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PENNSYLVANIA SUPERIOR COURT
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA **Plaintiff-Appellee,**	)	**802 WDA 2017**
v.	)	**CP-02-CR-0001624-2016** **CP-02-CR-0001637-2016**
LUCAS GUGGENHEIMER **Defendant-Appellant.**	)	**Trial Court: Mariani, A.M.**

Defendant-Appellant's Opening Brief

Appeal from the June 13, 2017 Judgment of Sentence Entered by the Honorable Anthony M. Mariani of the Allegheny County Common Pleas Court, Criminal Division, CP-02-CR-0001637-2016 and 1624-2016

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STATEMENT OF JURISDICTION

Jurisdiction for this appeal is provided for at 42 Pa. C.S. § 742, relating to this Court's exclusive appellate jurisdiction from a Common Pleas Court's final order.

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the May 4, 2017 judgment of sentence entered by the Honorable Anthony M. Mariani of the Allegheny County Common Pleas Court, Criminal Division, CP-02-CR-0001637-2016 and 1624-2016.[1]

On December 15, 2017, the Allegheny County Public Defender's Office filed Mr. Guggenheimer's *Concise Statement of Errors of Appeal.*[2]

On July 17, 2018, Judge Mariani filed his opinion.[3]

PROCEDURAL HISTORY

On March 2, 2016, the Commonwealth filed an *Information* charging Lucas Guggenheimer with an assortment of crimes in connection with two shootings: one involving an October 10, 2015 Turtle Creek shooting, another involving Justin Granda's October 11, 2015 shooting death. Mr. Guggenheimer

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[1] Rpp. 1-12. Counsel filed a separated *Reproduced Record*. Counsel cites to the *Reproduced Record* by using Rp. ___(for single page references) or Rpp. ____ (for multi-page reference).
[2] Rpp. 30-34.
[3] Rpp. 13-29.

pleaded not guilty and proceeded to trial before the Honorable Anthony M. Mariani. On February 16, 2017, in case number 1624-2016 (Granda murder), the jury convicted Mr. Guggenheimer of third-degree murder (18 Pa. C.S. § 2502(c)) and firearm not to be carried without a license (18 Pa. C.S. § 6106(a)(1)). In case number 1637-2016 (Turtle Creek shooting), the jury convicted Mr. Guggenheimer of firearm not to be carried without a license and two counts of REAP (18 Pa. C.S. § 2705). Ralph Karsh represented Mr. Guggenheimer at trial.

On May 4, 2017, Judge Mariani sentenced Mr. Guggenheimer to an aggregate term of 24 to 48 years imprisonment, with time credited for 553 days. In case number 1624-2016, Judge Mariani imposed a 20- to 40-year prison sentence for the third-degree murder conviction and a consecutive 2- to 4-year prison sentence for the firearm not to be carried without a license conviction. In case number 1637-2016, Judge Mariani imposed consecutive 1- to 2-year prison sentences for the REAP convictions and no further penalty for the firearm not to be carried without a license conviction.

Ralph Karsh withdraw and Judge Mariani appointed the Allegheny County Public Defender's Office. On December 15, 2017, Assistant Public

Defender Victoria Vidt filed Mr. Guggenheimer's *Concise Statement of Errors of Appeal*.[4]

On December 29, 2017, Lucas Guggenheimer retained undersigned counsel to litigate his direct appeal before this Court.

On July 17, 2018, Judge Mariani filed his opinion.[5]

ISSUE PRESENTED

Mr. Guggenheimer respectfully presents the following claim for the Court's consideration and adjudication:

> **The Record Evidence Was Insufficient as a Matter of Law to Convict Mr. Guggenheimer of Third-Degree Murder in Case Number 1624-2016. The Record Evidence Supported Two Equally Reasonable, Yet Mutually Exclusive, Inferences, One Incriminating Mr. Guggenheimer, the Other Exonerating Him. The Record Evidence, Therefore, Was in Equipoise Regarding the Guilt-Innocence Issue and the Jury Should Not Have Been Permitted to Guess as to Which Inference it Wished to Adopt. U.S. Const. admts. 5, 6, 8 14; Pa. Const. art. I, §§ 8, 9.**[6]

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[4] Rpp. 30-34.

[5] Rpp. 13-29.

[6] Mr. Guggenheimer preserved this claim for appellate review. Trial counsel moved to dismiss the murder count on insufficiency grounds after the Commonwealth rested. Tp. 777. Likewise, Mr. Guggenheimer's initial appellate attorney raised this issue in Mr. Guggenheimer's *Concise Statement of Errors on Appeal*. Rp. 33.

STANDARD AND SCOPE OF REVIEW

The standard of review for a sufficiency claim is whether, after viewing the record evidence in a light most favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Cabanj*, 60 A.3d 120, 132-133 (Pa. Super. 2012). In applying this standard, the Court may not reweigh the evidence or substitute its own judgment for the fact-finder's.

The Commonwealth may sustain its burden with only circumstantial evidence. *Id.* Moreover, the fact-finder is free to believe all, part, or none of the record evidence. *Id.* The Court must "examine and scrutinize in detail all the evidence in this record and to attempt to place in juxtaposition each act, scene and character in this macabre drama." *Commonwealth v. De Moss*, 165 A.2d 14, 16 (Pa. 1960).

Any doubts regarding the 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." *Commonwealth v. Cabanj*, 60 A.3d at 132-133. Thus, in those cases where the Commonwealth's evidence is insufficient as a matter of law, this Court "has

consistently held" it is "not bound" by the fact-finder's factual findings and credibility determinations. *In the Interest of J.B.*, 189 A.3d 390, 409 (Pa. 2018).

