed a notice of appeal on October 28, 2013. On October 29, 2013, defendant was ordered to file a Statement of Matters Complained of on Appeal. Defendant filed his Statement on November 8, 2013. On January 15, 2014, defendant filed an application in the Superior Court to remand this matter for an evidentiary hearing. The Superior Court denied defendant's application on February 21, 2014.

STATEMENT OF FACTS

On Thursday, October 21, 2010, at about 10:30 a.m., William Glatz, Margaret Colbridge, Eric Stiess, and Paul Brewington were all inside the William Glatz Jewelers' store, located at 6435 Rising Sun Avenue. Mr. Glatz was the owner of this family establishment, which had been in business for about 63 years. Ms. Colbridge and Mr. Stiess were both long-time employees who had each worked at the store for about 25 years. On this morning, Mr. Brewington, an outside salesman, had a scheduled appointment to sell jewelry to Mr. Glatz. (N.T. 05/28/13, pp. 54-55, 141-142, 217).

Defendant and Kevin Turner entered the jewelry store around 11:00 a.m. on October 21, 2010. They had been in the store days before posing as customers when they were really planning a robbery. On that Thursday, Turner and defendant approached Ms. Colbridge and asked her to remove a link from Turner's watch. Ms. Colbridge took the watch to Mr. Glatz, who was in the back room of the store. On her way to the back room, she noticed that Mr. Brewington had left two of his bags in the front of the store. She put one bag over the counter and dragged the other one to the back of the store. Defendant and Turner followed her as she entered the back room. In her testimony, Ms. Colbridge referred to the two men as "Fat" and "Skinny." "Fat" was Kevin Turner. "Skinny" was defendant. (N.T. 05/28/13, pp. 55-61, 69-70, 143, 218-220).

When they reached the back room, Turner approached Mr. Stiess and put a gun to his head. Mr. Stiess complied with Turner's order to drop whatever was in his hand, and dropped his gun on the floor. Defendant grabbed Ms. Colbridge and put a gun to her head. However, Ms. Colbridge struck defendant's arm, knocked his gun away, and ran for help. As Ms. Colbridge fled, Turner yelled to defendant: "Get her, shoot her." Defendant chased Ms.

Colbridge, but she ran from the store toward the pharmacy to her left, where she asked the attendant to call police. Defendant ran across the street, entered a waiting vehicle parked at Argyle and Levick Streets and fled the scene. (N.T. 05/28/13, pp. 56-71, 143-146, 150-159, 220-227).

Inside the jewelry store, Turner was holding a gun to Mr. Stiess's head. Mr. Brewington had his hands down and his back turned to show that he was not a threat. Turner ordered Mr. Stiess to approach him, and as Mr. Stiess complied with that command, Mr. Glatz reached for his gun. Turner and Mr. Glatz then exchanged gunfire. Turner shot Mr. Glatz four or five times, and Mr. Glatz shot Turner. (N.T. 05/28/13, pp. 56-66, 143-158, 223-226).

During the shooting, a bullet whizzed by Mr. Stiess's head and another bullet nearly struck Mr. Brewington. When the shooting was over, Mr. Glatz was on the floor gasping and holding his chest. Turner was also on the floor, but moving around with a gun in his hand. Mr. Stiess picked up his gun from the floor and shot Turner in the head. He then took the gun from Turner's hand. Despite their efforts, Mr. Stiess and Mr. Brewington were unable to revive Mr. Glatz. The men called 911 and police arrived within one to two minutes. (N.T. 05/28/13, pp. 144-145, 156, 226-227).

At about 10:51 a.m., Police Officers Donna Grebloski and Thomas Morrow responded to a radio call of robbery in progress at a jewelry store at 6435 Rising Sun Avenue. As Officer Grebloski entered the store, she saw Ms. Colbridge standing at the jewelry counter in a hysterical state. Ms. Colbridge told the officers that one of the men had fled from the store and requested an ambulance for Mr. Glatz. Mr. Stiess showed Officer Grebloski his gun and shouted: "I shot him. I shot him." As the officers continued to the rear of the store, they saw Turner lying face

down on the floor. Officer Grebloski also observed a gun on top of a table behind Turner. Mr. Glatz was lying on his back on the other side of a table. (N.T. 05/23/13, pp. 73-78).

Officer Grebloski requested two ambulances and secured the crime scene. The rescue unit did not transport Turner to the hospital because it appeared that his condition was hopeless. Mr. Glatz, who was conscious but unresponsive, was transported to the hospital, where he underwent several medical procedures in an attempt to save his life. However, on October 21, 2010, at 11:40 a.m., Mr. Glatz was pronounced dead at Albert Einstein Medical Center in Philadelphia. (N.T. 05/23/13, pp. 75-83, 102-106).

Dr. Samuel Gulino, Chief Medical Examiner, testified at trial as the Commonwealth's expert in forensic pathology. Dr. Gulino concluded to a reasonable degree of medical certainty that the cause of Mr. Glatz's death was one gunshot wound to his abdomen. He also concluded to a reasonable degree of medical certainty that the manner of Mr. Glatz's death was homicide. Dr. Gulino determined that the bullet entered Mr. Glatz's front abdomen and struck the large intestine, mesentery, pancreas, aorta, and one side of his vertebral column. The bullet lodged in the soft tissues on the left side of his back. This slightly deformed bullet was recovered and submitted to police. Due to damage to the aorta, other organs and blood vessels, Mr. Glatz bled internally and a significant amount of blood was found in his abdominal cavity. Dr. Gulino stated that the blood loss caused Mr. Glatz's heart to stop beating, resulting in death. (N.T. 05/23/13, pp. 97, 103-111; N.T. 05/30/13, pp. 98, 105).

