NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	
SCOTT J. BAKER,	:	No. 606 WDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, March 5, 2012,
in the Court of Common Pleas of Greene County
Criminal Division at No. CP-30-CR-0000544-2009

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
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SCOTT J. BAKER,	:	No. 607 WDA 2012
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Criminal Division at No. CP-30-CR-0000545-2009

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND STRASSBURGER,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED APRIL 21, 2014**

Scott J. Baker files the present appeal from the judgment of sentence entered on March 5, 2012, in the Court of Common Pleas of Greene County at CP-30-CR-0000544-2009 and CP-30-CR-0000545-2009. We affirm.

By informations filed January 8, 2010, the Commonwealth charged appellant in the above-referenced prosecutions and joined the cases for trial.

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* Retired Senior Judge assigned to the Superior Court

At CP-30-CR-0000544-2009, he was charged with criminal homicide in relation to the death of Melissa Ann Baker ("the victim"). At CP-30-CR-0000545-2009, he was charged with criminal solicitation, intimidation of witnesses or victims, tampering with or fabricating physical evidence, and criminal solicitation to tamper with or fabricate evidence.

A jury trial commenced on December 1, 2011. On the seventh day of trial, appellant pled guilty to the general count of homicide, and the court advised the jury of this plea. The facts of this case, as summarized by the trial court, are as follows:

> The testimony at trial revealed that the parties were married in 2006. Their son, Brett, was born on March 25, 2008. There were problems in the marriage and the parties separated in September of 2009, when [appellant] was hospitalized following a suicide attempt. After his discharge from a local hospital, he returned to the marital home in Nemacolin, a house owned by his mother. At about that time, the victim left and moved into a new residence in Crucible. [Appellant's] son from a previous relationship, Nathaniel (d/o/b: 6-2-97), lived with [appellant] and his mother, Carla Baker [hereinafter "Carla"]. [Appellant] and the victim had a shared custody arrangement with Brett.
>
> In the second week of the trial, [appellant] took the stand and for the first time admitted killing [the victim]. He said that he had taken Brett to her house on the morning of November 20, 2009, and while exchanging custody, they got into an argument over hospitalization insurance. [Appellant] testified that the argument got more heated and then he "blacked out". The next thing he remembers is being astride the victim on the floor with his hands or arms around her neck. He said he had no memory of cutting her throat. Nathaniel, who had

stayed home from school that day and had accompanied him to the victim's house, was in the bathroom when the killing actually occurred. Nathaniel emerged and carried Brett back to [appellant's] truck. [Appellant] then drove away with his two sons. Apparently, he drove around aimlessly for a while, then told Nathaniel "I think I killed [the victim]", or words to that effect. He went back to her house, reentered and attempted to create the impression of a robbery. He removed the contents of her purse and threw the purse on the floor. He placed her pistol near her hand. He took jewelry from her bedroom. He took a sheet from her bed. He then drove to his parents' vacant house in Clarksville where he burned the sheet and hid the jewelry in the ductwork of the house. ([Appellant's] father had recently passed away and his mother, Carla, had left their home in Clarksville and moved in with [appellant] in the house she owned in Nemacolin). [Appellant] then told Nathaniel to tell the police, if he was asked, that the two of them were at the Nemacolin house all day.

They returned to the Nemacolin house, where [appellant] shredded the cards and papers he had removed from the victim's purse. He left the boys at his mother's workplace while he went to a previously scheduled physical therapy session in Uniontown. When he got back to Nemacolin, he drove Nathaniel to a middle school dance, but on the way told him to drop the shreds from the purse contents into a [trashcan] at [a] local super market. This event was captured on a surveillance video. At some point during these happenings, he heard that [the victim] had been found dead and that the Pennsylvania State Police wanted to talk to him. He asked a friend to accompany him and they went to the Waynesburg barracks. Following questioning, he was arrested.

Nathaniel told a different story. He testified that at a trip to a mattress store in Uniontown a week or so before the death, [appellant] told him that [the victim] was "going to disappear". He said that on November 19, 2009, [appellant] told him

> that he would stay home from school the next day, Friday. On Thursday after school, the two [of] them went to [the victim]'s house and [appellant] told [the victim] that Nathaniel was feeling ill and had a doctor's appointment for the next day, so he would be dropping off Brett for her to watch while [appellant] took Nathaniel to the doctor. According to Nathaniel, on Friday morning the [appellant], Nathaniel, and Brett went to the victim's house. [Appellant] told Nathaniel to tell [the victim] that he had to use the bathroom. Nathaniel went to the bathroom and while there he heard a loud thump and other noises coming from the living room. Then he heard his father telling him to get Brett and take him to the truck. As they exited the victim's trailer, [appellant] told him not to look down.
>
> Later that day Pennsylvania State Police officers came to the N[e]macolin house and took Nathaniel along with his mother, Sarah Smith, to the Waynesburg barracks. At first he told police that he and his father had been at the Nemacolin house all day and that their only departure was to a store in Carmichaels where [appellant] bought water and snuff. After an interval in the questioning during which his mother urged him to tell the truth, he recanted his first story and then described to the investigators the same events that he testified to.

Trial court opinion, 1/8/13 at 1-4.

Dr. Cyril Wecht performed the autopsy and referred in his testimony to photographs depicting a large, incised wound on the right side of the neck in which the carotid artery was wholly severed and the right jugular vein partially severed. (Notes of testimony, 12/5/11 at 578.) Several smaller stab wounds were apparent. Dr. Wecht described multiple areas of discoloration and noted abrasions and contusions. (***Id.***) Many injuries on her body indicated manual strangulation. (***Id.*** at 589.) Dr. Wecht classified

the death as a homicide and opined that manual strangulation occurred first, and as the victim was dead or dying, then her throat was cut. (***Id.*** at 582-583, 595.) The cutting instrument associated with the incident was not recovered.

Carla testified that in July of 2010, she was cleaning out the Clarksville house following its sale and found a bag of jewelry in the ductwork. She recognized it as the victim's jewelry and brought the items to defense counsel six months later. Following the victim's death, she called on behalf of appellant, who was the main beneficiary on the victim's life insurance policy.

Following appellant's confession at trial, the defense presented the expert testimony of Michael Crabtree, M.D., a licensed psychologist. Dr. Crabtree interviewed appellant on two occasions and administered a psychological test, reviewed records from other professionals who had treated appellant, and reviewed a sampling of information from collateral sources regarding appellant's mental health functioning. (Notes of testimony, 12/9/11 at 1371.) Dr. Crabtree testified that appellant suffered from post-traumatic stress disorder that is recurrent with a high degree of severity and alcohol dependence. (***Id.*** at 1372, 1375.) Appellant's alcohol dependence has led to a high tolerance to alcohol. (***Id.*** at 1375.) Dr. Crabtree also diagnosed appellant with major depressive disorder that is recurrent with a high degree of severity. (***Id.***) The underlying trauma

consisted of abuse inflicted by his father, including beatings, whippings, and a threat of shooting at gunpoint. (***Id.*** at 1374.)