STATEMENT OF FACTS

A. The Turtle Creek Shooting

On October 10, 2015, Mr. Guggenheimer was looking to purchase marijuana. Mr. Guggenheimer sold marijuana. He used to purchase his marijuana from a man named Stone, but he and Stone eventually pooled their resources together, so they could buy larger quantities and make larger profits for the marijuana they sold.[7]

During the afternoon of October 10th, Mr. Guggenheimer spoke with his good friend, Justin Granda, about purchasing marijuana. Granda had worked at Day Ford Chevrolet in Monroeville and knew one of the salesmen, Sean Sperber, sold marijuana on the side. Sean sold an ounce for $250, but if the buyer purchased 8 or more ounces, Sean sold it for $200 an ounce. Mr. Guggenheimer did not know and had never purchased marijuana from Sean,

[7] Tpp. 812-816. The transcripts consist of 1,221 consecutively numbered pages. References to the transcripts will either be Tp. ___ (for single page citations) or Tpp. ___ (for multi-page citations).

but he felt comfortable purchasing from Sean because his good friend (Granda) vouched for him and said he was a legit supplier.[8]

Mr. Guggenheimer only had $800 in cash on him but wanted to purchase 8 ounces, so he could take advantage of the cheaper bulk rate. He intended to call Stone, tell him about Granda's supplier's prices, and ask him for an additional $800. Mr. Guggenheimer called Stone later that afternoon (October 10th) for a ride when his car overheated and broke down in front of the Old Town Buffet on Rt. 51 near the Liberty Tunnel. At the time, Mr. Guggenheimer was with his friend Amirae Benton. Stone picked up Mr. Guggenheimer and Benton and gave Mr. Guggenheimer $800 in cash before dropping them off at Granda's house in Mt. Oliver. Mr. Guggenheimer had $1,600 in cash to purchase a half pound (8 ounces) of marijuana from Granda's supplier.[9]

Mr. Guggenheimer only knew Stone as Stone. He did not know Stone's real name, nor did he know where Stone lived because he had never been to Stone's residence.[10] Mr. Guggenheimer never asked Stone his real name because he would not have lasted long in the drug trade. If a buyer or seller

[8] Tpp. 812-815
[9] Tpp. 815-818.
[10] Tpp. 832, 842.

repeatedly asked their buyers and suppliers their real names, word would quickly get out that this buyer or seller was likely a "snitch" working for law enforcement.[11]

Once at Granda's house, Granda said his "connection" was not ready yet, so Mr. Guggenheimer, Granda, and Benton walked to a nearby beer distributor. Granda briefly split from Mr. Guggenheimer and Benton when he went off with a woman he was courting. During this period, Sean called Granda and said he was finally free to make the sell. Granda called Mr. Guggenheimer and said his supplier was ready.[12]

Sean lived in Turtle Creek, so the group needed transportation because none had a car or a serviceable one. Mr. Guggenheimer, consequently, called cab driver Johanna Jones. Mr. Guggenheimer had befriended Jones a few months earlier and had called her on prior occasions when he needed a ride. Jones picked up Mr. Guggenheimer and Benton in Mt. Oliver before picking up Granda at his house. Granda gave Jones Sean's Turtle Creek address - 1903 Lynn Avenue – and she drove them (Mr. Guggenheimer, Granda, and Benton)

[11] Tp. 842.
[12] Tpp. 817-819.

to this address. The group left the Arlington/Mt. Oliver area for Turtle Creek around 11:00 p.m. on (Saturday) October 10th.[13]

None of the three, including Mr. Guggenheimer, had ever been to Sean's residence, so none knew its layout or whether other people lived with, near, under, or over Sean. Their sole purpose of going to Sean's was to purchase a half pound (8 ounces) of marijuana and Sean knew this because he and Granda had discussed quantities and prices throughout the afternoon and early evening. None of the three, including Mr. Guggenheimer, had any intention of robbing Sean. Mr. Guggenheimer simply wanted to purchase marijuana.[14]

Mr. Guggenheimer was armed that night but concealed his 9 mm firearm in the waistline of his pants. Neither Granda, nor Benton were armed. Mr. Guggenheimer did not have a license to carry a firearm, but he carried one for protection because, as a small-time marijuana dealer, he needed to be able to defend himself if a buy or sell went bad. Although he was armed, he still had no intention of robbing Sean.[15]

[13] Tpp. 240-242, 819-821.
[14] Tpp. 819-821.
[15] Tpp. 835, 844.

Sean's Turtle Creek residence - 1903 Lynn Avenue – is a duplex that sits atop a hill. Unbeknownst to Mr. Guggenheimer and the group, Sean lived in the top apartment with his wife and child, while his brother, Seth Sperber, lived in the bottom apartment. There are 30 plus steps leading from the duplex to the base of the hill near Lynn Avenue. When the group arrived at Sean's residence, Mr. Guggenheimer and Granda exited the cab, while Benton remained in the cab. Mr. Guggenheimer told Jones they would be back in 15 to 20 minutes.[16]

As Mr. Guggenheimer and Granda approached 1903 Lynn Avenue, they saw Sean standing at the base of the hill near the steps. Granda introduced Sean to Mr. Guggenheimer before Sean escorted them up the 30 plus steps to the back of the duplex and through the back door into Seth's kitchen.[17]

Mr. Guggenheimer saw Seth standing in the kitchen by himself. Mr. Guggenheimer had never met Seth and had no idea he was a unemployed heroin addict who also smoked marijuana. Mr. Guggenheimer tried to make small talk with Sean and Seth but they acted "zombie-like" and said very little. Mr. Guggenheimer, consequently, cut to the chase and asked to see the

[16] Tpp. 821-822.
[17] Tpp. 821-822.

marijuana. Sean pointed to the kitchen table and said, "That's what I have." It was a small sampling of the marijuana Sean intended to sell. Mr. Guggenheimer smelled the marijuana and thought it "smelled good." Sean said they could sample it by using the smoke pipe on the kitchen table. Knowing Granda "really wanted to smoke," Mr. Guggenheimer gave his good friend first dibs at trying the marijuana. When Granda liked it, Mr. Guggenheimer gave Sean the $1,600 in cash he had and asked for 8 ounces of marijuana.[18]

When Mr. Guggenheimer gave Sean the money, Sean said he had to go get it. He exited the kitchen through the back door. A few minutes later, he reentered the kitchen with a bag of marijuana. Mr. Guggenheimer immediately "knew it was short," meaning the bag contained less than 8 ounces of marijuana. Based on his experience weighing and packaging marijuana, Mr. Guggenheimer believed the bag, at most, contained only 6 ounces, which is what he immediately told Sean. Sean disagreed and told him the bag contained 8 ounces. Mr. Guggenheimer asked Sean to "grab his scale."

