NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
TODD ANGEL KANE,	:	
	:	No. 1107 MDA 2013
Appellant	:	

Appeal from the Judgment of Sentence January 17, 2013
In the Court of Common Pleas of Luzerne County
Criminal Division No(s).: CP-40-CR-0002727-2011

BEFORE: BOWES, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED APRIL 22, 2014**

Appellant, Todd Angel Kane, appeals from the judgment of sentence entered in the Luzerne County Court of Common Pleas following a jury trial and his convictions for burglary,[1] criminal trespass,[2] and criminal mischief.[3] He challenges the sufficiency and weight of the evidence for his convictions and suggests that the court erred in ordering him to pay restitution of $2,840 for damaging the victim's personal items. We affirm.

We quote the facts as set forth by the trial court's opinion:

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 3502.

[2] 18 Pa.C.S. § 3503.

[3] 18 Pa.C.S. § 3304.

Jaime Sebolka is the father of the victim, Michelle Sebolka[,] and he testified that at approximately 7:30 P.M. on June 22, 2011, shortly after picking up his grandson, he went to his daughter's house to check on her residence when he witnessed [Appellant] coming down off the back porch and into the yard of his daughter's house and described [Appellant] as "really upset" and that [Appellant's] clothes were "very dirty" with paint on him. Mr. Sebolka called the police and while the police were on scene, [Appellant] called Mr. Sebolka. Mr. Sebolka described [Appellant] as "very irate" and . . . he admitted to Mr. Sebolka that he caused damage to [Ms. Sebolka's] home. At this time[,] the phone was turned over to the police.

Next, Sergeant McTague testified that he took the phone from Mr. Sebolka and spoke to [Appellant]. During that conversation, [Appellant] stated he was in an argument with the victim (Michelle Sebolka) and that he bought everything in the house; he owned it and had the right to go in and destroy whatever he wanted to. [Appellant] went on to describe the exact damage inside the home to Sergeant McTague; specifically, that he took all the clothes in the front bedroom and put them in the middle of the room and dumped paint all over them; how he cut all the cords to the refrigerator and freezers since he couldn't get them out of the house – he made them inoperable. He also damaged the couches, computer and television.

The victim . . . testified before the court. She checked her home at 6:00 P.M. on June 22, 2012 and it was secure. When she next returned at approximately 8:00 P.M. she discovered that her clothes were covered in paint and bleach, the cords were cut off of the refrigerator, freezer, and coffee pot and there was paint all over her bedroom set and her television and computer no longer worked. Michelle Sebolka also testified regarding the amount and value of property damage. Specifically, Michelle Sebolka testified that the freezer was valued at $150.00; the television at $560.00; the computer at $500.00; the couch at $780.00; the clothes at $600.00 and the rug at $250.00.

> Detective Stephen Gibson, of the Kingston Police department also testified on behalf of the Commonwealth. Detective Gibson responded to the call of a break-in at [the victim's home]. When he arrived on scene and entered the back door, he observed damage to the molding around the doorway in the area of the door locks. Detective Gibson also observed the cords were cut to the refrigerator and freezer, the living room couch was cut, the computer and television were wet and the victim's clothes were piled up and covered in paint. Detective Gibson photographed all of this damage and said photographs were duly admitted into evidence and published to the jury.

Trial Ct. Op., 5/23/13, at 4-6 (footnote, citations, and some capitalization omitted).

A jury convicted Appellant and the court sentenced him to an aggregate sentence of twenty-nine to seventy-two months' imprisonment. Appellant filed a timely post-sentence motion, which challenged, *inter alia*, the weight of the evidence for all of his convictions and the value of the property he damaged. The court denied Appellant's motion on May 23, 2013, and Appellant timely appealed. The court did not order Appellant to comply with Pa.R.A.P. 1925(b).