Turner sustained two gunshot wounds, including one to the left back of his head administered by Mr. Stiess. A second gunshot wound was located to the left lower back, where the bullet travelled upward, struck his heart and left lung, and lodged in the left front part of his chest. Dr. Gulino concluded that such a wound would not be immediately incapacitating and

that an individual would be able to move and speak until significant blood loss caused unconsciousness. In addition to these two gunshot wounds, Turner had one abrasion to the right side of his forehead and a second abrasion on the side of his right eye. Dr. Gulino concluded that these abrasions were consistent with Turner's face striking the floor after he collapsed from being shot. (N.T. 05/23/13, pp. 112-116).

At 1:50 p.m., Police Officer Christopher Reed responded to the location and processed the crime scene. Officer Reed found a bloody black hat with a red brim embossed with "New Era 59Fifty" and "Cincinnati Reds" in the doorway near Turner's body. Officer Reed also recovered three firearms: one .357 caliber Smith and Wesson revolver owned by Mr. Glatz, one .45 semi-automatic Ruger that had been possessed by Turner, and one .380 Walther owned by Mr. Stiess. The .357 caliber Smith and Wesson revolver contained one 9 millimeter live round and four fired cartridge casings. Officer Reed also recovered five .45 caliber fired cartridge casings, one copper jacket fragment, one copper projectile, and two other projectiles. He later submitted the ballistics evidence to the Firearms Identification Unit. In addition to finding these fired cartridge casings, Officer Reed also observed several strike marks inside the store. (N.T. 05/23/13, pp. 130-131, 145-169, 176-177, 192-193; N.T. 05/28/13, pp. 151-152; N.T. 05/30/13, pp. 101-103).

At trial, the parties stipulated to Police Officer Grandizio's expertise in tool marking firearms identification and ballistics evidence. He examined the submitted ballistics evidence and made the following findings. The .45 caliber semi-automatic weapon fired the five spent cartridge casings. The .380 Walther contained one live round and one fired cartridge casing, and used hydroshock ammunition. The .357 revolver contained four fired cartridge casings and one live round inside the chamber. Further, the Commonwealth introduced a certificate of non-

licensure, which confirmed that defendant was not licensed to carry a firearm on October 21, 2010. (N.T. 05/28/13, pp. 151-153; N.T. 05/29/13, p. 53; N.T. 05/30/13, pp. 101-103).

Officer Reed and other responding officers also dusted the jewelry store display cases for latent fingerprints and submitted them for further processing at the Records and Identification Unit. At trial, the parties stipulated to the latent fingerprint report prepared by Patrick Raytik, a fingerprint technician, who determined that the fingerprints could not be attributed to defendant, Kevin Turner, or a third man, Jamal Hicks. (N.T. 05/23/12, pp. 172-173; N.T. 05/30/13, pp. 96-97, 103-104).

Homicide Detectives interviewed Mr. Brewington, Ms. Colbridge, and Mr. Stiess, who each provided a statement wherein they gave an account of what happened inside the jewelry store and a description of the second perpetrator. They also interviewed Suzanne Duffy, who saw the second man flee the crime scene. At approximately 1:45 p.m., Detectives Lucke and Dunlap arrived and recovered surveillance video from three security cameras inside the jewelry store. Based on information that Detective Lucke received from other detectives and witnesses at the scene, he narrowed his search to certain individuals and to the time periods of October 19, 2010 between 10:30 a.m. and 10:45 a.m., October 20, 2010 between 2:50 p.m. and 3:00 p.m., and October 21, 2010 between 10:30 a.m. and 11:00 a.m. (N.T. 05/23/13, pp. 165-167, 182-186, 200-211; N.T. 05/28/13, pp. 76, 100-102, 164-165, 183-184, 229-232; N.T. 05/29/13, pp. 30-43).

Detective Lucke compiled the relevant timeframes chronologically into one video. On October 19, 2010, at 10:30 a.m., the video displayed two men entering the store. One of the men was Turner, who was significantly taller and had a bigger build than the other man. The second man was of a thin build, had a medium brown complexion, and was wearing a loose reddish orange hoodie. At 10:39 a.m., the two men are seen exiting the store. On October 20, 2010, at

2:54 p.m., the video showed an individual entering and exiting the store. (N.T. 05/23/13, pp. 205, 207-221).

The October 21, 2010 video showed Turner and a tall, thin man who appeared close to Turner's height. The tall, thin man, later identified as defendant, was wearing a dark hat, dark hoodie, dark pants, and white sneakers. The video further showed that Turner pulled out a large dark silver semi-automatic gun and defendant retrieved an item from his waistband. It also showed Ms. Colbridge running toward the front door and defendant chasing her with a gun in his right hand. (N.T. 05/23/13, pp. 221-228).

As the above transpired, a cloud of dust, consistent with the exchange of gunfire, appeared in the video. Ms. Colbridge can be seen running left toward the store next door, as defendant, who chased her, turned right after exiting the jewelry store. Another employee then moved to the front door of the store. The video then showed activity in the back of the store. One man was in the back behind a workstation. Detective Lucke believed that this man was Mr. Glatz, who was shot and killed. Another individual fell to the floor. When Detective Lucke arrived on location, he saw Turner lying on the floor about several feet inside the rear work area. (N.T. 05/23/13, pp. 227-232).

During Detective Lucke's review of his video compilation, he viewed each frame and identified the clearest one from which to extract a still photograph. The best frame depicted a man wearing a dark hoodie and a dark fitted hat with a dark brim. The man had a brown complexion, full lips, and a slight mustache. He did not appear to have tattoos, piercing, jewelry, or scars. The man carried a dark colored handgun. Detective Lucke extracted a second frame of the man from the same angle. This man was later identified as defendant. (N.T. 05/23/13, pp. 225-227, 235-236).