[18] Tpp. 822-823.

Sean said he did not have a scale and shoved the bag of marijuana into Mr. Guggenheimer's chest.[19]

Mr. Guggenheimer was seated at the kitchen table – near the hallway - when Sean shoved the bag into his chest. Granda sat across from him near the kitchen door. Sean was standing beside the kitchen table. Once Sean shoved the marijuana into his chest, Mr. Guggenheimer stood up, lifted his sweater, which revealed the 9 mm firearm near his waistline. When Sean saw the firearm, he quickly put Mr. Guggenheimer in a bear hug, but not before Mr. Guggenheimer was able to turn quickly, meaning his back was against Sean's chest.[20]

Once Sean had Mr. Guggenheimer in a bear hug, he grabbed Mr. Guggenheimer's firearm and began removing it before Mr. Guggenheimer placed both of his hands on the hand Sean was using to grab the firearm. At that point, both struggled to gain control of the firearm. The struggle started in the kitchen, continued into the hallway, and ultimately into the Seth's bedroom. Throughout the struggle, Sean had one arm around Mr.

[19] Tpp. 824-825.
[20] Tp. 825.

Guggenheimer's waist and his other hand on the firearm, while Mr. Guggenheimer had both hands on the firearm.[21]

While they struggled in Seth's bedroom, the firearm accidentally discharged and struck Seth in the left leg who was standing in the bedroom doorway. When the firearm accidentally discharged, Sean loosened his grip, which allowed Mr. Guggenheimer to "rip the gun out of his hands," at which point he ran from the bedroom, stepping over Seth in the process, into the kitchen and out the back door. Although he now had sole control of the firearm, Mr. Guggenheimer did not take back the $1,600 he had given Sean, nor did he take the bag of marijuana Sean had shoved at him. Instead, he exited the duplex and when he saw Granda they ran to the cab.[22]

When they got to the cab Mr. Guggenheimer and Granda were "breathing heavy." Jones corroborated this saying Mr. Guggenheimer and Granda appeared "pretty hurried," "out of breath," and "worked up." Once inside the cab, Granda realized he had left his cell phone inside the kitchen and began complaining. Mr. Guggenheimer told him to "shut the fuck up" and that he would buy him a new phone. Mr. Guggenheimer was more

[21] Tpp. 825-826.
[22] Tpp. 826-828.

concerned about Stone and what he might do to him (Guggenheimer) because he had lost his (Stone's) $800 and had no marijuana to show for it.[23]

B. The Arlington Avenue Shooting

Mr. Guggenheimer asked Jones to take them to the South Side. Based on cell phone ping data, the group left Turtle Creek sometime shortly before midnight (Saturday) October 10th. Like most people who sold marijuana, Mr. Guggenheimer used multiple cell phones and he frequently switched phones. Granda, for instance, had two numbers in his cell phone for Mr. Guggenheimer: 412-660-2793 and 412-289-0697. That night, Mr. Guggenheimer had three cell phones. He used one, not the 412-660-2793 phone, to call Stone. Stone told Mr. Guggenheimer to meet him on Arlington Avenue. Mr. Guggenheimer, therefore, asked Jones to drop them off at the corner of Fernleaf Street and Arlington Avenue near Choung's Market.[24] Like him, Stone frequently switched cell phones.[25]

Mr. Guggenheimer called Stone sometime shortly before midnight on (Saturday) October 10th. Shortly thereafter, Loretta Sizemore saw a light blue Impala stop and park at the corner of Cologne Street and Arlington Avenue –

[23] Tpp. 640, 642, 827-828.
[24] Tpp. 131, 643-644, 839, 841.
[25] Tp. 842.

which was only blocks east from Choung's Market. Sizemore lived at 2800 Arlington Avenue, which annexes Arlington Avenue (to the north) and Cologne Street (to the west). She saw the light blue Impala when she looked out her upstairs bedroom window.[26]

Jones dropped off Mr. Guggenheimer, Granda, and Benton at the corner of Fernleaf Street and Arlington Avenue near Choung's Market at around 12:15 a.m. on (Sunday) October 11th. Surveillance footage from a local business showed the three walking east on Arlington Avenue past Choung's Market at 12:18 a.m.[27]

Once on Arlington Avenue, Mr. Guggenheimer called Stone who told him to meet at the Will Way city steps – which were just east of the corner or Cologne Street and Arlington Avenue where the blue Impala had parked. Mr. Guggenheimer was familiar with the Will Way city steps having met Stone there on prior occasions.[28]

The group walked east on Arlington Avenue toward the city steps. When they arrived, Mr. Guggenheimer saw Stone and his associate Mello. Mr. Guggenheimer told Stone he had lost his $800 because the deal with Granda's

[26] Tpp. 790-793.
[27] Tpp. 547-549, 643-644.
[28] Tpp. 828-829.