Appellant raises the following issues on appeal:

> Did the lower court err in denying [Appellant's] post-trial motions where the Commonwealth failed to establish beyond a reasonable doubt that (1) [Appellant] entered [the victim's home]; (2) [Appellant] forcibly entered [the victim's home]; and (3) [Appellant] damaged the personal property [of the victim].
>
> Did the lower court err in denying [Appellant's] post-trial motions where the Commonwealth failed to prove beyond

> a reasonable doubt that [the victim] incurred $2,840.00 in damage to her personal property?
>
> Did the lower court err in ordering [Appellant] to pay $2,840.00 in restitution for the personal items allegedly damaged by him since the evidence at trial was against the weight of the evidence and insufficient to establish such damages and/or the cost of the damage or replacement cost or damages actually expended or incurred by [the victim]?

Appellant's Brief at 6.

For his first issue, Appellant challenges the sufficiency and weight for his convictions for burglary, criminal trespass, and criminal mischief. He contends that Mr. Sebolka never testified he was in the apartment, damaged any of the contents therein, or damaged the door. Appellant also references the victim's testimony that she never saw him at the residence that day or observe him commit the above crimes. He notes that there were footprints inside the home but they did not match his shoe size. We hold Appellant is not entitled to relief.

The standard of review for a challenge to the sufficiency of evidence is *de novo*, as it is a question of law. ***Commonwealth v. Sanford***, 863 A.2d 428, 431 (Pa. 2004).

> The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . does not require a court to ask itself whether **it** believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, it must determine simply whether the evidence believed by the fact-finder was sufficient to support the verdict.

Commonwealth v. Ratsamy, 934 A.2d 1233, 1235-36 (Pa. 2007) (citations and quotation marks omitted). "When reviewing the sufficiency of the evidence, an appellate court must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offense beyond a reasonable doubt." ***Id.*** at 1237 (citation omitted).

We state the following with respect to the elements needed to establish burglary:

> "A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." 18 Pa.C.S. § 3502(a). Thus, to prevail on a burglary charge, the Commonwealth is required to prove beyond a reasonable doubt that the offender entered the premises with the contemporaneous intent of committing a crime therein, at a time when he or she was not licensed or privileged to enter.

Commonwealth v. Sanchez, 82 A.3d 943, 973 (Pa. 2013) (citation omitted), *cert. denied* 133 S. Ct. 122 (2012).

Our Crimes Code has defined the offense of criminal trespass as follows:

> **(a) Buildings and occupied structures.—**
>
> (1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he:

> (i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; or
>
> (ii) breaks into any building or occupied structure or separately secured or occupied portion thereof.
>
> * * *
>
> (3) As used in this subsection:
>
> "Breaks into." To gain entry by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access.

18 Pa.C.S. § 3503(a)(1), (3).

We reproduce the relevant portion of the criminal mischief statute:

> **(a) Offense defined.—**A person is guilty of criminal mischief if he:
>
> * * *
>
> (5) intentionally damages real or personal property of another . . . .

18 Pa.C.S. § 3304(a)(5).

On the issue of whether the jury's verdict is contrary to the weight of the evidence, our Supreme Court has held that "[t]he decision to grant or deny a motion for a new trial on the ground that the verdict is against the weight of the evidence is committed to the sound discretion of the trial court." ***Commonwealth v. Pronkoskie***, 445 A.2d 1203, 1206 (Pa. 1982). In such circumstances, "[t]he role of an appellate court in reviewing the weight of the evidence is very limited." ***Commonwealth v. Sanders***, 627

A.2d 183, 185 (Pa. Super. 1993). "Relief on a weight of the evidence claim is reserved for extraordinary circumstances, when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." ***Commonwealth v. Sanchez***, 36 A.3d 24, 39 (Pa. 2011) (quotation marks omitted). An argument that witnesses are not credible is an argument challenging the weight of the evidence. ***Commonwealth v. Lewis***, 911 A.2d 558, 566 (Pa. Super. 2006). The evaluation of the credibility of witnesses is the domain of the fact-finder. ***Commonwealth v. Akers***, 572 A.2d 746, 752 (Pa. Super. 1990).