On October 23, 2010, Raneisha Carter provided a statement to Homicide Detectives after viewing a newspaper article that showed the side profile of a man wearing a hat and a hoodie. Ms. Carter thought that the man depicted in the photograph resembled Donte Waters, her son's father. On the same day that Ms. Carter identified Waters, detectives visited the respective homes of Ms. Colbridge and Mr. Stiess and interviewed them a second time. After being shown a photographic array, Ms. Colbridge and Mr. Stiess each identified Waters, as a man bearing a close resemblance to the perpetrator. This man had similar facial characteristics as defendant such as prominent lips and nose and a dark complexion. However, police later determined that Waters was not involved in this incident, and identified defendant as the second perpetrator. (N.T. 05/28/13, pp. 76-77, 105-107, 165; N.T. 05/29/13, pp. 19-23, 28).

At trial, Detective Lucke compared the still photograph that was extracted from the jewelry store surveillance video to a photograph of Donte Waters taken on April 20, 2011. Detective Lucke noted that Waters had a lighter complexion and had distinctive tattoos on his right neck. Detective Lucke stated that those tattoos would have been shown in the surveillance video if Waters had been in the jewelry store. Waters's height was listed as 5 feet 9 inches tall and his weight was 155 pounds. Detective Lucke also compared the still photograph to a photograph of defendant taken on November 10, 2010. In the November 10, 2010 photograph, defendant's height was listed as 6 feet 3 inches and his weight was 195 pounds. Detective Lucke stated that the individuals depicted in the two photographs had similar facial features including the nose, the lips, and complexion. (N.T. 05/28/13, pp. 13-15, 45-51).

On November 4, 2010, Donnell Cheek provided a statement to Detectives Cummings and Glenn. Mr. Cheek provided this statement after he saw a still photograph of defendant on television news while he was in a Camden County prison. He saw this photograph three (3)

times. After he saw this still photograph, he called a friend and asked her to contact the news station. Mr. Cheek also spoke with his attorney. After consulting with his attorney, Mr. Cheek was interviewed by the detectives in this case. (N.T. 05/30/13, pp. 48-56, 66-68).[1]

During his interview, Mr. Cheek identified defendant as the man depicted in the still photograph. Mr. Cheek was shown a second photograph that depicted a man with an afro and a prominent mustache and beard and identified defendant as the man depicted therein. At trial, Mr. Cheek testified that he was 100 percent certain of his identifications of defendant, whom he has known since 1997. Mr. Cheek attended the same school as defendant from middle school until the first year of high school, when defendant transferred to another school. The two men had been friends during that period and played basketball together. The last time that Mr. Cheek had seen defendant was sometime in 2005. From 1997 to 2005, Mr. Cheek had seen defendant over 200 times. (N.T. 05/30/13, pp. 44-47, 52-58, 68-69).

On December 20, 2010, Detective Bill Urban conducted a lineup that included five men and defendant, who was in the Number 4 position. Ms. Colbridge, Mr. Stiess, and Mr. Brewington were present and viewed the lineup. Mr. Brewington could not identify anyone, but he further described the second man as a black male in his 20s who was about 5 feet and 7 to 8 inches tall and had no facial hair and no tattoos. Mr. Stiess immediately identified defendant. Ms. Colbridge identified defendant, stating "I think it was Number 4." Detective Urban considered Ms. Colbridge's statement to be a positive identification of defendant because she did not choose anyone else. At trial, Ms. Colbridge confirmed her identification of defendant. (N.T. 05/28/13, pp. 72-73, 113-116, 125, 132-138, 161-168, 230, 242-243).

---

[1] On September 29, 2010, Mr. Cheek entered into a federal plea agreement and a cooperation agreement with the United States Attorney's Office. (N.T. 05/30/13, p. 59). As a result of Mr. Cheek's cooperation in this case, the United States Attorney's Office offered to file a motion to reduce his federal sentence. (N.T. 05/30/13, pp. 64-65).

On November 8, 2010, at 10:10 a.m., Detective Pitts interviewed Chioma Christine Onyiah, defendant's sister, at the Homicide Unit. As a result of this interview, Ms. Onyiah arranged for defendant to meet her outside a McDonald's near Bridge and Pratt Streets. At about 2:50 p.m., Police Officer Brian Ward detained defendant at the intersection of Saul Street and Cheltenham Avenue and transported him to the Homicide Unit. (N.T. 05/29/13, pp. 49-51-59, 79).

Defendant arrived at the Homicide Unit at about 3:20 p.m. on November 8, 2010. At 10:55 p.m., Detective Pitts took a verbatim statement from defendant. During this interview, defendant was in good physical condition. He did not appear to be under the influence of drugs or alcohol. Defendant appeared to be oriented to time and space, and his answers were responsive. Defendant did not appear to be sleepy. He did not request to use the bathroom. He did not request food or drink. Defendant spoke English and stated that he could read, write and understand English. There were no threats or promises made to defendant before, during, or after the statement. He was not physically abused in any way. (N.T. 05/29/13, pp. 51-52, 59-63).

Before defendant provided his statement, Detective Pitts advised him of his Miranda rights and informed him that he was being questioned about the robbery at Glatz Jewelry Store and the murder of William Glatz. Detective Pitts and defendant then engaged in an informal conversation. Before the formal interview began, Detective Pitts again advised defendant of his Miranda rights. On the second page of his statement, defendant stated that he understood his Miranda rights and voluntarily waived them. (N.T. 05/29/13, pp. 63-68).

In his statement, defendant explained that a week prior to the robbery, he was playing basketball with another male named Jamal, who proposed that they rob a store for quick and easy

money. Defendant agreed and met Jamal in a parking lot near the Frankford Terminal, where he entered the rear passenger seat of a dark green car with tinted windows with Kevin Turner sitting inside. When the two men arrived at the jewelry store, Turner entered first and defendant followed. (N.T. 05/29/13, pp. 70-71).