"connection" went "bad" and he "shot the connection." Mr. Guggenheimer explained the situation because he did not want Stone to think he (Guggenheimer) had stolen his money.[29]

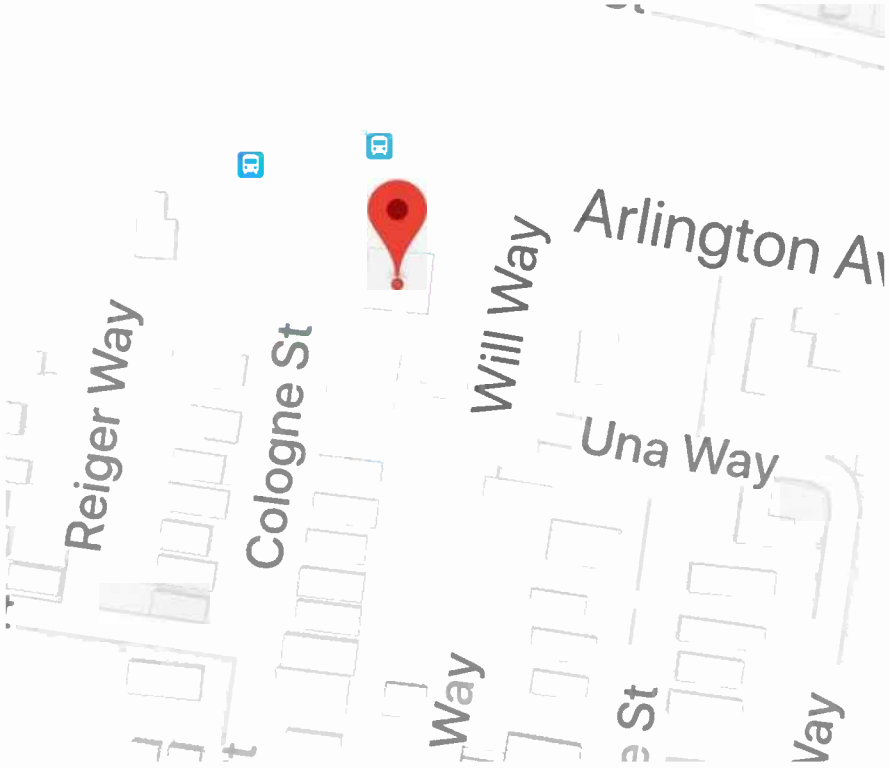
Concerned how Stone would react if he (Stone) was not compensated for his $800, Mr. Guggenheimer gave Stone his 9 mm firearm and told him he would also give him $400 in cash. Stone took Mr. Guggenheimer's 9 mm firearm, turned to Granda, and said, "Did you have anything to do about my money getting taken?" Stone's accusation triggered a brief, but deadly disagreement between him and Granda. The last thing Mr. Guggenheimer heard before he saw Stone point the 9 mm firearm at Granda and shoot (Granda) was, "Oh, yeah, you are a snake." Mr. Guggenheimer ran as soon as he saw and heard Stone shoot Granda. As he ran, he heard several shots, a pause, and then another series of shots. He saw Stone fire once at Granda before he ran, but he did not know if Mello also fired at Granda. Mr. Guggenheimer ran to his aunt's house who lived on Arlington Avenue.[30]

[29] Tp. 829.
[30] Tpp. 829-833, 843.

C. Police Canvass Regarding the Arlington Shooting

1. Loretta Sizemore

The first 911 call reporting the shooting came in at 12:25 a.m. Responding officers found Granda's body in front of 2822 Arlington Avenue. He had been shot four times in the head and four times in the torso.[31] Officers canvassed the area interviewing residents, including Luis Rodriguez and Loretta Sizemore. Sizemore, as mentioned, lived at 2800 Arlington Avenue, which annexed Cologne Street to the west, Arlington Avenue to the north, and the city steps near Will Way to the east (see Google map below):



[31] Tpp. 527, 534, 731, 735.

There are city steps on Arlington Avenue running north and south leading to Will Way and Rinne Street. Mr. Guggenheimer said he, Granda, and Benton met Stone and Mello at the Will Way city streets, which annexes Sizemore's residence t.[32]

Sizemore told officers that minutes before midnight she looked out her upstairs bedroom window and saw a light blue Impala pull up at the corner of Cologne Street and Arlington Avenue. Shortly thereafter, she heard people talking loudly, but did not know where they were. She then heard several gunshots. Upon hearing the shots, she opened her bedroom window and heard several more gunshots, which prompted her to run to her infant daughter's room, remove her daughter from her crib, and place her on the floor. She ran back into her bedroom, looked out the window, and saw a thin black man with very short hair in dark clothing get into the Impala before it "t[oo]k off" and fled west bound on Arlington Avenue.[33]

Stone had on a black Nike sweatshirt and dark blue jeans, while Stone's associate, Mello, had on a dark blue sweat suit. Also, Benton had shoulder length dreadlocks.[34]

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[32] Tpp. 828-830.
[33] Tpp. 790-793, 796-799.
[34] Tpp. 530, 832.

2. Luis Rodriguez

Rodriguez lived at 2822 Arlington Avenue – just east of the Rinne Street city steps. When Rodriguez spoke with the officers canvassing the neighborhood, he told them he only saw someone running up the Rinne Street city steps. He said he did not witness the shooting. His initial statement was false and he did not come forward about the falsity until April 2016 - six months after the shooting. [35]

Rodriguez decided to come clean after meeting Granda's family, who visited the scene of Granda's death nearly every day. One day, Granda's family knocked on Rodriguez's door and asked to speak with him. Rodriguez told Granda's family what he had witnessed that night. After this, he contacted detectives and told them what he had told Granda's family.[36]

When Rodriguez met with detectives in April 2016, he gave the following narrative: He lives at 2822 Arlington Avenue – three-story, five-bedroom house. His bedroom is on the second floor which had a window on the north side facing Arlington Avenue. Shortly after midnight on (Sunday) October 11, 2015, he was prepping for bed when he heard "screaming" outside his window.

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[35] Tpp. 666-667, 672, 675-676.
[36] Tpp. 675-676.