Appellant's condition became more acute in the weeks leading up to the homicide. Following his admission to the hospital, he was served with a PFA order, and his father died following his discharge. Dr. Crabtree further opined that appellant's diagnosis coupled with the "probable intoxication" (given the level of consumption he already testified to), his insomnia and possible withdrawal from prescribed medications would have diminished his capacity to form specific intent on November 20, 2009. (***Id.*** at 1376.) Dr. Crabtree opined that appellant's mental disorder or abnormality interfered with his ability to premeditate and carry out a specific plan. (***Id.*** at 1380.) Dr. Crabtree, however, testified that he never inquired of appellant about the events of November 19-20, 2009. (***Id.*** at 1381-1382.) Rather, he read the police report to gain knowledge of the events that took place. (***Id.*** at 1383.) The doctor testified on cross-examination that he concluded appellant must have been intoxicated at the time due to his history and pattern of drinking a fifth of alcohol a day. (***Id.*** at 1391-1302.) Dr. Crabtree agreed that there were no records of prior treatment indicating that appellant was delusional, had psychosis, or had blackouts. (***Id.*** at 1409.)

In rebuttal, the Commonwealth called Dr. Robert Wettstein, a board certified forensic psychiatrist. (Notes of testimony, 12/13/11 at 1626.)

Dr. Wettstein testified that he considered various sources of information, including an interview with appellant as to the circumstances surrounding the victim's death, the police report, photographs of the crime scene, preliminary hearing testimony, medical and psychiatric records, and interviews with family members. (***Id.*** at 1631-1640, 1649.) Appellant advised Dr. Wettstein that he was a regular alcohol user and had consumed "the usual amount of hard alcohol at home" the night before the incident between 8:00 p.m. and midnight. (***Id.*** at 1641-1642.) Appellant did not tell the doctor that he had any problems in the morning after awakening. (***Id.*** at 1643.)

During the interview, appellant denied recall of the killing and did not have an explanation for why he blacked out. (***Id.*** at 1651.) Alcohol was not the explanation he had provided. (***Id.***) Dr. Wettstein noted that appellant had consumed alcohol the previous night but slept several hours and the crimes occurred many hours after his alcohol consumption. (***Id.***) Appellant reported no prior periods of blackouts except at times of alcohol consumption. Appellant reported no history of delusions, hallucinations, or other psychotic symptoms.

Dr. Wettstein's primary diagnosis was borderline personality disorder, described generally as difficulty getting along with others, as well as alcohol dependence, attention deficit disorder, and post-traumatic stress disorder. (***Id.*** at 1657-1658.) The doctor opined that none of the diagnoses interfered

with his ability to premeditate or deliberate the offense. (***Id.*** at 1660.) Appellant was not intoxicated at the time of the offense. (***Id.***) Dr. Wettstein also opined that appellant was not experiencing psychotic symptoms, a manic episode or manic depression at the time of offense. (***Id.***) "He certainly has ongoing problems with his moods, the problems with his anger, problems controlling his anger, problems with impulse control, but that is not a problem of being unable to plan or premeditate or deliberate an offense." (***Id.***)

Thereafter, on December 14, 2011, appellant was convicted of first degree murder, criminal solicitation (homicide), intimidation of witnesses, tampering with or fabricating evidence, and criminal solicitation (tampering with or fabricating evidence). He was sentenced to an aggregate sentence of life imprisonment plus 11 to 22 years' incarceration. Appellant filed a timely notice of appeal and 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. Herein, the following issues have been presented for our review:

> 1. Whether the evidence was sufficient to convict the defendant of a violation of Criminal Solicitation -- Criminal Homicide when there was no proof of an agreement or plan to commit nor any concerted act in furtherance of a conspiracy and whether that was properly charged to the jury[?]

2. Whether the evidence was sufficient to convict the defendant of "Intimidation of Witness/ Victim False/Misleading Testimony"[?]

3. Whether the evidence was sufficient to convict the defendant [of] intentionally premeditated [sic] the murder of Melissa Baker[?]

4. Whether the Commonwealth's action at trial of asking Carla Baker whether Nathaniel Baker, a witness for the prosecution, was a liar, was reversible error[?]

5. Whether the Court erred in allowing several pictures to be published to the jury[?]

6. Whether the Court erred in admitting details regarding a protection from abuse case in which Defendant and Victim were named parties[?]

7. Whether the Court erred in admitting exhibits #66 and 67, offered by Corporal Delucio as a latent print examiner, to be published to the jury[?]

8. Whether the Court erred in admitting evidence of text messages, offered by Trooper Lewis, even though it was not the best evidence of the Commonwealth's assertion[?]

. . . .

[9]. Whether the Court erred in admitting hearsay evidence through the testimony of Corporal Ashton[?]

[10]. Whether the Court erred in failing to instruct the Jury on the use of alcohol as a circumstance that should be considered when deciding the degree of homicide[?]

[11]. Whether the Court erred in in [sic] denying Defendant's request for a mistrial, after stating

to the jury, at the beginning of the charge, that it was "intimidating" to follow eloquent counsel's closing statements, when one of the charges was intimidating a witness[?]

[12]. Whether the Court erred in denying Defendant's request for a mistrial or curative instruction after the Commonwealth improperly made reference to Scott Baker's decision to plead guilty to general homicide halfway through the trial, which was prejudicial to Mr. Baker[?]

Appellant's brief at 9-10.[1]

The first three issues presented challenge the sufficiency of the evidence to support appellant's convictions of first degree murder, criminal solicitation, and intimidation of witnesses. No relief is due.

We begin our analysis of this issue by stating our standard of review:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

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[1] Appellant indicates in his brief that he has withdrawn one of the issues presented in his Rule 1925(b) statement.

> Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Brown, 23 A.3d 544, 559-560 (Pa.Super. 2011) (***en banc***) (citations omitted).

Following a review of appellant's sufficiency arguments, we agree with the Commonwealth that appellant has ignored our standard of review by examining the evidence in the light most favorable to him. A sufficiency of the evidence review does not include an assessment of the credibility of the testimony offered by the Commonwealth. ***Commonwealth v. Brown***, 538 Pa. 410, 438, 648 A.2d 1177, 1191 (1994). "Such a claim is more properly characterized as a weight of the evidence challenge." ***Commonwealth v. Wilson***, 825 A.2d 710, 713-714 (Pa.Super. 2003), citing ***Commonwealth v. Bourgeon***, 654 A.2d 555 (Pa.Super. 1994). The jury heard the testimony that appellant contends is inconsistent and unreliable: the failure of the police to recover non-existent video evidence from the mattress store, and the relocation and unloading of the gun by Officer Gismondi. The jury also heard extensive cross-examination of all witnesses and was able to evaluate such in deliberation. As stated previously, such an argument does not go to the sufficiency, but rather the weight of the evidence.