In his statement, defendant further explained what happened inside the jewelry store on October 21, 2010; how he chased Ms. Colbridge and how he fled the scene. Defendant also informed police that he discarded the hoodie, jeans and skull cap he wore that day, and that he left the gun in Jamal's car. During this interview, defendant identified a photograph of Jamal Hicks. He identified Turner as "[t]he guy in the store with me." At the end of his interview, defendant signed the appropriate form to indicate that he declined to have his statement videotaped. On November 10, 2010, at 3:15 p.m., defendant was arrested and charged with murder, robbery and related offenses. (N.T. 05/29/13, pp. 69-78).

On November 16, 2010, at 11:20 a.m., Jeremy Carrion provided a statement to police after he was contacted by the Homicide Unit. At that time, Mr. Carrion identified defendant from the still photographs and news captions from the Internet. Mr. Carrion also identified defendant at trial and noted that defendant looked the same as he did the last time that they met. Jeremy Carrion knew defendant in a professional capacity from March 2009 to July 2010. During that time, he met with defendant once or twice per month for anytime between five (5) minutes to one (1) hour in standard lighting conditions. In fact, Mr. Carrion was defendant's probation officer, but that fact was not disclosed to the jury. (N.T. 05/29/13, pp. 10-17).

On February 9, 2011, Ms. Colbridge identified defendant at his preliminary hearing. At trial, she confirmed her prior identifications of defendant. Mr. Stiess also identified defendant at the preliminary hearing and at trial. Mr. Brewington did not testify at defendant's preliminary

hearing. At trial, he identified defendant. He explained that he was able to make this identification after he independently viewed videotapes of the incident. (N.T. 05/28/13, pp. 77-78, 115-123, 145-146, 201-206, 215, 229-230, 240-248).

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

Defendant raised the following issues in his Statement of Matters Complained of on Appeal, in accordance with Pennsylvania Rule of Appellate Procedure 1925(b): [2]

> 1. The trial court erred in denying the defendant's motion to suppress the defendant's alleged statement because the statement was not voluntary, was taken in violation of defendant's right to a prompt preliminary arraignment and in violation of defendant's right to remain silent. There was no evidence to support the trial court's finding that the testimony of Katherine Cardona was wholly lacking in credibility.
>
> 2. The trial court erred in allowing the witnesses, Donnell Cheek, Jeremy Carrion and Detective Luck to provide opinion testimony that photos/video from the incident were that of the defendant.
>
> 3. The trial court erred in denying the defense motion to strike the testimony of the Paul Brewington identifying the defendant as one of the perpetrator's of the offenses.
>
> 4. The verdicts of guilty as to all offenses were against the weight of the evidence because the photos/video of the criminal incident and the witnesses identifications of the perpetrator all state that the perpetrator of the incident, i.e. the man that ran from the scene of the crimes was 5'6' to 5'8" when the defendant was in fact 6'3". Two of the witnesses identified another individual as the perpetrator at a Photo array conducted by the police. The Commonwealth's own witness testified that the resolution of the video of the incident was not good. The defendant further incorporates the post sentence motions in this statement as though expressly set forth herein.
>
> 5. The evidence was insufficient to find that the defendant was one of the perpetrators of the crimes of 2nd degree murder, robbery (3 counts) and conspiracy to commit robbery.
>
> 6. The trial court erred in denying the defendant's post sentence motions.
>
> 7. The trial court erred in not giving the defense charge as to inter racial identifications.

[2] The following is a verbatim account of defendant's Statement.

8. Defendant reserves the right to amend, supplement, and/or modify this statement.

DISCUSSION

Defendant first alleges that this court erred in denying his motion to suppress the statement he made to police. When reviewing a challenge to the suppression court's ruling, the appellate court is bound by the suppression court's findings of fact so long as they are supported by the record. *Commonwealth v. Chandler*, 505 Pa. 113, 477 A.2d 851 (1984). The appellate court will reverse this court's decision " 'only if there is an error in the legal conclusions drawn from those findings.' " *Commonwealth v. Basking*, 970 A.2d 1181, 1187 (Pa. Super. 2009) (quoting *Commonwealth v. Hill*, 874 A.2d 1214, 1216 (Pa. Super. 2005)). Thus, the appellate court must consider "whether the suppression court properly applied the law to the facts of the case." *Commonwealth v. Ruey*, 586 Pa. 230, 240, 892 A.2d 802, 807 (2006). In cases where the defendant's motion to suppress has been denied, the appellate court will " 'consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted.' " *In re J.V.*, 762 A.2d 376, 379 (Pa. Super. 2000) (quoting *Commonwealth v. Reddix*, 513 A.2d 1041, 1042 (Pa. Super. 1986)). Our Superior Court has held that "it is the sole province of the suppression court to weigh the credibility of the witnesses. .... Further, the suppression court judge is entitled to believe all, part or none of the evidence presented." *Commonwealth v. Benton*, 655 A.2d 1030, 1032 (Pa. Super. 1995) (citation omitted). It is the Commonwealth's burden to prove by a preponderance of the evidence that the evidence challenged by a defendant in his motion to suppress is admissible. *See Basking*.

In contesting this court's ruling, defendant argues that his statement was made involuntarily. First, as the fact finder at the motion to suppress, it was this court's duty to

determine the credibility of the witnesses, and defendant's witness, Katherine Cardona, was found wanting on that score. Further, after considering the evidence, this court concluded that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights. This determination was made after considering the following two factors:

> First[,] the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that *Miranda* rights have been waived.