After careful consideration of the parties' briefs, the record, and the decision of the Honorable Joseph Augello, we affirm on the basis of the trial court's decision. ***See*** Trial Ct. Op. at 3-7 (holding that record, when viewed in light most favorable to Commonwealth, substantiates that Appellant broke into victim's home by damaging door with the intent of and actually damaging victim's real and personal property; record also establishes cost of replacing damaged property). We note that Appellant does not dispute his confession to Sergeant McTague.

With respect to Appellant's challenge to the weight of the evidence, the jury was free to believe all, part, or none of the testimony of Mr. Sebolka and Sergeant McTague recounting Appellant's confession and any other evidence offered at trial. ***See Akers***, 572 A.2d at 752. The jury's verdict in

this case was supported by the trial testimony and evidence, as set forth above. After careful consideration of the entire record, we cannot conclude that the verdict was "so contrary to the evidence as to shock one's sense of justice." ***See Sanchez***, 36 A.3d at 39. Thus, given our limited review, ***see Sanders***, 627 A.2d at 185, we discern no abuse of discretion. ***See Pronkoskie***, 445 A.2d at 1206.

Lastly, Appellant summarily challenges both the legality of the sentence of restitution and the amount of restitution imposed by the court. He maintains that restitution was improper because the Commonwealth failed to meet its burden of proof that he was the perpetrator. Further, he contends that the evidence did not sufficiently establish the replacement or repair cost of the damaged items. We conclude Appellant has not established a basis for relief.

> [C]hallenges to the appropriateness of a sentence of restitution are challenges to the legality of the sentence, based upon the proposition that the court lacks jurisdiction to impose the sentence, . . . nevertheless, challenges alleging that a sentence of restitution is excessive under the circumstances have been held by this court to be challenges to the discretionary aspects of sentencing.

Commonwealth v. Walker, 666 A.2d 301, 307 (Pa. Super. 1995) (citation omitted).

Initially, to the extent Appellant challenged the legality of his restitution sentence because the underlying convictions were improper based upon insufficient or weight of the evidence, we affirm. As set forth above,

Appellant's sufficiency and weight claims lack merit; accordingly, the court was within its authority to impose a sentence of restitution. ***See id.***

To the extent Appellant contested the amount of restitution, we initially consider whether he has preserved his issue for appeal.

This Court has stated that

> [c]hallenges to the discretionary aspects of sentencing do not entitle an appellant to appellate review as of right. Prior to reaching the merits of a discretionary sentencing issue:
>
> > We conduct a four part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).
>
> Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing.

Commonwealth v. Evans, 901 A.2d 528, 533-34 (Pa. Super. 2006) (some citations and punctuation omitted).

> [T]he Rule 2119(f) statement must specify where the sentence falls in relation to the sentencing guidelines and what particular provision of the Code is violated (*e.g.*, the sentence is outside the guidelines and the court did not offer any reasons either on the record or in writing, or double-counted factors already considered). Similarly, the Rule 2119(f) statement must specify what fundamental

> norm the sentence violates and the manner in which it violates that norm (*e.g.*, the sentence is unreasonable or the result of prejudice because it is 500 percent greater than the extreme end of the aggravated range.).

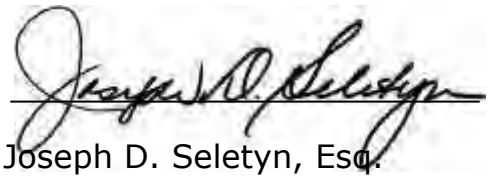
Commonwealth v. Googins, 748 A.2d 721, 727 (Pa. Super. 2000) (*en banc*).

Instantly, Appellant timely appealed, preserved his issues at the post-sentence motion hearing, and included a Pa.R.A.P. 2119(f) statement in his brief. ***See Evans***, 901 A.2d at 533. Appellant's Rule 2119(f) statement essentially complies with ***Googins***, ***supra***, as it contends there is no basis for the amount of restitution and thus the sentence was unreasonable. ***See also Walker***, 666 A.2d at 310 (holding defendant raised substantial question by arguing "sentence of restitution was not supported by the record."). Accordingly, we examine the merits. In this case, the victim testified as to the amount of damages. Appellant did not challenge the victim's calculation of damages at trial. Thus, we discern no basis to disturb the court's restitution order. ***See Walker***, 666 A.2d at 307. Accordingly, we affirm.