Nevertheless, we find the Commonwealth provided sufficient evidence to prove each element of first degree murder. To convict a defendant of first

degree murder, the Commonwealth must prove: a human being was unlawfully killed; the defendant was responsible for the killing; and the defendant acted with malice and a specific intent to kill. ***See*** 18 Pa.C.S.A. § 2502(a); ***Commonwealth v. Brown***, 605 Pa. 103, 113-114, 987 A.2d 699, 705 (2009); ***Commonwealth v. Sherwood***, 603 Pa. 92, 106, 982 A.2d 483, 491-492 (2009) (citations omitted). The Commonwealth may use solely circumstantial evidence to prove a killing was intentional, and the fact-finder "may infer that the defendant had the specific intent to kill the victim based on the defendant's use of a deadly weapon upon a vital part of the victim's body." ***Brown***, ***supra***, quoting ***Commonwealth v. Blakeney***, 596 Pa. 510, ___, 946 A.2d 645, 651 (2008). Malice, as well, may be inferred from the use of a deadly weapon upon a vital part of the victim's body. ***Commonwealth v. Gardner***, 490 Pa. 421, 424, 416 A.2d 1007, 1008 (1980).

Appellant took the stand and admitted to killing the victim. Dr. Wecht testified that the victim's carotid artery was wholly severed and the right jugular vein was partially severed. He opined that as the victim was dead or dying from strangulation, her throat was cut. Again, malice may be inferred from the use of a deadly weapon upon a vital part of the victim's body.

Appellant argues that the Commonwealth failed to disprove his diminished capacity defense. He avers that the jury should have found he was too intoxicated to murder, believed his testimony that he "blacked out,"

and accepted the opinion of Dr. Crabtree as to diminished capacity. Once again, such matters are reserved for the jury as the fact finders. Obviously, the jury credited the testimony of Dr. Wettstein who refuted the findings of diminished capacity.

> A diminished capacity defense does not exculpate the defendant from criminal liability entirely, but instead negates the element of specific intent. For a defendant who proves a diminished capacity defense, first-degree murder is mitigated to third-degree murder. To establish a diminished capacity defense, a defendant must prove that his cognitive abilities of deliberation and premeditation were so compromised, by mental defect or voluntary intoxication, that he was unable to formulate the specific intent to kill. The mere fact of intoxication does not give rise to a diminished capacity defense. [Rather, a defendant must] show that he was overwhelmed to the point of losing his faculties and sensibilities to prove a voluntary intoxication defense. Evidence that the defendant lacked the ability to control his or her actions or acted impulsively is irrelevant to specific intent to kill, and thus is not admissible to support a diminished capacity defense. Furthermore, diagnosis with a personality disorder does not suffice to establish diminished capacity.

Commonwealth v. Spotz, 616 Pa. 164, 211, 47 A.3d 63, 90-91 (2012).

The Commonwealth's expert testified that appellant was capable of forming the specific intent to kill. We find that the jurors were justified in finding that appellant acted with specific intent and that the murder was premeditated. The Commonwealth presented credible testimony as to appellant's intent and desire to kill the victim. The jury heard the testimony of Nathaniel who stated that appellant told him a week before her murder

that the victim was going to disappear. As the record supports the jury's finding that appellant committed first degree murder, it will not be disturbed.

Appellant also argues that the evidence was insufficient to support his conviction of criminal solicitation. His argument is two-fold: he first contends that the acts that are alleged to have been carried out by his son would not constitute homicide, and he also argues that the charge and verdict slip should have asked the jury to decide whether he committed criminal solicitation to commit criminal homicide, not murder.

We also find that the evidence was sufficient to support the charge of criminal solicitation.

> A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

18 Pa.C.S.A. § 902(a). Appellant avers that the "acts that are alleged to have been carried out by Nathaniel Baker would not constitute homicide." (Appellant's brief at 15.) No relief is due.

A closer look at Nathaniel's testimony indicates that the Commonwealth presented evidence that appellant is guilty of criminal solicitation. Again, Nathaniel testified that during a drive to Uniontown to purchase a mattress, appellant told him that the victim "was going to disappear." (Notes of testimony, 12/5/11 at 669.) A week before the

victim's death, appellant told Nathaniel that he was going to stay at the victim's home and when appellant picked him up "that's when he was going to do it." (***Id.*** at 671.) Appellant had a discussion with his son as to what would occur. (***Id.*** at 672.) Appellant told him that when appellant arrived, Nathaniel was to go to the bathroom and stay there until "he did it." (***Id.***) Nathaniel testified that he had never stayed at the victim's before this night. (***Id.***) When appellant arrived, Nathaniel went to the bathroom but the victim did not hear the door. After waiting in the bathroom five minutes, he came out and left with appellant. (***Id.*** at 673.)

The following week, appellant told Nathaniel that he was not going to school on Friday, November 20, 2009. This provided appellant with an alibi for the day and also gave appellant an excuse to go to the victim's house.

> A. Friday morning he just said, get your clothes on, and we're going. And then we went over [to the victim's].
>
> Q. Okay.
>
> A. And then he knocked on the door, she answered it, and then as soon as we got in I went to the bathroom.
>
> Q. Okay. Why did you go to the bathroom?
>
> A. Because he told me to.
>
> Q. Did he tell you why you were to go to the bathroom?
>
> A. Yeah, because he said he was going to kill her.

Id. at 676.

A. I heard a loud thump, and then a couple minutes later he said come get the baby. And then I --

Q. Let me ask you this: Before he said come get the baby, did you hear anything else in the living[ ]room?

A. No.

Q. Okay. And what did you do when he said come get the baby?

A. I picked up Brett and I took him to his room, and then I played with him.

Id. at 677.

A. He said come on, and then we went out to the truck.

Q. Who went out to the truck?

A. Me and my dad and Brett.

Q. How did you get from Brett's room to the truck?

A. We just walked outside.

Q. Okay. Did you see anything? Well, let me ask you this: To get from where you were with Brett to the truck, where did you have to walk?

A. We had to walk through the living[ ]room.

Q. Did your dad say anything to you as you were walking through the living[ ]room?

A. He just said don't look down.

Id. at 679.

Q. Was there a reason why you went to All Star?

A. My dad said, so he could be on camera.

Q. What happened at All Star?

A. He just bought a water, and then we left.

. . . .