Commonwealth v. Rushing, 71 A.3d 939, 949 (Pa. Super. 2013) (quoting *In re T.B.*, 11 A.3d 500, 55-506 (Pa. Super. 2010)). Those two requirements were met in this case. The credible evidence established that defendant provided his statement without coercion or duress and in accordance with the constitutional rights afforded to defendants in criminal cases. *See Commonwealth v. Elmobdy*, 823 A.2d 180, 183 (Pa. Super. 2003) (ruling that "[i]t is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given to their testimony"). Defendant was not intimidated, coerced, or deceived into making his statement. Rather, his decision was freely and deliberately made. When defendant made his choice, he was fully aware of his surroundings. He was not under the influence of drugs or alcohol. Before defendant provided his statement, he was twice warned of his *Miranda* rights. Defendant understood the nature of his rights and the consequences of his decision to provide a statement to police.

In challenging the voluntariness of his statement, defendant also claims that his right to a prompt preliminary arraignment was violated. Pennsylvania Rule of Criminal Procedure 516

states that "[w]hen a defendant has been arrested in a court case, with a warrant, within the judicial district where the warrant of arrest was issued, the defendant shall be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay." In *Commonwealth v. Perez*, 577 Pa. 360, 373, 845 A.2d 779, 787 (2004), the court ruled that "voluntary statements by an accused, given more than six hours after arrest when the accused has not been arraigned, are no longer inadmissible per se. Rather, in determining the admissibility of all statements, regardless of the time of their making, courts must consider the totality of the circumstances surrounding the confession." In making this determination, the court considers "the duration and means of interrogation; the defendant's physical and psychological state; the conditions attendant to the detention; the attitude exhibited by the police during the interrogation; and any other factors which may serve to drain one's powers of resistance to suggestion and coercion." *Id.*

In this case, defendant's preliminary arraignment was not unnecessarily delayed. At the suppression hearing, the detective explained that he was involved in several tasks related to this matter before he was able to formally interview defendant, who was given a preliminary arraignment shortly thereafter. Furthermore, the above noted factors were duly considered before this court determined that defendant voluntarily provided his statement to police. First, the formal interview was not unnecessarily long as it was completed within four hours. Second, there was nothing about defendant's physical and psychological state to lead to the conclusion that his statement was made involuntarily. Defendant did not appear to be under the influence of drugs or alcohol. He did not appear to be sleepy or sleep deprived. Neither did he appear to be suffering from a mental illness or psychological condition. During the interview, defendant answered questions clearly and coherently. As previously indicated, defendant understood the

nature of his constitutional rights and the consequences of his decision to waive them. Third, defendant was not deprived of food, water, or restroom breaks, as he did not make a request for any of these basic necessities. Based on the totality of the circumstances, this court did not err in admitting defendant's statement upon finding that he voluntarily, knowingly, and intelligently waived his rights. Accordingly, defendant's claim is without merit.

Defendant next asserts that the trial court erred by permitting witnesses to provide opinion testimony, wherein they identified defendant as the individual depicted in the photographs and video that were recovered from the jewelry store. In *Commonwealth v. Rivera*, 603 Pa. 340, 368, 983 A.2d 1211, 1228 (2009), the court ruled that "the admissibility of evidence is within the discretion of the trial court, and such rulings will not form the basis for appellate relief absent an abuse of discretion." Pennsylvania Rule of Evidence 701 states that "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

The testimony of Jeremy Carrion, Donnell Cheek, and Detective Lucke met the requirements of Rule 701. First, their opinions were rationally based on their perception. Jeremy Carrion and Donnell Cheek were personally familiar with defendant and his physical characteristics as they had regular contact with defendant over a significant period of time. Jeremy Carrion consistently met with defendant once or twice per month from March 2009 to July 2010 in standard lighting conditions. Donnell Cheek had known defendant since 1997. Donnell Cheek attended the same school as defendant from middle school until the first year of high school, when defendant transferred to another educational institution. During that time

period, they were friends and played basketball together. The last time he saw defendant was sometime in 2005. From 1997 to 2005, Donnell Cheek had seen defendant over 200 times. Due to the recurring contact that Jeremy Carrion and Donnell Cheek had with defendant, they were readily able to identify defendant from a photograph. Although Detective Lucke was not personally familiar with defendant, he was able to render his opinion on the physical similarities exhibited in two different photographs of defendant.

In addition to being rationally based on perception, the lay opinion of each witness was helpful to clearly understanding their testimony and to determining a fact in issue. Detective Lucke's opinion aided the jury in determining the identity of the second perpetrator. After reviewing a photograph of defendant taken on November 10, 2010 and a still photograph extracted from the jewelry store's video surveillance, Detective Lucke noted that both photographs showed similar facial features. *See* N.T. 05/28/13, pp. 47-48. Specifically, he noted that the nose, lip, and complexion were similar in both photographs. In providing his opinion, Detective Lucke helped the jury in its consideration of whether the two photographs depicted the same individual by comparing and contrasting facial characteristics.

Likewise, the testimony of Jeremy Carrion and Donnell Cheek was helpful to the jury's task of determining the identity of the second perpetrator. At trial, Jeremy Carrion identified defendant as the individual depicted in two still photographs (C-24 and C-41) extracted from the video surveillance. Similarly, Donnell Cheek explained how he identified defendant from a still photograph that he viewed on television news while he was in prison. Being 100 percent certain that the photograph depicted defendant, Donnell Cheek enlisted a female friend to call the news station to identify defendant on his behalf. At trial, Donnell Cheek confirmed his identification of defendant in the still photograph. The testimony of Jeremy Carrion and Donnell Cheek helped

the jury understand how and why police eventually identified defendant as the second male who was involved in this robbery and murder. For these reasons, there was no error in admitting the challenged testimony.