Judgment of sentence affirmed.

Olson, J. concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014

IN THE COURT OF COMMON PLEAS

OF LUZERNE COUNTY

COMMONWEALTH OF PENNSYLVANIA	NO. 2727 OF 2011
vs.	CRIMINAL DIVISION
TODD KANE,	
Defendant	

POST-TRIAL MOTIONS OPINION

I. Factual and Procedural Background

The Defendant was charged with Burglary, Criminal Trespass and Criminal Mischief relating to an alleged entry into the home of Michelle Sebolka, 89 Gates Avenue, Kingston, Pennsylvania on June 22, 2011. A jury trial was held in this matter beginning November 27th through November 29, 2012 and the Defendant was found guilty on all charges. On January 17, 2013, the Defendant was sentenced by this Court as follows: Count 1 Burglary, a term of incarceration of twenty-nine (29) months to seventy-two (72) months at a State Correctional Institute; Count 2 Criminal Trespass, fifteen (15) months to sixty (60) months concurrent to Count 1; and for Count 3 Criminal Mischief, no sentence imposed as it was the offense underlying the Burglary charge.

On or about January 29, 2013 Defendant filed post-trial motions. Particularly, Defendant moved the Court for Judgment of Acquittal and/or Arrest of Judgment alleging the Commonwealth's information regarding the charge of Burglary was insufficiently specific since it did not specify the crime which Defendant allegedly intended to commit; the Court erred in denying Defendant's omnibus pre-trial motion; and that Defendant's conviction on all charges was against the weight and sufficiency of

the evidence. Furthermore, Defendant filed a Motion to Modify his Sentence claiming it was excessive and unreasonable in light of the evidence presented at his trial and sentencing.

The challenge to the sufficiency of the information was first raised post-trial. The Defendant was not prejudiced because the subject crime of the burglary in the Criminal Complaint was Criminal Mischief though it did not appear in the criminal information. Further, we expressly instructed the jury that the underlying offense of the burglary was criminal mischief in our final charge, without objection. The entire charge may be found at pages 186 through 205 of the trial proceedings transcript of November 29, 2012, hereinafter, "N.T. at 186-205." In relevant part regarding the underlying offense of criminal mischief, we charged as follows:

> *"The Defendant is charged with burglary. To find the Defendant guilty of this offense, you must find that all of the following elements have been proven by the Commonwealth beyond a reasonable doubt:*
> *First, that the Defendant entered the location on Gates Avenue in Kingston. Second, that the Defendant entered this location* ***with the intent to commit a crime, the crime intended being criminal mischief.*** *That the location was not open to the public at the time. And fourth, that the Defendant did not have permission or lawful authority to enter. Fifth, that the location was an occupied structure or separately secured portion of an occupied structure. Occupied structure is any structure, vehicle, or place adapted for overnight accommodation of persons or for carrying on business inside, whether or not it is actually occupied at the time.*
> *If the Commonwealth has proven each of these elements beyond a reasonable doubt, you may find the Defendant guilty of burglary. Otherwise, you must find him not guilty.*
> ***Keep in mind, one of the elements is that the Defendant intended to commit the crime of criminal mischief inside. Let me explain for you criminal mischief. That is one of the charges against the Defendant. Defendant is charged with criminal mischief. To find the Defendant guilty of this offense, you must find that the following elements have been proven by the Commonwealth beyond a reasonable doubt:***
> *First, that the Defendant damaged the tangible property of Michelle Sebolka intentionally or recklessly. Tangible property is anything that may*