He jumped up from his bed, stuck his head out the window, and saw two men chasing a third man down (west to east) Arlington Avenue. The two men chasing both had firearms and were shooting at the third man – who he later learned was Granda. Rodriguez heard two distinct types of gunfire; one being a 9 mm, the other being a .38 caliber. He heard distinct gunfire, but did not see the gunmen's firearms, he only saw flashes from the two gunmen's firearms.[37]

Rodriguez said one of the gunmen had on a hoodie but could not recall what the other gunman had on. He said the hooded gunman stopped running when Granda stopped running in front of his (Rodriguez's) house. He heard 5 to 8 gunshots before Granda stopped running. He then saw the hooded gunman approach Granda with his firearm still drawn, but then lost sight of Granda because of the retaining wall in his front yard annexing the sidewalk. He believed Granda fell to the ground. Although he had lost sight of the hooded gunman and Granda, he saw and heard five flashes and gunshots once the gunman approached Granda. After the gunfire stopped, Rodriguez put his shoes on, went outside, and attended to Granda.[38]

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[37] Tpp. 660-663.
[38] Tpp. 662-664.

Rodriguez was unable to physically describe the gunmen's faces and never identified Mr. Guggenheimer or Benton as either of gunmen. He said it was "hard to tell" the gunmen's heights because he only saw them "from [a] distance."[39]

D. Investigation of Turtle Creek Shooting

1. Sean Sperber

Sean called 911 after the accidental shooting. Sean, though, gave conflicting narratives as to what happened and how and why Seth got shot. On the night of the shooting, Sean told Turtle Creek Police Department ("TCPD") officers he had come home from 7-11 and had walked to his car to get money. While inside his car, he saw someone run past his car and then heard Seth scream.[40]

Sean's initial narrative mentioned nothing about (1) the marijuana transaction between him, Granda, and Mr. Guggenheimer, (2) the fact he tried to short Mr. Guggenheimer after he (Guggenheimer) had paid him $1,600 for 8 ounces of marijuana, and (3) the fact Seth was accidentally shot when he tried to forcefully take Mr. Guggenheimer's firearm from him.

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[39] Tpp. 669, 670

[40] Tpp. 340, 341, 343.

Seth lied because he did not want to be prosecuted for drug offenses. He said the TCPD officers threatened to take drug sniffing dogs into Seth's apartment if he did not tell them what happened. He knew Seth had heroin in his (Seth's) bedroom and he did not want him and Seth to get hit with heroin charges.[41] After providing his false narrative, Sean never called authorities to come clean and tell them what actually happened.[42]

On October 26, 2015, Pittsburgh homicide detectives called Sean, after they had found his cell number in Granda's phone records, told him Granda had been murdered, and asked if he knew anything about his murder. When homicide detectives called him, they had no knowledge of the Turtle Creek shooting because Turtle Creek was out of their jurisdiction. Sean did not believe the detectives at first, but when he Googled Granda's name and learned of his murder, he agreed to speak with detectives, but only if prosecutors did not charge him in connection with what had transpired during the Turtle Creek shooting.[43]

[41] Tpp. 267-268, 272.
[42] Tp. 343.
[43] Tpp. 343-344.

Sean told detectives he wanted an immunity deal in writing. Detectives did not obtain a written immunity agreement from the Allegheny County District Attorney's Office ("DAO"), but detective Fallert contacted ADA Stephine Ramaley on Sean's behalf and asked the DAO not to charge Sean. ADA Ramaley told Fallert the DAO would not charge Sean. When Fallert told Sean about ADA Ramely's verbal commitment, Sean gave the following narrative regarding the Turtle Creek shooting.[44]

Sean worked as a car salesman at Day Ford in Monroeville. He had a wife and child and they lived in the upstairs apartment at 1903 Lynn Avenue. Sean also had a profitable side business selling marijuana – which his wife knew nothing about because he hid it from her. He sold an ounce of marijuana from anywhere between $200 and $500.[45]

Justin Granda had worked with him at Day Ford. On October 10, 2015, Granda had called him about purchasing marijuana. Sean said he agreed to sell Granda marijuana but said he and Granda never discussed price and quantity. Sean told Granda he would contact him later that night to let him know when and where to meet him. Sean contacted Granda later that night,

[44] Tpp. 274-275, 346, 367, 573, 578-579.
[45] Tpp. 302, 304, 305.

told him to meet at his (Sean's) Turtle Creek residence, and gave Granda his address.[46]

Granda called Sean when he, Mr. Guggenheimer, and Benton had arrived. Sean went downstairs, exited the duplex, walked down the 30 plus steps to Lynn Avenue, and met Granda. He was upset when he saw Mr. Guggenheimer because he did not know Mr. Guggenheimer and usually did not sell marijuana to people he did not know. Granda, though, assured him Mr. Guggenheimer was "cool" because he had worked with him at Joe's Crab Shack.[47]

Besides Granda's assurances, Sean said he agreed to sell to Granda and Mr. Guggenheimer because Mr. Guggenheimer "flashed" a wad of cash, suggesting they had the money to purchase the marijuana. He said Mr. Guggenheimer probably had a few thousand dollars. He escorted Granda and Mr. Guggenheimer up the 30 plus steps to the back of the duplex and into Seth's kitchen. Sean said he generally did his marijuana sells in Seth's apartment because he did not want his wife to learn about his marijuana

[46] Tpp. 245, 246, 298.
[47] Tpp. 247-249, 251, 295.

business. Later, though, he said he rarely did business in private because it was safer to do public transactions.[48]

When they entered Seth's kitchen, Sean said they had yet to talk price or quantity.[49] Sean said Seth was in the back bedroom when they entered the kitchen, but he came to the kitchen when he heard the group enter. Mr. Guggenheimer asked if they could try the marijuana. Sean agreed, grabbed a pot pipe from the stove, packed it, and gave it to Mr. Guggenheimer. Mr. Guggenheimer declined the offer and said Granda would test it. Granda smoked it and liked it.[50]

Once Granda approved the marijuana, Sean said Mr. Guggenheimer asked if he could use the bathroom. When Sean showed him to the bathroom, he said Mr. Guggenheimer pulled a firearm, put it in his face, and said, "Run it." Sean assumed "run it" meant Mr. Guggenheimer and Granda intended to rob him. Granda, though, did nothing when Mr. Guggenheimer said "[r]un it."[51]

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[48] Tpp. 247-249, 251, 295, 314, 317
[49] Tp. 317.
[50] Tpp. 250-251, 289,
[51] Tpp. 252-254, 318-319.