This court also rejects defendant's assertion that it was error to deny his motion to strike the identification testimony of Paul Brewington. Indeed, "[q]uestions concerning the admissibility of evidence lie within the sound discretion of the trial court, and the [appellate court] will not reverse the court's decision on such a question absent a clear abuse of discretion." *Commonwealth v. Chmiel*, 558 Pa. 478, 493, 738 A.2d 406, 414 (1999). Certainly, "[t]rial testimony identifying one as the person observed at the time of a crime is a one-on-one confrontation involving circumstances even more suggestive than those present at pre-trial one-on-one confrontations." *Commonwealth v. Fant*, 480 Pa. 586, 591, 391 A.2d 1040, 1043 (1978) (quoting *Commonwealth v. Fowler*, 466 Pa. 198, 203-204, 352 A.2d 17, 19-20 (1976)). However, as the court observed in *Commonwealth v. Davis*, 439 A.2d 195 (Pa. Super. 1981), "[t]he fact that the confrontation was on a one-to-one basis in a courtroom setting is not in itself sufficient reason to exclude the evidence. Rather, 'the primary evil to be avoided is a very substantial likelihood of irreparable misidentification.' " *Id.* at 198 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

To prevent such evil, the court is "required to look at the totality of the circumstances to determine whether the influences for a misidentification were so great as to render [the witness's] in-court identification offensive to the fairness mandated by due process." *Commonwealth v. Floyd*, 494 Pa. 537, 543, 431 A.2d 984, 987 (1981). In reviewing the totality of the circumstances, the court evaluates the following factors: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the

accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness during the confrontation; and (5) the length of time between the crime and the confrontation." *Commonwealth v. Kendricks*, 30 A.3d 499, 506 (Pa. Super. 2011). The factor that is of paramount importance is the opportunity of the witness to view the criminal at the time of the crime. *See Commonwealth v. Bradford*, 451 A.2d 1035, 1037 (Pa. Super. 1982).

Thus, there was no error in denying defendant's motion to strike Mr. Brewington's in-court identification of defendant. In *Commonwealth v. Baker*, 531 Pa. 541, 553, 614 A.2d 663, 669 (1992), the court ruled that "[a]n opportunity to observe, even for a limited moment, can form an independent basis for an in-court identification[.]" Although Mr. Brewington saw defendant for a brief moment, he, nevertheless, had sufficient time to view defendant during commission of the crime. After independently viewing videotapes of the incident, Mr. Brewington recalled that defendant was one of the two perpetrators and identified him as such at trial. Furthermore, it was not error to allow Mr. Brewington's testimony because it was the jury's responsibility to determine the weight that this evidence would be allotted when it made the ultimate determination of guilt. *See Commonwealth v. Lambert*, 529 Pa. 320, 334, 603 A.2d 568, 574 (1992) (holding that an "[i]n-court identification, following a prior inability to target a defendant, is clearly admissible, while the weight of that evidence is to be judged by the jury"); *Commonwealth v. Hodge*, 658 A.2d 386, 388 (Pa. Super. 1995) (stating that it is "for the jury to resolve conflicts or inconsistencies in the testimony of the witnesses"). For these reasons, defendant's claim has no merit.

Defendant next argues that this court erred in denying his request for a jury instruction regarding cross-racial identification. In reviewing a trial court's refusal to provide a jury instruction, the appellate court reviews whether the jury instruction is warranted by the evidence

presented in the case. *Commonwealth v. Baker*, 963 A.2d 495 (Pa. Super. 2008). An appellate court will not find error "where the court fails to use the specific language requested by the accused, but rather only where the applicable law is not adequately, accurately and clearly communicated to the jury." *Commonwealth v. Leber*, 802 A.2d 648, 651 (Pa. Super. 2002). It is a well settled principle that "[t]he trial court has broad discretion in phrasing jury instructions, and may choose its own wording[.]" *Commonwealth v. Chambers*, 546 Pa. 370, 382, 685 A.2d 96, 102 (1996). When evaluating the suitability of the trial court's jury instructions, those "instructions must be considered in the context of the overall charge; a single instruction may not be reviewed in isolation." *Commonwealth v. Einhorn*, 911 A.2d 960, 976 (Pa. Super. 2006). The appellate court "will not rigidly inspect a jury charge, finding reversible error for every technical inaccuracy, but rather evaluate whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision." *Commonwealth v. Prosdocimo*, 525 Pa. 147, 154, 578 A.2d 1273, 1276 (1990). Even if the trial court erred in its refusal, "a new trial is warranted only where such error has been clearly prejudicial to the appellant." *Commonwealth v. Serge*, 837 A.2d 1255, 1265 (Pa. Super. 2003).

This court did not abuse its discretion by denying defendant's request for a jury instruction regarding cross-racial identification. In *Commonwealth v. Robinson*, 5 A.3d 339, 344 (Pa. Super. 2010), the Superior Court addressed this issue and held that the trial court properly refused to instruct the jury on alleged "inherent difficulties in making an accurate cross-racial identification." In addition to concluding that there was no evidence to support the provision of this particular jury instruction, the court determined that "the premise is not settled law in Pennsylvania." *Id. See also Commonwealth v. Moye*, 836 A.2d 973 (Pa. Super. 2003)

(rejecting defendant's contention that a victim's cross-racial identifications were inherently unreliable). Consequently, defendant was not legally entitled to such an instruction.