be touched or felt. It may be real property or personal property owned by another that can be touched or felt.
A person acts intentionally when it is his conscious object or purpose to engage in a particular type of conduct or to cause a particular result. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that his conduct will cause a particular result. The risk must be of such a nature and degree that considering the nature and intent of the Defendant's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the Defendant's situation.
If and only if you find the Commonwealth has proven beyond a reasonable doubt the previous elements as I have described them, you will then be required to determine beyond a reasonable doubt the pecuniary amount of loss caused by the Defendant. The burden is on the Commonwealth to prove the amount of pecuniary loss. These will be shown for you in the verdict slip. You must be satisfied beyond a reasonable doubt that the Commonwealth has proven one of the items of pecuniary loss.
There are four choices: Pecuniary loss was in excess of $5,000, or the pecuniary loss was over $1,000 but not in excess of $5,000, or the pecuniary loss was over $500 but not in excess of $1,000, or the pecuniary loss was $500 or less.
If you find the Defendant guilty of criminal mischief and you cannot determine the amount of pecuniary loss beyond a reasonable doubt, you should indicate that the amount of pecuniary loss was $500 or less.
Defendant is charged with criminal trespass . . ."

(N.T. at 197-200)

On April 15, 2013, Defendant filed a Brief in support of his Post-Trial Motions and on May 10, 2013, the Commonwealth filed a Brief in Opposition to Defendant's Post-Trial Motions. This Opinion serves to address all of Defendant's post-trial motions.

II. Motion for Judgment of Acquittal and/or Arrest of Judgment and/or New Trial

A. Sufficiency and Weight of Evidence

Defendant argues that his conviction on all charges was against the weight and sufficiency of the evidence in that the Commonwealth failed to establish beyond a reasonable doubt that (1) Defendant entered 89 South Gates Avenue, Kingston, PA; (2)

Defendant forcibly entered 89 South Gates Avenue, Kingston, PA; and (3) Defendant damaged the personal property of Michelle Sebolka.

The standard for *sufficiency* of the evidence is well-established in the Commonwealth. The standard is whether viewing all evidence admitted at trial in the light most favorable to the verdict winner, sufficient evidence exists to allow the finder of fact to find each element of the crime beyond a reasonable doubt. **Commonwealth v. Nahvandian**, 849 A.2d 1221 (Pa.Super. 2004). Consistent therewith in this case, the Court must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to establish every element of the offense, beyond a reasonable doubt. **Commonwealth v. Krouse**, 799 A.2d 835 (Pa. Super. 2002). Any question of doubt is for the trier of fact, 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. **Commonwealth v. Foreman**, 797 A.2d 1005 (Pa. Super. 2002).

Though the Commonwealth may rely solely on circumstantial evidence to prove a defendant guilty beyond a reasonable doubt, the Commonwealth presented (and proved) its case against Defendant herein through both direct and circumstantial evidence. That evidence consisted of the testimony of four witnesses; Mr. Jaime Sebolka, Sergeant McTague, Michelle Sebolka, and Detective Stephen Gibson and published photographs of the scene.

Jaime Sebolka is the father of the victim, Michelle Sebolka and he testified that at approximately 7:30 P.M. on June 22, 2011, shortly after picking up his grandson, he

went to his daughter's house to check on her residence when he witnessed the Defendant coming down off the back porch and into the yard of his daughter's house and described the Defendant as "really upset" and that the Defendant's clothes were "very dirty" with paint on him. ("N.T." at 32-35.) Mr. Sebolka called the police and while the police were on scene, the Defendant called Mr. Sebolka. Mr. Sebolka described the Defendant as "very irate" and where he admitted to Mr. Sebolka that he caused damage to the home at 89 South Gates Avenue, Kingston, PA. At this time the phone was turned over to the police. (N.T. at 36.)

Next, Sergeant McTague testified that he took the phone from Mr. Sebolka and spoke to the Defendant. During that conversation, the Defendant stated he was in an argument with the victim (Michelle Sebolka) and that he bought everything in the house; he owned it and had the right to go in and destroy whatever he wanted to. The Defendant went on to describe the exact damage inside the home to Sergeant McTague; specifically, that he took all the clothes in the front bedroom and put them in the middle of the room and dumped paint all over them; how he cut all the cords to the refrigerator and freezers since he couldn't get them out of the house - he made them inoperable. He also damaged the couches, computer and television. (N.T. at 62-63.)