Q. Where did you go from there?

A. We went to my grandma's old house.

. . . .

Q. What happened there?

A. My dad burned a sheet and a pillow.

Q. How do you know that?

A. Because I saw it in the mirror.

. . . .

A. We went home. And then he shredded credit cards.

Q. Where did that happen?

A. In my house. He put them in a shredder and then he put them in a bag.

Q. Okay. Where did those credit cards come from?

A. [The victim's] wallet.

. . . .

Q. What happened next?

> A. He went to [the victim's] house one more time. Me and Brett went with him, but we didn't go inside.
>
> Q. Okay. Did he say why he was going to [the victim's] house?
>
> A. He said he wanted to stage it like a robbery.

Id. at 680-683.

> Q. Why didn't you go to school that day?
>
> A. Because my dad told me that I wasn't going.

Id. at 686.

Nathaniel also testified that he initially lied to the police. He told them that he was home all day because he had a headache. (***Id.*** at 687-688.) He also told them that he was at All Star "because that's what I was supposed to do." (***Id.*** at 688.)

> Q. Before your dad dropped you off at [the victim's] on that Friday, did he give you any instructions?
>
> . . . .
>
> A. I had a phone, and my dad told me there was a code. I don't remember which one it was, but there was a code saying that if I sent one then nobody was coming over and that he could do it. But the other one meant that he couldn't.

Id. at 693-694.

The evidence produced at appellant's trial, if believed by the trier of fact, was clearly sufficient to support the verdict. Clearly, appellant directed

his son to stay at home from school on Friday, November 20, 2009; this provided him with an alibi and an excuse to enter the victim's residence. Appellant also directed Nathaniel on how to proceed once inside the residence. Nathaniel complied and went into the bathroom so appellant could commit a homicide. Nathaniel's performance of his role in the homicide and attempted cover up established that appellant engaged Nathaniel in the commission and concealment of the homicide. We agree with the trial court that the jury could reasonably infer that appellant's request to his 12-year-old son was equivalent to a command, which he obeyed. (Trial court opinion, 1/8/13 at 5.) As the trial court observes, the statute covers more than naked threats.

Appellant also contends that the verdict slip should have asked the jury whether appellant had committed criminal solicitation to commit criminal homicide, not murder. As the Commonwealth notes, in ***Commonwealth v. Weimer***, 602 Pa. 33, 35, 977 A.2d 1103, 1104 (2009), our supreme court highlighted the fact that the jury's verdict slip for the crime of conspiracy "read 'Criminal Conspiracy--Criminal Homicide,' and the jury wrote the word 'Guilty' below the charge, which provided no gradation options." Here, the verdict slip did not list a specific degree of murder, and the jury found appellant guilty of first degree murder. Thus, we cannot find appellant is entitled to relief.

We now turn to appellant's sufficiency challenge of intimidation of a witness. He argues that the Commonwealth did not establish proof of any force, threat, intimidation, or other means causing Nathaniel to act. (Appellant's brief at 16.)

§ 4952. Intimidation of witnesses or victims

(a) Offense defined.--A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:

. . . .

(2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge.

18 Pa.C.S.A. § 4952(a)(2).

Contrary to appellant's implicit argument, there is no requirement that the Commonwealth establish a threat was actually made to prove the offense of witness intimidation. ***Commonwealth v. Brachbill***, 520 Pa. 533, 538-539, 555 A.2d 82, 84-85 (1989). At trial, Nathaniel testified that his initial statement to the police was untruthful. He told the police that he and his father had been home all day because his father told him to do it. While there was no explicit testimony that appellant threatened his son in relation to his instruction to lie to the police, the jury could reasonably infer

that "a father who instructs his 12 year old son (and the father in this case is an imposing physical figure) to do or say something is intimidating." (Trial court opinion, 1/8/12 at 6.)

We now turn to the issue of whether the Commonwealth committed prosecutorial misconduct. (Appellant's brief at 24.) Appellant avers that the trial court should have granted his motion for a mistrial when the prosecutor asked Carla on cross-examination whether Nathaniel, her grandson, had lied. Appellant also claims that the trial court should have granted his motion for a mistrial when the prosecutor referred to Nathaniel's veracity during closing argument.

"Our standard of review for a claim of prosecutorial misconduct is limited to 'whether the trial court abused its discretion.'" ***Commonwealth v. Harris***, 884 A.2d 920, 927 (Pa.Super. 2005), ***appeal denied***, 593 Pa. 726, 928 A.2d 1289 (2007). "It is within the discretion of the trial court to determine whether a defendant has been prejudiced by misconduct or impropriety to the extent that a mistrial is warranted." ***Commonwealth v. Baez***, 554 Pa. 66, 102, 720 A.2d 711, 729 (1998), ***cert. denied***, 528 U.S. 827 (1999).

> In considering this claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one.
>
> Not every unwise remark on a prosecutor's part constitutes reversible error. Indeed, the test is a relatively stringent one. Generally speaking, a prosecutor's comments do not constitute reversible

> error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward [Appellant] so that they could not weigh[] the evidence objectively and render a true verdict. Prosecutorial misconduct, however, will not be found where comments were based on evidence or proper inferences therefrom or were only oratorical flair. In order to evaluate whether comments were improper, we must look to the context in which they were made. Finally, when a trial court finds that a prosecutor's comments were inappropriate, they may be appropriately cured by a cautionary instruction to the jury.

Harris, 884 A.2d at 927 (internal citations omitted). A new trial is required only when a prosecutor's improper remarks are prejudicial, ***i.e.***, when they are of such a nature or delivered in such a manner that they may reasonably be said to have deprived the defendant of a fair and impartial trial. ***Commonwealth v. Davis***, 554 A.2d 104, 111 (Pa.Super. 1989), ***appeal denied***, 524 Pa. 617, 571 A.2d 380 (1989).

At the outset, we note that appellant's issue concerning closing argument is waived as he has presented no argument concerning this claim in his brief. Nor does appellant direct us to the portion of the lengthy record where the objection was made during closing argument. Issues not properly developed or argued in the argument section of an appellate brief are waived. ***Commonwealth v. Cassidy***, 620 A.2d 9 (Pa.Super. 1993). We also note with disapproval the poorly developed argument presented in support of his cross-examination claim; appellant directs us to specific portions of the record but cites to one federal case.

Instantly, Nathaniel testified that during a shopping trip to Uniontown a week before the victim died, appellant told him that the victim was going to disappear. Carla, appellant's mother and Nathaniel's grandmother, accompanied them on this trip. During appellant's case-in-chief, Carla testified that appellant made no such statement during this trip. During cross-examination, Carla was asked if Nathaniel was lying when he testified to the contrary. Appellant claims such questioning was improper as it "relegated [sic] the task of accessing [sic] the credibility of a witness, which is the duty of the jury alone." (Appellant's brief at 24.)