Moreover, defendant was not prejudiced by this court's decision to refuse his request because the jury was carefully instructed on how to consider each witness's testimony. The jury received accurate and clear instructions on how to evaluate identification testimony, along with instructions on how to determine the weight and credibility of each witness's testimony, how to reconcile inconsistencies or conflicts in a witness's testimony, and how to evaluate witness's prior inconsistent statements.[3] *See Commonwealth v. Williams*, 581 Pa. 57, 80, 863 A.2d 505,

---

[3] This court provided the following jury instruction:

> Now, Ladies and Gentlemen, I must now give you the general rules of evidence regarding eyewitness testimony. In their testimony Ms. Colbridge, Mr. Stiess and Mr. Brewington have all identified the defendant as one of the persons who committed the crimes in this case. In evaluating such testimony, in addition to the other instructions I will have provided to you in judging the credibility of witnesses, you should consider the following additional factors: Did the witness have a good opportunity to observe the perpetrator or perpetrators of this offense? Was there sufficient lighting for him or her to make his or her observations? Was he or she close enough to the individual to note his or her facial and other physical characteristics as well as any clothing he was wearing? Has he or she made a prior identification of the defendant as the perpetrator of these crimes at any other proceeding? Was his or her identification positive or was it qualified by any hedging or inconsistencies? During the course of this case, did the witness identify anyone else as the perpetrator of the crimes?
>
> As previously-stated in their testimony, Ms. Colbridge, Mr. Stiess and Mr. Brewington have each identified the defendant as one of the persons who committed the crime in this case. There is a question of whether or those [sic] identifications are accurate. A victim or other witness can sometimes make a mistake when trying to identify the perpetrator of a crime. If certain factors are present, the accuracy of identification testimony is so doubtful that the jury must receive it with caution. Identification testimony must be received with caution if the witness did not identify the defendant at a lineup or identified someone else as the criminal when shown photographs before trial.
>
> In this case there was evidence that Ms. Colbridge and Mr. Stiess identified someone else from a photographic spread and Mr. Brewington did not identify the defendant at a lineup. Therefore, you must consider with caution that testimony identifying the defendant as the person who committed the crimes in this case.

519 (2004) (holding that "[j]ury instructions will be upheld if they adequately and accurately reflect the law and are sufficient to guide the jury properly in its deliberations"). Furthermore, in reviewing the entirety of the jury instructions, defendant cannot demonstrate error by this court in instructing the jury on the relevant law in this case. Thus, this claim is wholly meritless.

Defendant next claims that there was insufficient evidence to convict him of the aforementioned crimes. In determining whether the evidence was sufficient to sustain a conviction, the appellate court "must view the evidence in the light most favorable to the Commonwealth as verdict winner, accept as true all the evidence and all reasonable inferences upon which, if believed, the jury could properly have based its verdict, and determine whether such evidence and inferences are sufficient in law to prove guilt beyond a reasonable doubt." *Commonwealth v. Tate*, 485 Pa. 180, 182, 401 A.2d 353, 354 (1979). In applying this test, the "entire record must be evaluated and all evidence actually received must be considered." *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. 2001) (quoting *Commonwealth v. Hennigan*, 753 A.2d 245, 253 (Pa. Super. 2000)). In *Commonwealth v. McKeithan*, 504 A.2d 294, 299 (Pa. Super. 1986), the court noted that "[a] person may be convicted on the basis of circumstantial evidence alone if reasonable inferences arising therefrom prove the fact in question beyond a reasonable doubt." In *Commonwealth v. Costa-Hernandez*, 802 A.2d 671,

---

> However, you should consider all evidence relevant to the question of who committed the crimes in this case, including the testimony of Ms. Colbridge, Mr. Stiess and Mr. Brewington, together with any evidence of facts and circumstances from which identity or non-identity of the criminal may be inferred, including the testimony of Mr. Carrion and Mr. Cheek, as well as the videotape in this case.
>
> It is for you to decide after evaluation of the testimony what weight and credibility to give the testimony of the various witnesses in this case. You cannot find the defendant guilty unless you are satisfied beyond a reasonable doubt by all the evidence, direct and circumstantial, not only that a crime or crimes were committed, but that it was the defendant who committed or participated in the commission of that crime or those crimes.

N.T. 05/31/13, pp. 127-129.

675 (Pa. Super. 2002), the court recognized that the "question of any doubt regarding the facts and circumstances established by the Commonwealth is for the fact-finder to resolve unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." The appellate court may not weigh the evidence and substitute its judgment for the fact-finder. *Commonwealth v. Taylor*, 831 A.2d 661 (Pa. Super. 2003). Further, "it is for the fact finder to make credibility determinations, and the finder of fact may believe all, part, or none of a witness's testimony." *Commonwealth v. Mack*, 850 A.2d 690, 693 (Pa. Super. 2004).

In this case, defendant was convicted of second-degree murder, three counts of robbery, criminal conspiracy, and carrying a firearm without a license in violation of Section 6106 of the Uniform Firearms Act, 18 Pa. C.S. §6106. To convict an individual of second-degree murder, the Commonwealth must prove that there was "a homicide committed while a defendant was engaged as a principal or an accomplice in the perpetration of a felony." *Commonwealth v. Gladden*, 665 A.2d 1201, 1209 (Pa. Super. 1995). Section 2502(d) of the Crimes Code, 18 Pa. C.S. §2502(d), defines perpetration of a felony as "[t]he act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." The court has further explained that "[t]o sustain a conviction of murder of either degree it is absolutely essential that there be evidence showing that the murder was committed with malice." *Commonwealth v. McFadden*, 448 Pa. 277, 280, 292 A.2d 324, 326 (1972). The jury "may infer malice from the underlying felony of second-degree murder[.]" *Commonwealth v. Haynes*, 577 A.2d 564, 575 (Pa. Super. 1990).

The evidence shows that defendant and his co-conspirator was guilty of committing a homicide while in the perpetration of a felony, namely robbery. *See Gladden*, 665 A.2d at 1209 (recognizing that "robbery is included in the list of felonies which would permit a second-degree murder charge"). Certainly, defendant's conduct showed that he possessed the requisite malice to be found guilty of second-degree murder. *See Commonwealth v. Davis*, 565 A.2d 458, 465 (Pa. Super. 1989) (quoting *Commonwealth v. Rawls*, 477 A.2d 540, 543 (Pa. Super. 1984), which explained that each enumerated crime "in the felony-murder statute is a crime of specific intent.... Once such intent is shown, the felony-murder doctrine merely imputes the malice incident to the intentional felony over to the killing").