The victim, Michelle Sebolka testified before the Court. She checked her home at 6:00 P.M. on June 22, 2012 and it was secure. When she next returned at approximately 8:00 P.M. she discovered that her clothes were covered in paint and bleach, the cords were cut off of the refrigerator, freezer, and coffee pot and there was paint all over her bedroom set and her television and computer no longer worked. (N.T. at 76-77). Michelle Sebolka also testified regarding the amount and value of property

damage. Specifically, Michelle Sebolka testified that the freezer was valued at $150.00; the television at $560.00; the computer at $500.00; the couch at $780.00; the clothes at $600.00 and the rug at $250.00. (N.T. at 77-81).

Detective Stephen Gibson, of the Kingston Police department also testified on behalf of the Commonwealth[1]. Detective Gibson responded to the call of a break-in at 89 South Gates Avenue, Kingston, PA. When he arrived on scene and entered the back door, he observed damage to the molding around the doorway in the area of the door locks. Detective Gibson also observed the cords were cut to the refrigerator and freezer, the living room couch was cut, the computer and television were wet and the victim's clothes were piled up and covered in paint. Detective Gibson photographed all of this damage and said photographs were duly admitted into evidence and published to the jury.

The credibility of the aforementioned witnesses is a question of fact to be determined exclusively by the fact-finder. **Commonwealth v. Smith**, 416 A.2d 494, 496 (Pa. 1980). The facts and circumstances established by the Commonwealth do not need to preclude all possibilities of the innocence of the defendant and any questions of the guilt of the defendant may be decided by the finder of fact. **Nahvandian**, *supra* at. p. 1229. Thus, the jury has the ultimate determination in deciding the fate of the defendant where they are free to believe all, part or none of the evidence, and the verdict will not be overturned unless each element of a crime was not proven beyond a reasonable doubt.

[1] Detective Gibson was also the lone witness called on direct by the Defendant. (N.T. at 147-148).

The evidence presented by the Commonwealth was sufficient to sustain the guilty verdict on all counts and the verdict in this case should not be overturned based upon the sufficiency of the evidence.

The *weight* of the evidence is reserved for the finder of fact who is free to believe all, part, or none of the evidence and to examine the credibility of the witnesses. **Commonwealth v. Champney**, 832 A.2d 403, 408 (Pa. 2003); **Commonwealth v. Nahvandian**, 849 A.2d 1221, 1231 (Pa.Super. 2004). Thus, overturning a verdict based upon the weight of the evidence is very difficult and highly unusual and where the only way to overturn a jury verdict based upon the weight of the evidence is if the verdict is so contrary to the evidence as to "shock one's sense of justice." *Id.*

Certainly it cannot be said in the present instance that the jury's verdict served to "shock one's sense of justice." In finding the Defendant guilty by unanimous verdict, the jury believed the witnesses presented by the Commonwealth after having the opportunity to examine the credibility of Jaime Sebolka, Sergeant McTague, Michelle Sebolka, and Detective Stephen Gibson. The jury also had the ability to weigh the testimony of Detective Gibson, called in the Defendant's case-in-chief. It is fair and reasonable to conclude that the jury weighed the evidence affording more weight and credibility to the Commonwealth's witnesses and did so beyond a reasonable doubt.

Accordingly, the verdict should not be overturned based upon the weight of the evidence.

B. Omnibus Pre-Trial Motion

Interwoven within Defendant's Motion for Judgment of Acquittal and/or Arrest of Judgment and/or New Trial is an allegation that this Court erred in denying Defendant's Pre-Trial Motion to suppress statements, his prior criminal record and prior bad acts.

On August 30, 2012, this Court held a hearing on Defendant's Omnibus pre-trial motions including a Motion for Writ of Habeas Corpus as well as a Motion to suppress oral and written statements. With regard to Defendant's prior criminal record and prior bad acts, an agreement was in fact reached by and between the Commonwealth and the Defendant that should the Defendant take the stand in his own defense, the Commonwealth does not intend to raise any prior bad acts or prior convictions of the Defendant, other than those convictions which would constitute crimen falsi. The Commonwealth and the Defendant agreed to this stipulation on the record and this Court approved subject to said agreement. (N.T. of "Habeas Corpus Proceeding" of August 30, 2012 at 3-4.) Notwithstanding, the issue was rendered moot since the Defendant did not take the stand in his own defense.