We cannot find the instant prosecutorial question on cross-examination could have so prejudiced the jury as to have interfered with attainment of a true verdict. "A prosecutor's assertion that a witness had lied does not warrant a new trial when the statement was a fair inference from irrefutable evidence rather than a broad characterization." ***Commonwealth v. Ragan***, 538 Pa. 2, 38, 645 A.2d 811, 829 (1994). Likewise, the prosecutor's question to Carla as to whether she thought Nathaniel was lying was based on the fact that they told separate versions of events. The prosecutor's question did not so bias the jury as to render it incapable of delivering a true verdict. No relief is due.

We now turn to appellant's claims that the trial court erred in allowing the introduction of "several improper pictures." (Appellant's brief at 26.) Appellant specifically argues the trial court erred in admitting color photos of

the victim's body and a photo of the victim taken the night before she was found dead.

Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. ***Commonwealth v. Bardo***, 551 Pa. 140, 153, 709 A.2d 871, 877 (1998). Admissibility depends on relevance and probative value. ***Commonwealth v. Crews***, 536 Pa. 508, 523, 640 A.2d 395, 402 (1994). Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact. ***Id.***

Instantly, we find appellant's claim concerning the photograph of the victim smiling to be waived. Appellant has presented no argument concerning this claim in his brief aside from one conclusory sentence. (Appellant's brief at 26.) Again, issues not properly developed or argued in the argument section of an appellate brief are waived. ***Cassidy***, ***supra***. In any event, we would affirm this claim based on the trial court's opinion which explained the relevance of this photograph. (Trial court opinion, 1/8/13 at 11-12.) Likewise, with regard to appellant's boilerplate argument concerning the color photographs of the victim's body at the scene, we find no relief is due and affirm on the trial court's well-reasoned opinion. (***Id.*** at 12-13.)

Turning to appellant's issues numbered 6, 7 and 8, regarding the protection from abuse proceedings, exhibits #66 and #67, and the admission of text messages, we find these claims are waived. Appellant fails to direct this court to the specific portion of the record in support of these claims. Rules 2117(c) and 2119(e) of the Pennsylvania Rules of Appellate Procedure mandate that litigants specify the manner in which issues were preserved and the location in the record where the issue appears and was preserved. ***See also Commonwealth v. Bomar***, 573 Pa. 426, ___, 826 A.2d 831, 847 (2003) (holding that this court has no duty to peruse lengthy records to find support for issues raised by a defendant). The notes of testimony in this case consist of five volumes of testimony, totaling 1,839 pages; the trial was held from December 1, 2011 to December 14, 2011. It is not our duty to scour the record, and we decline to do so. Moreover, appellant has failed to properly develop arguments supporting these claims. Issues not properly developed or argued in the argument section of an appellate brief are waived. ***Cassidy***, ***supra***.

We now turn to appellant's ninth and tenth issues. We find no error with the trial court's holdings. 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 these questions raised on appeal. The trial court's opinion comprehensively discusses and

properly disposes of the questions presented. (Trial court opinion, 1/8/12 at 15-17.) We will adopt it as our own and affirm on that basis.

Appellant's eleventh issue is woefully underdeveloped. (Appellant's brief at 31.) Appellant has utterly failed to discuss this issue in any substantive, meaningful way. ***See Commonwealth v. Clayton***, 572 Pa. 395, 816 A.2d 217 (2002) (stating that undeveloped claims are waived). As a result, we will not review this argument and find that the issue has been waived.

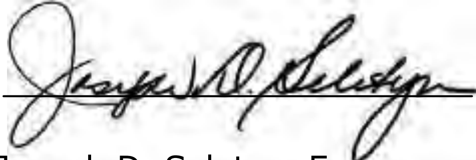
The final issue presented is whether the trial court erred in denying his request for a mistrial or curative instruction after the Commonwealth made reference to appellant's decision to plead guilty to general homicide halfway through the trial; appellant claims that such reference was unfairly prejudicial. (Appellant's brief at 31.) No relief is due.

After the Commonwealth rested, on the seventh day of trial, appellant pled guilty to general homicide. (Notes of testimony, 12/9/11 at 1284-1308.) Thereafter, the trial court advised the jury that appellant had pled guilty to a general charge of homicide and clarified what such a plea meant in terms of the Commonwealth's burden. (***Id.*** at 1316-1320.) Appellant then took the stand and admitted to killing the victim. (***Id.*** at 1352.) We agree with the trial court that the prosecutor's reference to appellant's plea "did not infringe on any right of [appellant] and did not in any way unfairly impact the jury's decision." (Trial court opinion, 1/8/12 at 18.)

Judgment of sentence affirmed.

Strassburger, J. files a Concurring and Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/21/2014

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

COMMONWEALTH OF PENNSYLVANIA,)

vs.) Nos. 544 & 545, CRIMINAL, 2009

SCOTT J. BAKER,)

Defendant.)

MEMORANDUM PURSUANT TO PA. R.A.P. 1925

On November 20, 2009, co-workers found Melissa Baker, a 30 year old corrections officer at the Greene County Jail, dead in her mobile home in Crucible. Her throat had been cut, so deeply that her right carotid artery was severed, but a subsequent autopsy showed that death was due primarily to asphyxiation caused by manual strangulation.

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Suspicion soon centered on the victim's estranged husband, Scott J. Baker, Defendant. He was arrested and charged with homicide. The matter came to be heard by a jury in December of 2011 and, after a two week trial, Defendant was found guilty of first-degree homicide and related offenses. He was subsequently sentenced to life in prison.

The testimony at trial revealed that the parties were married in 2006. Their son, Brett, was born on March 25, 2008. There were problems in the marriage and the parties separated in September of 2009, when Defendant was hospitalized following a suicide attempt. After his discharge from a local hospital,

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he returned to the marital home in Nemacolin, a house owned by his mother. At about that time, the victim left and moved into a new residence in Crucible. Defendant's son from a previous relationship, Nathaniel (d/o/b: 6-2-97), lived with Defendant and his mother, Carla Baker. Defendant and the victim had a shared custody arrangement with Brett.