Sean said he grabbed for the firearm to disarm Mr. Guggenheimer, but a struggle for control of the firearm quickly ensued. During the struggle, he heard Granda say something to the effect, "Why would you do that to him?" Sean assumed Granda directed his statement to Mr. Guggenheimer.[52]

Sean said they had struggled 40 seconds or so before the firearm accidentally discharged and struck Seth in the left leg. Sean said his hand was on the firearm when it discharged because he said it felt like he was using a chainsaw or that he hit a baseball with a metal bat without wearing a batter's glove. Although admitting his hand was on the firearm when it accidentailly fired, he said he did not know who pulled the trigger, but believed it was Mr. Guggenheimer. He said the struggle continued for another two minutes after the firearm accidentally discharged.[53]

Once Sean's adrenaline wore off, he thought it was best to end the struggle and to get Mr. Guggenheimer out of the apartment. He also sensed Mr. Guggenheimer no longer wanted to remain inside the apartment. Thus, he let go of the firearm, which allowed Mr. Guggenheimer to gain control of it, placed his arms around Mr. Guggenheimer's waist, like a "bear hug,"[54] and

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[52] Tpp. 252-254, 258.
[53] Tpp. 259-261, 325.
[54] Tpp. 328, 329.

pushed/carried him through the hallway, into the kitchen, and out the back (kitchen) door. He locked the kitchen door and lifted Seth by the armpits and moved him from the kitchen because he feared Mr. Guggenheimer might shoot through the kitchen door.[55]

Despite allegedly trying to rob him and the fact he had sole control of the firearm at the end of the struggle, Sean said Mr. Guggenheimer never threatened him or Seth or demanded that they give him their money and/or marijuana. Once he carried/pushed Mr. Guggenheimer out the back door, Sean said he had the same amount of cash on him as when Granda and Mr. Guggenheimer arrived.[56]

Sean claimed Mr. Guggenheimer returned immediately thereafter and pounded on the kitchen door. Sean, though, could not recall if Mr. Guggenheimer said anything while pounding on the kitchen door, but he recalled yelling at Mr. Guggenheimer telling him he was calling 911. Sean called 911, but only reported that Seth had been shot. He did not identify the shooter or report that someone had just tried to rob him.[57]

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[55] Tpp. 262-264, 291, 328-330.
[56] Tp. 294.
[57] Tpp. 264-266, 267-268.

When Sean heard the TCPD officers arrive, he said he "ran to the front door," forced it open, saw the officers running up the front steps towards the duplex, and screamed, "You have to come in and help me, my brother is shot."[58]

2. Seth Sperber

In October 2015, Seth was a heroin addict who used heroin daily. He ingested his heroin intravenously but snorted it sometimes. He funded his heroin habit by working as a disc jockey, but he had not deejayed in the months leading up to October 10, 2015, meaning he had little, if any, cash by October 2015.[59]

On the evening of October 10, 2015, Seth was hanging out with Audra DiVittorio in his bedroom. DiVittorio was also a heroin addict and the two had planned to shoot up heroin that night. Around 11:30 p.m. Seth said he left his bedroom to get a drink when he saw Sean and two unknown men at the kitchen table. He saw marijuana on the kitchen table, so he smoked 1 or 2 pipes with one of the men who he later learned was Granda. He smoked

[58] Tp. 265.
[59] Tpp. 393, 412, 414, 415.

enough to get buzzed. Sean and the two unknown men sat at the kitchen table, while he stood in the middle of the kitchen.[60]

After Seth and Granda had finished smoking the marijuana, Seth said Mr. Guggenheimer asked to use the bathroom, so Sean escorted him to the bathroom. Once in the hallway near the bathroom, Seth said he saw Mr. Guggenheimer pull a firearm on Sean, and heard him say, "Give me your shit, bitch" and "Run and get me your shit, bitch." According to Sean, though, Mr. Guggenheimer only said, "run it." After Mr. Guggenheimer threatened Sean, Seth said, "[Sean] got into a little bit of a wrestling match" with Mr. Guggenheimer.[61]

Once the "wrestling match" broke out, Seth said he chased Granda out of his apartment. After Granda left, Seth went to help Sean who was still "wrestling" with Mr. Guggenheimer in the hallway near the bathroom. As he approached the melee, the firearm accidentally discharged striking him in the upper left thigh and fracturing his femur. He fell to the floor once hit.[62]

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[60] Tpp. 393, 394, 395, 421, 425.
[61] Tpp. 254, 395-396, 397, 422.
[62] Tpp. 397, 398-399.

Seth initially could not recall what he did to get Granda to leave his apartment. He said he might have hit him, but then said he may have simply walked towards him and this prompted Granda to leave. Seth then said he had, in fact, run toward Granda while shouting at him and asking if he (Granda) knew of Mr. Guggenheimer's plan to rob Sean. He did not wait for Granda's answer because he was pushing him toward the kitchen door to get him out of his apartment.[63]

Seth changed his testimony once more and said, before chasing Granda from the apartment, he heard Granda say, "What did you do?" He then gave this sequence of events: (1) he saw Mr. Guggenheimer pull a firearm and place it in Sean's face; (2) he heard Granda say, "What did you do?"; (3) he chased Granda from the apartment, while shouting at him; (4) he saw Sean struggling with Mr. Guggenheimer; and (5) he ran towards Sean to help him, but got shot in the process.[64]

Once shot, Seth said, "I saw [Sean] carry - - push [Mr. Guggenheimer] towards the [back kitchen] door, but I didn't see [Mr. Guggenheimer] actually cross the threshold of the [back kitchen] door."[65] Later, though, Seth said he