At the conclusion of the habeas corpus and suppression hearing, this Court placed its rational and reasons for denying and dismissing Defendant's motions on the record. They may be found at pages 31 and 32.

After and upon hearing testimony from Detective Gibson and Sergeant McTague on August 30, 2012 this Court held that the Commonwealth had established a prima facie case and the Motion for Habeas corpus was denied and dismissed. With regard to the statements made by the Defendant on the phone while in conversation with Sergeant McTague, this Court found the Defendant was not in custody, that the

conversation was initiated by the Defendant and there was no coercive police action. Furthermore, Miranda warnings were not required; the statements of the Defendant were totally voluntary and not in response to police questioning and therefore the statements are admissible at the time of trial. (N.T. at 32.) Accordingly, this Court concluded the admissibility of Defendant's statements at time of trial, violated neither the United States nor Pennsylvania Constitutions.

III. Motion to Modify Sentence

The Defendant alleges the sentence imposed by this Court is excessive and unreasonable in light of the evidence presented at Defendant's trial and sentencing.

Following the conclusion of the jury trial on November 29, 2012, this Court ordered a pre-sentence investigation and report and sentencing was scheduled, originally for January 10th and ultimately held on January 17, 2013. Our rational and express sentence was placed upon the record at pages 15–16 and 18-19 of the transcript of Sentencing Proceedings:

> "We find that the criminal mischief was the underlying charge of the burglary and therefore will not sentence on that offense. On the burglary, we find that sentence of incarceration is appropriate as any lesser sentence would diminish the seriousness of the offense. The conduct of the defendant once he entered – broke into the home in pursuance of the crime of criminal mischief and the damage done is egregious, therefore a sentence of incarceration is appropriate. I sentence the defendant under the standard range of the sentencing guidelines to a minimum of 29 months and a maximum of 72 months in the custody and control of the State Department of Corrections. I order the Defendant to submit a DNA sample if one has not already been collected. I order the defendant to pay restitution . . . The criminal trespass does not merge with the burglary. The standard range sentence is appropriate. The minimum of 15 months and the maximum of 60 months in the custody and control of the State Department of Corrections to be served concurrent with and not consecutive to the sentence imposed for burglary."

Defendant also received appropriate credit for time served aggregating 372 days and this may be found at page 19 of the sentencing transcript. The evidence presented by the Commonwealth was sufficient to sustain the guilty verdict on all counts. By sentencing the Defendant within the standard range of sentencing guidelines, this court appropriately exercised its discretion. Notably, our Superior Court in **Commonwealth v. Matroni**, 923 A.2d 444, 456 (Pa. Super. 2007) stated the following:

> *Where a pre-sentence report exists, and the sentence is within the sentencing guideline ranges, the appellate court will presume the sentencing court was aware of any and all relevant information contained in the report and weighed those considerations along with all mitigating factors.*

Applying these principles to the present instance depicts this sentencing court sentenced Defendant within the standard range of the sentencing guidelines thus affording this court the above presumptions regarding awareness of and properly weighing any and all relevant sentencing information.

The Superior Court in **Commonwealth v. Zurburg**, 937 A.2d 1131, 1135 (Pa. Super 2007) explained the standard of review for the discretionary aspects of sentencing when it appears that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. Respectfully, there has been no colorable argument advanced in this case remotely articulating that the sentence imposed is either inconsistent with a specific provision of the sentencing code or is contrary to the fundamental norms that underlie the sentencing process. Commonwealth v. Eby, 784 A.2d 204, 205-06 (Pa. Super 2001).

Accordingly and based upon the evidence, rational and reasons set forth herein and in the trial transcript, the habeas corpus and suppression hearing transcript, and the sentencing proceedings transcript, Defendant's Post-Trial Motions are Denied.

ORDER IS ATTACHED SEPARATELY AS PAGE NO. 12.