In the second week of the trial, Defendant took the stand and for the first time admitted killing Melissa Baker. He said that he had taken Brett to her house on the morning of November 20, 2009, and while exchanging custody, they got into an argument over hospitalization insurance. Defendant testified that the argument got more heated and then he "blacked out". The next thing he remembers is being astride the victim on the floor with his hands or arms around her neck. He said he had no memory of cutting her throat. Nathaniel, who had stayed home from school that day and had accompanied him to the victim's house, was in the bathroom when the killing actually occurred. Nathaniel emerged and carried Brett back to Defendant's truck. Defendant then drove away with his two sons. Apparently, he drove around aimlessly for a while, then told Nathaniel "I think I killed Melissa", or words to that effect. He went back to her house, reentered and attempted to create the impression of a robbery. He removed the contents of her purse and threw the purse on the floor. He placed her pistol near her hand. He took jewelry from her bedroom. He took a sheet from her bed. He then drove to his parents' vacant house in Clarksville where he burned the sheet and hid the jewelry in the duct work of the house. (Defendant's father had recently passed away and his mother, Carla, had left their home in Clarksville and

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moved in with Defendant in the house she owned in Nemacolin). Defendant then told Nathaniel to tell the police, if he was asked, that the two of them were at the Nemacolin house all day.

They returned to the Nemacolin house, where Defendant shredded the cards and papers he had removed from the victim's purse. He left the boys at his mother's workplace while he went to a previously scheduled physical therapy session in Uniontown. When he got back to Nemacolin, he drove Nathaniel to a middle school dance, but on the way told him to drop the shreds from the purse contents into a trash can at local super market. This event was captured on a surveillance video. At some point during these happenings, he heard that Melissa Baker had been found dead and that the Pennsylvania State Police wanted to talk to him. He asked a friend to accompany him and they went to the Waynesburg barracks. Following questioning, he was arrested.

Nathaniel told a different story. He testified that at a trip to a mattress store in Uniontown a week or so before the death, Defendant told him that Melissa was "going to disappear". He said that on November 19, 2009, Defendant told him that he would stay home from school the next day, Friday. On Thursday after school, the two them went to Melissa's house and Defendant told Melissa that Nathaniel was feeling ill and had a doctor's appointment for the next day, so he would be dropping off Brett for her to watch while Defendant took Nathaniel to the doctor. According to Nathaniel, on Friday morning the Defendant, Nathaniel, and Brett went to the victim's house. Defendant told Nathaniel to tell Melissa that he had to use the bathroom. Nathaniel went to the bathroom and

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while there he heard a loud thump and other noises coming from the living room. Then he heard his father telling him to get Brett and take him to the truck. As they exited the victim's trailer, Defendant told him not to look down.

Later that day Pennsylvania State Police officers came to the Namacolin house and took Nathaniel along with his mother, Sarah Smith, to the Waynesburg barracks. At first he told police that he and his father had been at the Nemacolin house all day and that their only departure was to a store in Carmichaels where Defendant bought water and snuff. After an interval in the questioning during which his mother urged him to tell the truth, he recanted his first story and then described to the investigators the same events that he testified to.

Following the conviction and sentencing, Defendant filed a timely appeal and at our request filed a concise statement of matters complained of pursuant to Pa. R.A.P. 1925. He promptly responded mentioning some 11 issues, but also requested leave to supplement the list after the transcript was filed. The supplemental list has now been filed. We will discuss each of the issues raised by Defendant.

1. Insufficient Evidence to Convict the Defendant of Criminal Solicitation to Commit Criminal Homicide

The jury convicted Defendant of criminal solicitation. "A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages, or requests another person to engage in specific conduct… which would establish his complicity in its commission… ." 18 Pa. C.S.A. §902.

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In considering a claim of insufficiency of the evidence, we bear in mind that it was for the jury to determine the weight of the evidence and the credibility of the witnesses. To that end, a court considers the evidence in the light most favorably to the verdict winner, the Commonwealth in this case. In that light, a court determines if the evidence and all reasonable inferences from that evidence are sufficient to establish the elements of the offense beyond a reasonable doubt. Commonwealth v. Thur, 906 A.2d 552 (Pa. Super 2006). Here, there was evidence that Nathaniel engaged in conduct which would establish his complicity in Melissa's murder. At Defendant's request or command, he stayed home from school on Friday, November 20, 2009, apparently for two reasons: first, to give Defendant an alibi for the day; and second, to give Defendant an excuse to go to the victim's house and ask her to let them in when Nathaniel said that he had to use the bathroom. It was during this interval that she was killed. It was certainly a reasonable inference for the jury to assume that a request by a father to a 12 year old boy was equivalent to a command.

2. Intimidation of a Witness

Along the same lines, Defendant claims that there was insufficient evidence to find him guilty of intimidation of a witness. According to 18 Pa. C.S.A. §4952, "A person commits an offense if, with the intent to … impede…or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness to… [g]ive any false or misleading information relating to the commission of any crime to a law enforcement officer… [or]… [w]ithhold

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any testimony [or] information… relating to the commission of a crime from any law enforcement officer… ."

Nathaniel clearly testified that his initial statement to the police, that he and his father had been at home all day, was a lie and that he told it because his father told him to. Obviously there was sufficient evidence presented to the jury from which it could find that element of the offense. Rather, it seems to be Defendant's point that there is no evidence that Defendant "intimidated" Nathaniel. Although there was no testimony that Defendant made explicit threats to Nathaniel in connection with his instructions to him that he lie to the police about Defendant's whereabouts on the day of the murder, we believe that it is a reasonable inference that a father who instructs his 12 year old son (and the father in this case is an imposing physical figure) to do or say something is intimidating. Furthermore, the statute covers more than naked threats. Commonwealth v. Brachbill, 555 A.2d 82 (Pa. 1989). Finally, we note that §4952 (b)(2) and (3) use the phrase "to influence or intimidate" in grading this offense. Obviously, for a father to instruct his 12 year old son to say a certain thing is to influence him.

3. Insufficiency of Evidence of Premeditation

Here, in the second week of trial, Defendant took the stand and admitted to killing Melissa Baker. The facts as he relayed them would have supported a charge of voluntary manslaughter or perhaps third-degree murder. On the other hand, the jury heard the testimony of Nathaniel, who said that Defendant told him a week earlier that Melissa was going to disappear, and who told him the day before the killing that he was going to stay home from school the next day. This is

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certainly sufficient evidence from which the jury could find that the murder was premeditated. To be sure, there were inconsistencies in Nathaniel's testimony, which Defendant's counsel skillfully exploited on cross-examination, but the jury heard it all and there is absolutely no reason to disregard its verdict.

a. Statement of Angela Romanakis

Angela Romanakis was a neighbor of the victim and coincidently a co-worker (who was on sick leave at the time of Melissa's death). She testified that on the morning of November 20, 2009, she looked out her window and noticed a dark colored pick-up truck at the victim's house, which she recognized as Defendant's truck. She knew that the two were separated and that they shared custody of Brett. Later, the truck was gone and still later appeared again, this time backed up to the porch. She testified she saw a man on the porch at the later time whom she recognized to be Defendant although she had never met him.