[63] Tpp. 439-440.
[64] Tpp. 429-431.
[65] Tp. 432.

had, in fact, seen Sean push Mr. Guggenheimer out the back (kitchen) door. He also saw Sean slam and lock the back door. Once locked, Seth claimed Mr. Guggenheimer "tri[ed] to get back into the house," at which point he saw Sean throw a "quart-size bag of marijuana" and pots and pans at the back door. Seth said, "[Sean] just threw everything he had towards the back door[.]"[66] Sean, though, never mentioned throwing anything at the back door. Instead, Sean claimed once he had pushed Mr. Guggenheimer out the back door, he grabbed Seth by the armpits and dragged him from the kitchen.[67]

When responding officers entered the apartment, Seth said "they didn't know who was who" so "they drew their weapons on [Sean]." Not wanting the officers to harm Sean, Seth yelled, "That's my brother. Whoever shot me isn't here now."[68] Sean, though, described things differently. He said he met responding officers outside Seth's apartment, screamed "my brother has been shot," and escorted them into Seth's apartment.[69] Like Sean, authorities never arrested or charged Seth with drug crimes, even though CSI photographs captured a good bit of heroin paraphernalia in his apartment.

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[66] Tpp. 442-443.
[67] Tpp. 264-266.
[68] Tp. 402.
[69] Tp. 265.

3. The Money in the CSI Photographs

Mr. Guggenheimer said he gave Sean $1,600 in cash.[70] Once he gained control of the firearm, Mr. Guggenheimer said he fled the apartment without the marijuana or the $1,600 he gave Sean.[71]

Sean said Mr. Guggenheimer never gave him money for the marijuana. Also, he said Mr. Guggenheimer did not remove his money once inside Seth's kitchen. Sean, though, said Mr. Guggenheimer flashed a wad of cash when he had initially met them at the base of the hill near Lynn Avenue. He said Mr. Guggenheimer placed the wad of cash back into his pocket after flashing it.[72]

Seth said he saw Mr. Guggenheimer removed money from his pocket that night but claimed he did not know what Mr. Guggenheimer did with the money.[73]

Sean said he hid his marijuana business from his wife by not bringing his marijuana, drug paraphernalia, and his drug proceeds into the apartment he shared with his wife and child. Seth and Sean both said Seth was "virtually

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[70] Tp. 823.
[71] Tpp. 827-828.
[72] Tpp. 252, 295, 317.
[73] Tp. 442.

broke" because he was an unemployed heroin addict who needed Sean to "provide for him."[74]

CSI personnel photographed Seth's apartment after EMS personnel transported Seth to the hospital. The photographs showed a pile of cash in the unused bedroom which was near Seth's bedroom. Sean and Seth both said the pile of cash was not theirs, but neither could not explain how the pile of cash got there.[75] The CSI photographs also showed that marijuana was scattered throughout Seth's apartment – in the kitchen, hallway, and Seth's bedroom.

4. Audra DiVittorio

Audra DiVittorio lived across the street from Seth and Sean. According to Sean and Seth, she was inside Seth's bedroom during the entire incident and only exited the bedroom after Mr. Guggenheimer and Granda had left.[76] Unlike Sean and Seth, though, TCPD officers arrested her that night and charged her with several drug charges.[77]

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[74] Tpp. 331, 378, 446.
[75] Tpp. 330-331, 378, 378, 446-447.
[76] Tpp. 266-267, 296.
[77] In case number 14841-2015, the TCPD arrested DiVittorio for (1) possession of drug paraphernalia, (2) tampering with physical evidence, (3) intentional possession of a controlled substance, and (4) possession with intent to deliver drug paraphernalia. On February 18, 2016, the DAO filed an *Information* charging these offenses. On May 2, 2016,

E. Trial and the Commonwealth's Theory of Motive

During opening statements, the prosecutor told jurors the evidence would show Mr. Guggenheimer went to Sean Sperber's place with the intent of robbing him and taking his marijuana and money. The prosecutor then said "the motive" for Granda's murder "couldn't be clearer":

> Justin Granda left his phone at that botched drug deal robbery, and he presented a problem to [Mr. Guggenheimer, because Sean Sperber, Seth Sperber, didn't know Lucas Guggenheimer from a hole in the wall, but they knew Justin Granda, because he was the one that set the whole thing up.
>
> And the police were going to be on Justin Granda before they knew it, because he left his phone at the robbery. And Lucas Guggenheimer knew that, because Justin Granda was complaining about it on the way back.
>
> So, I submit to you that the evidence will show that to Lucas Guggenheimer, Justin Granda was not a friend, he was a loose end. He was a loose end that needed to be tied up.[78]

Regarding the Turtle Creek shooting, Sean and Seth Sperber testified for the Commonwealth and told jurors the abovementioned botched robbery

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DiVittorio pleaded guilty to the possession of drug paraphernalia count and received nine months probation. Rpp. 35-42.

[78] Tpp. 44-45.

narrative. The Commonwealth never presented Audra DiVittorio to corroborate Sean's and Seth's narrative.

Mr. Guggenheimer testified and told the jury: (1) he, Granda, and Benton went to Sean Sperber's for the sole purpose of purchasing marijuana; (2) he gave Sean $1,600 in cash for 8 ounces of marijuana, $800 of which was Stone's; (3) when Sean handed him a bag of marijuana that did not weigh 8 ounces, he called Sean out and asked him to produce a scale so they could weigh the marijuana; (4) insulted by his request, Sean shoved the bag of marijuana at him, prompting him to stand up and raise his sweater thus revealing to Sean that he was carrying a 9 mm firearm; (5) Sean quickly grabbed him and the firearm, resulting in a struggle over control of the firearm; (6) during the struggling, the firearm accidentally discharged striking Seth in the leg; (7) once he gained control of the firearm shortly after Seth was shot, he ran from the apartment, leaving behind the marijuana and the $1,600, including the $800 Stone had given him earlier that day.