The record shows that defendant and Kevin Turner entered the jewelry store with the intent to commit a robbery at gunpoint. In the course of committing that crime, Mr. Glatz was fatally shot and killed. At trial, the medical examiner concluded to a reasonable degree of medical certainty that the cause of Mr. Glatz's death was one gunshot wound to his abdomen and that the manner of his death was homicide. During Mr. Glatz's autopsy, one slightly deformed bullet that had been lodged in the soft tissues on the left side of his back was recovered. In addition to this bullet, police recovered numerous pieces of ballistics evidence, including one .45 semi-automatic Ruger and five .45 fired cartridge casings. Kevin Turner fired the .45 semi-automatic Ruger during the commission of this crime.

Although defendant was not the man who actually shot and killed Mr. Glatz, the Commonwealth proved beyond a reasonable doubt that he was guilty of second-degree murder as an accomplice. Indeed, "one may be guilty of criminal homicide as an accomplice." *Commonwealth v. Gooding*, 818 A.2d 546, 550 (Pa. Super. 2003); 18 Pa. C.S. §306 (relating to liability for conduct of another; complicity). To find that an individual is guilty of a crime as an

accomplice, the Commonwealth must show: 1) that defendant "intended to facilitate or promote the underlying offense" and 2) that defendant "actively participated in the crime or crimes by soliciting, aiding, or agreeing to aid the principal[.]" *Commonwealth v. Kimbrough*, 872 A.2d 1244, 1251 (Pa. Super. 2005). These two prongs "may be established wholly by circumstantial evidence." *Id.*

In this case, the Commonwealth presented evidence that satisfied this two-prong test. Kevin Turner and defendant approached Margaret Colbridge as if they were customers. When Ms. Colbridge went to the back room to obtain Turner's watch, the two men followed her. Defendant grabbed Ms. Colbridge and held a gun to her head. Turner held a gun to Eric Stiess's head. When Ms. Colbridge managed to escape defendant's grip, he chased her as she ran from the store with the gun in his hand. When Ms. Colbridge ran to the next door pharmacy, defendant fled the scene. During this occurrence, gunfire erupted in the back of the jewelry store. Turner fired at William Glatz at least five times. Despite rescue efforts, Mr. Glatz died from a gunshot wound to his abdomen. These facts were presented through the testimony of four eyewitnesses, three of whom identified defendant at trial. The Commonwealth also introduced surveillance video, which confirmed eyewitness testimony regarding the sequence of events leading up to the shooting. From this video, a still photograph was extracted. This still photograph was an instrumental aid in identifying defendant, as two other individuals who knew defendant very well later recognized him as the man depicted therein. Based on these facts, there was sufficient evidence to show that defendant acted as an accomplice to second-degree murder. Consequently, the Commonwealth proved beyond a reasonable doubt that defendant was guilty of second-degree murder.

Defendant was also convicted of three counts of robbery. An individual is guilty of first-degree robbery "if, in the course of committing a theft, he: (i) inflicts serious bodily injury upon another; (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury; [or] (iii) commits or threatens immediately to commit any felony of the first or second degree[.]" 18 Pa. C.S. §3701(a)(1)(i)-(iii), (b). An act is considered to be in the course of committing a theft "if it occurs in an attempt to commit theft or in flight after the attempt or commission." 18 Pa. C.S. §3701(a)(2). In this case, the record shows that Mr. Glatz was murdered in the course of an attempt to commit a theft at the jewelry store. The evidence further showed that defendant personally threatened and/or intentionally put Ms. Colbridge and Mr. Stiess in fear of immediate serious bodily injury during the course of this robbery.

Further, there was sufficient evidence to convict defendant of conspiracy. Section 903 of the Crimes Code, 18 Pa. C.S. §903, states that a person is guilty of criminal 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." In this case, defendant and Kevin Turner both entered the jewelry store with the intent to commit a robbery at gunpoint. The evidence introduced by the Commonwealth established that defendant entered into an agreement with Kevin Turner to rob the jewelry store and then took action to effectuate their agreement. Accordingly, the Commonwealth proved beyond a reasonable doubt that defendant was guilty of conspiracy.

The Commonwealth also presented sufficient evidence to convict defendant of carrying a firearm without a license in violation of Section 6106 of the Uniform Firearms Act. Pursuant to Section 6106(a)(1) of the Uniform Firearms Act, a person is guilty of carrying a firearm without a license if he "carries a firearm in any vehicle or ... carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license...." 18 Pa. C.S. §6106(a)(1). In this case, defendant held a gun to Ms. Colbridge's head while he and Kevin Turner attempted to rob the jewelry store. When Ms. Colbridge ran from the store, he chased her with a gun in his hand. In addition, the Commonwealth introduced into evidence a certificate from the Commissioner of the Pennsylvania State Police and the Director of Firearms indicating that defendant did not have a valid license to carry a firearm. These facts proved beyond a reasonable doubt that defendant was carrying a firearm without a license in violation of Section 6106 of the Uniform Firearms Act.

Defendant further contends that this court erred in denying his post-sentence motion. Defendant's post-sentence motion presented the same issues raised in his Statement of Matters Complained of on Appeal. As the foregoing discussion has established, none of defendant's claims have merit. Thus, this court did not abuse its discretion in denying defendant's post-sentence motions.

Accordingly, in light of the foregoing, the judgment of sentence should be AFFIRMED.

BY THE COURT,

Sandy L.V. Byrd, J.