Defendant extracted on cross-examination an admission by her that when she first spoke to the investigating officers she omitted the part about seeing the man on the porch. She could not explain the omission.

b. Sarah Smith's Influence on Nathaniel Baker

Defendant argues that Sarah Smith "persuaded Nathaniel Baker to tell the police that his dad killed Melissa Baker and that he was asked to help". There is absolutely no evidence that Sarah Smith told Nathaniel to say those words. Instead, she testified that she told Nathaniel to tell the police the truth. To be sure, Nathaniel gave two different versions of the events of November 20, 2009, to the

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police, but it was up to the jury to determine the truth. Obviously, it believed the second version.

c. Dr. Wecht's testimony

Dr. Wecht testified that in his professional opinion the cause of death was asphyxiation due to manual strangulation. The wound in the victim's throat may have been a contributing factor. He clearly testified that she was already dead or "dying" when her throat was cut. The Commonwealth did not "conclude" that the victim was alive at the time of the wound.

d. Discrepancies in Nathaniel Baker's testimony

i. & ii. The Existence of a 'Code' Prior to the Murder

On direct examination, Nathaniel testified that he was supposed to send a code to Defendant if he could "help do it", presumably help Defendant kill Melissa. The evidence on this point was uncertain and unclear, and according to Defendant was inconsistent with the text message dates which supposedly relayed the coded message. Likewise, Nathaniel did not mention the code to Corporal Ashton. There was abundant evidence completely apart from any reference to a code that the murder was premeditated. See paragraph 3 above.

iii. The Trip to the Mattress Store

Nathaniel testified that a few weeks before Melissa's death, while driving to a mattress store in Uniontown, Defendant told Nathaniel that she would "disappear". He testified that Carla Baker met them at the store. Carla herself testified that she rode with them on the trip to Uniontown and heard no such conversation, although there was evidence that Defendant and Nathaniel were

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alone in the truck for about ten minutes on the trip from Nemacolin to Carmichaels, where they picked up Carla.

iv. Nathaniel's memory

Several times, Nathaniel in response to questions said that he could not remember certain events or statements. It must be recalled that the trial took place over two years after Melissa's death. Perfect recall by anyone, let alone a twelve year old, is unlikely.

e. No Video Evidence from Mattress Store

This is a matter for argument. The jury was able to come to a decision based on the evidence offered. Certainly, the lack of evidence on a point like this does not compel a finding that as a matter of law no jury could find that the murder was premeditated.

f. Victim's gun

The first officer on the scene, Officer Gismondi, noted the victim's pistol lying near her hand. He picked it up from the floor, emptied it, and set it on a table, out of concern, he said, for the safety of other first responders. There is no evidence this gun had anything to do with the death of Melissa Baker. There was no evidence it was fired that day. Whether Officer Gismondi followed proper crime scene protocol could in no way have confused the jury or deprived Defendant of a fair trial.

g. Scott Baker's Intoxication

See paragraph 11 below.

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h. Scott Baker's Post-Traumatic Stress Disorder

See paragraph 11 below.

All of these issues were discussed and thoroughly rediscussed during extensive cross-examination. All were laid before the jury which was charged with determining credibility. The fact that the jury convicted Defendant is no argument that there was any error in the conduct of the trial.

4. Prejudice of Asking Carla Baker if Nathaniel was a Liar

As mentioned earlier, Nathaniel testified that during a shopping trip to Uniontown about a week before Melissa's death, Defendant told him that she was going to disappear. Defendant's mother and Nathaniel's grandmother, Carla Baker, accompanied them on that trip. During Defendant's case in chief, she testified that Defendant made no such statement. During cross-examination, she was asked if Nathaniel was lying when he testified to the contrary. Defendant claims that this was improper because it "relegated the task of accessing [sic] the credibility of witness, which is the duty of the jury alone". This was prejudicial to Defendant because it cast Carla Baker in a falsely hostile light.

We cannot agree with this argument and we believe it is no basis for a new trial. It is surely the task of an advocate to explore and display to the trier of fact inconsistencies in the evidence. It is part of the standard jury instruction that "the jury has the duty of deciding which testimony to believe. But [it] should attempt to reconcile… any conflicts in the testimony… ". Pa.-J.I. Crim. 4.09. Here, even though Carla Baker testified under oath that there was no mention by Defendant of Melissa "disappearing" during the trip to Uniontown, she also admitted that she

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was not with Defendant and Nathaniel for the entire trip, because they set out from Nemacolin by themselves that day and picked her up at her place of work in Carmichaels, about ten minutes away.

It is of course improper to ask an expert witness to opine on the credibility of a witness. Commonwealth v. O'Searo, 352 A.2d 30 (Pa. 1976), but nothing prevents a party from attacking the credibility of witness by comparing her testimony to that of another witness. Pa. R.E. 607.

5. Objection to photographs

Defendant objects to the admission of several photographs. Specifically, he objects to Ex. 122, a picture of the victim, seated and smiling. He claims that the picture is irrelevant and prejudicial. Prejudicial it may have been, because it was detrimental to his position, but it was highly relevant. Ex. 122 shows the deceased seated at a table in a restaurant, smiling at the camera. It was taken in the early morning hours of November 20, 2009, and it is undoubtedly the last picture taken of her during her lifetime. A friend, Kelly Rishell, testified and authenticated the photo. It seems that the two women, co-workers at the Greene County Jail, were working the afternoon shift on November 19. They finished at about midnight, changed clothes and went to a local bar, Stiffy's. They met a couple of friends and all four went to the Mount Morris Truck Stop for breakfast. As they sat at a table, Rishell across from Melissa, she took the victim's picture with her phone. What makes the photograph relevant was that it clearly showed an opal "Mother" pendant around her neck, described and identified in court by her mother. The next time the opal pendant was seen was by Defendant's mother

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when she found it some months later in the duct work of the Clarksville house. This was a house to which only three people had access: Defendant, his mother Carla, and his sister Marla.

During the Commonwealth's case in chief, before there was any indication that Defendant would admit anything, the evidence, including Ex. 122, introduced by the Commonwealth showed that shortly before her death the victim was in possession of a distinctive item of jewelry. The item was not found among her effects after her death. It was found in a place that could have been accessed only by three people, one of whom was Defendant. The photo was highly relevant.

Defendant also complains about the introduction of all of the color photographs of the body and the murder scene, arguing that they were more prejudicial than probative. Cyril Wecht, M.D., performed the autopsy and described the photographs that he took as part of the process. Although the photographs were graphic and perhaps gruesome, we believe that the probative value clearly outweighs the likelihood of inflaming the minds and passions of the jury. Commonwealth v. Morelli, 609 A.2d 203 (Pa. 1997). This was a homicide where the victim was strangled and then had her throat slashed. It was obviously an unpleasant and brutal scene, but to exclude the photos would be to hamper the Commonwealth's attempt to prove one of the essential issues of this trial, the intent of the actor. Commonwealth v. McCutchen, 454 A.2d 549 (Pa. 1982). As to the objection that the photographs were in color, we respond that we live in a world of color and to introduce only black and white photographs would inject a tone of artificiality. Even more significantly, we note that the color photo of the

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decedent's face, Ex. 157, showed multiple petechial hemorrhages. Dr. Wecht explained that these red dots scattered across the victim's face, particularly in the area of the eyes, are indicative of asphyxiation. They are clear on the color photograph; they cannot be seen on the black and white copy that was available. To have admitted only the black and white photo would have deprived the jury the opportunity to see what Dr. Wecht was talking about.

6. Introduction of PFA

The Prothonotary of Greene County was called to testify that her office contained the records of a Protection from Abuse proceeding between the victim and the Defendant. She said that the victim filed a PFA petition against the defendant on September 14, 2009, which was duly served on the defendant and was withdrawn by the victim on September 29, 2009. The contents and specific allegations were not divulged to the jury. We admitted the fact of the filings because it occurred at about the same time as Defendant's hospitalization and the parties' separation. It was offered and admitted for the purpose of showing the parties' relationship at the time of their separation.

7. Report of Fingerprint Examiner

Anthony DeLucio, a fingerprint examiner with the Pennsylvania State Police, testified. The gist of his testimony was that he examined for latent fingerprints the victim's Glock .40 handgun found near the body. He found none. We permitted the Commonwealth to offer this testimony to show the thoroughness of its investigation. This was in no way incriminating to Defendant.

8. Text Messages

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Defendant argues that we erred when we admitted a photograph or photographs of a cell phone screen displaying a text message. The photograph was authenticated by Donald Lucas, the Pennsylvania State Police trooper who took the photo of the screen. We admitted it as evidence of the message, rather than the cell phone itself because of safety and security. The photograph is fixed and unchangeable. Messages on the phone could be deleted. P.A. R.E. 1003 provides as follows: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate of the original." Neither circumstance was present in this case.

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9. Verizon Wireless Records

Defendant objects to the Verizon Wireless records of cell phone activity relating to Defendant's cell phone as they were compiled by what Chris Sproul, a Verizon employee, called the "law enforcement team" of Verizon in Bedminster, New Jersey. He explained that when a proper request is made to use Verizon cell phone records in court this team triggers a computer search that generates a list of activities for the phone in question. Mr. Sproul described himself as a custodian of call records for Verizon. The process seems to be that a subpoena or similar request comes to him and he forwards it to his law enforcement team which in turn activates a computer search of Verizon's records. This search generates a report which is transmitted electronically to Mr. Sproul who delivers it to the requesting entity.

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We believe that Mr. Sproul was the proper person to authenticate the report. He is the custodian of records. The fact that other persons in the corporation helped him compile those records does not make him incompetent to present the evidence. If in the days before computers a request was made for information to be culled from the records of a large corporation, the fact that a team of clerks helped the custodian find the requested records would not invalidate the results of the search nor would all of those clerks have to testify. The custodian of the records is not necessarily the person who compiles the report, but is the person who can testify about how the business is regularly conducted and how records are kept. PA. R.E. 803(6).

10. Hearsay Evidence of Corporal Ashton

Retired Pennsylvania State Police Corporal Beverly Ashton testified, primarily about her interview with Nathaniel Baker. By the time she appeared in the trial, Nathaniel had already testified about his visit to the Waynesburg barracks with his mother, his first version of the events of November 20, 2009, the interval in questioning when his mother told him to tell the truth, and his second version of the events of November 20, 2009. He was extensively cross-examined on his testimony. Corporal Ashton described for the jury over Defendant's objections of hearsay her account of these interviews. We believe that the testimony was admissible because it was not offered for the truth of the matter, which Nathaniel had already testified about, but rather was offered to give context to her observations of Nathaniel's demeanor and affect during the questioning and each of his versions.

11. Failure to Instruct the Jury on the Effect of Alcohol When Considering the Degree of Homicide

Defendant complains that it was error for us to fail to charge the jury on his alleged voluntary intoxication at the time of the murder. It is true that a person can be so intoxicated that he cannot form the intent to commit premeditated murder, Commonwealth v. Tilley, 595 A.2d 575 (Pa. 1991), but we did not do so because there was little evidence to suggest that he was. Defendant never claimed to be intoxicated on November 20, 2009. He did testify that between the hours of approximately 8:00 p.m. and 2:00 a.m. the evening before he consumed a fifth of liquor. This apparently was his normal custom. The time of the killing is uncertain, but was most likely between 9:00 and 9:30 the next morning. There was no testimony that Defendant's thought processes or motor skills were in any way affected by his alcohol consumption.

His expert, Dr. Crabtree, was called to opine that because of Defendant 's childhood abuse at the hands of his father, he suffered from Post-Traumatic Stress Disorder (PTSD) and because of that Defendant could not think clearly enough to develop a consistent plan for any complicated part of his life. Dr. Crabtree also opined that the effects of Defendant's PTSD were exacerbated by the high levels of alcohol he regularly consumed. We think that it is significant, however, that Dr. Crabtree only met Defendant when he was confined. He never met him or talked to him when he had been drinking. He made certain assumptions regarding Defendant's state of intoxication, but these were necessarily vague. Nothing in the record supports the conclusion that he was "so overwhelmed or overpowered" by

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alcohol so as to be incapable of forming the specific intent to kill. Commonwealth v. Tilley, *supra*.

12. Error in the Court's Use of the Word 'Intimidating'

Here, the Defendant claims that the jury was hopelessly confused when it heard on the same day in two different contexts the word 'intimidate'. Webster's New Collegiate Dictionary (1980) defines intimidate as "to make timid or fearful" or "to compel or deter by or as if by threats". Our use of the word to describe our attitude in addressing the jury following the eloquent presentations by defense counsel and the district attorney was intended to be a bit of self-deprecating hyperbole. We are absolutely confident that the jury understood it as such. The statute itself contains no definition of intimidate, likely because it is a word in common usage in everyday English. We do not believe the jury needed any particular instruction on the word although we certainly would have considered Defendant's request for a charge on that point, but he made no such request.

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13. Commonwealth's reference to Defendant's to Defendant's Decision to Plead Guilty during the Trial

Once Defendant admitted that he killed Melissa Baker, the task for the jury was to ascertain the degree of homicide. Any reference by the Commonwealth to his decision to take the stand was after the fact of his testimony and his admission. The testimony and admission was a fact before the jury which the Commonwealth had a right to explore. This did not infringe on any right of the Defendant and did not in any way unfairly impact the jury's decision.

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Respectfully submitted,

21 Dec 2012
Date

William R Nalitz
William R. Nalitz