Regarding Granda's murder, the Commonwealth presented forensic evidence establishing Granda had been struck by bullets fired from two different firearms: a 9 mm and .32 caliber.[79] No Commonwealth witness,

[79] Tpp. 695-697.

though, identified the two people who shot Granda, meaning no one identified Mr. Guggenheimer as one of the two gunmen. Luis Rodriguez, as mentioned, never identified Mr. Guggenheimer or Benton as the gunmen.

With respect to Granda's murder, Mr. Guggenheimer told jurors: (1) using one of the three cell phones he had on him that night, he called Stone from the cab shortly before midnight and briefly explained what had happened in Turtle Creek; (2) Stone said to meet him at Arlington Avenue; (3) he asked Jones to take them to Fernleaf Street and Arlington Avenue; (4) once on Arlington Avenue, he called Stone again using the same cell phone, who told him to meet at the Will Way city steps; (5) he, Granda, and Benton walked east on Arlington Avenue until they met up with Stone and his associate Mello at the city steps; (6) he told Stone what had happened in Turtle Creek and that he had lost his (Stone's) $800; (7) he gave Stone his 9 mm firearm for collateral and told Stone he would also give him $400 in cash to compensate him for the $800 he (Guggenheimer) had lost; (8) angered by the situation, and knowing Sean Sperber was Granda's "connection," Stone accused Granda of setting them up; (9) Stone's accusation angered Granda, resulting in a brief argument, during which Stone pointed the 9 mm firearm at Granda and shot him; (10) he immediately ran when he saw Stone point and fire; (11) he ran to his aunt's

house who lived nearby in the Arlington area; and (12) as he ran he heard a series of shots, then a pause, then another series of shots.

Loretta Sizemore testified on Mr. Guggenheimer's behalf. She told jurors she saw someone park a blue Impala at the corner of Cologne Street and Arlington Avenue shortly before midnight. She also told jurors how she had seen a thin black man with very short hair and dark clothing enter the Impala immediately after the shooting and how the Impala "took off" west bound on Arlington Avenue. She also told jurors how she had mentioned the Impala and the thin black man to officers the night of the shooting.

During closing arguments, the prosecutor argued Mr. Guggenheimer went to Sean's Turtle Creek residence with the sole intention of robbing him. She also argued Mr. Guggenheimer was a "wannbe thug" who murdered Granda because he (Granda) made it possible for the Sperbers to identify him when he (Granda) left his cell phone at the Sperbers.[80]

Before issuing its verdicts, the jury asked eight questions. For instance, the jury asked, "Related to Third-Degree Murder, does Lucas need to be the person who actually pulled the trigger?"[81] When the prosecutor (Ditka) heard

[80] Tpp. 920, 925.
[81] Tp. 1030.

this question, she said, "I think when you read these questions, much to my chagrin, it appears they are buying the Stone theory."[82]

Regarding the Turtle Creek shooting (1637-2016), jurors acquitted Mr. Guggenheimer on the the robbery, aggravated assault, and attempted homicide counts,[83] and only found him guilty for the two REAP counts and the firearm not to be carried without a license count.[84]

Regarding Granda's murder (1624-2016), jurors acquitted Mr. Guggenheimer of first- and second-degree murder,[85] but convicted him of third-degree murder and firearm not to be carried without a license.[86]

[82] Tp. 1041.
[83] Tp. 1091.
[84] Tp. 1091.
[85] Tp. 1092.
[86] Tp. 1092.

ARGUMENT

I. The Record Evidence Was Insufficient as a Matter of Law to Convict Mr. Guggenheimer of Third-Degree Murder in Case Number 1624-2016. The Record Evidence Supported Two Equally Reasonable, Yet Mutually Exclusive, Inferences, One Incriminating Mr. Guggenheimer, the Other Exonerating Him. The Record Evidence, Therefore, Was in Equipoise Regarding the Guilt-Innocence Issue and the Jury Should Not Have Been Permitted to Guess as to Which Inference it Wished to Adopt. U.S. Const. admts. 5, 6, 8 14; Pa. Const. art. I, §§ 8, 9.

A. Sufficiency of the Evidence Claims and the Equipoise Principle

The case law is clear: "guilt must be proved and not conjectured. The reasonable inference of guilt must be based on facts and conditions proved; it cannot rest solely on suspicion or surmise. These do not take the place of testimony." *Commonwealth v. Bauswine*, 46 A.2d 491, 493 (Pa. 1946). Thus, "[a]n accused is entitled to an acquittal if his guilt of the crime charged is *not* the only reasonable interpretation of which the facts adduced against him are susceptible. Guilt must be *proved* and not merely *conjectured*." *Commonwealth v. Woong Knee New*, 47 A.2d 450, 455 (Pa. 1946) (emphasis in original).

Accordingly, "[w]hen two equally reasonable and mutually inconsistent inferences can be drawn from the same set of circumstances, a jury *must not be permitted* to guess which inference it will adopt, especially when one of the two guesses may result in depriving a defendant of his life or his liberty." *Commonwealth v. Woong Knee New*, 47 A.2d at 468 (emphasis added); *accord In the Interest of J.B.*, 189 A.3d at 415 ("[I]f the trial evidence of record viewed in the light most favorable to the Commonwealth and all reasonable inferences drawn from that evidence is only, at most, equally consistent with a defendant's innocence as it is with his guilt, the Commonwealth has not sustained its burden of proving the defendant's guilt beyond a reasonable doubt."); *Commonwealth v. Tribble*, 467 A.2d 1130, 1131-1132 (Pa. 1983); *Commonwealth v. Garrett*, 222 A.2d 902, 905 (Pa. 1966); *Commonwealth v. Bausewine*, 46 A.2d at 493-494.

Put differently, "[w]hen a party on whom rests the burden of proof in either a criminal or a civil case, offers evidence consistent with two opposing propositions, he proves neither." *Commonwealth v. Woong Knee New*, 47 A.2d at 468. In short, "*[a] jury cannot be permitted to guess.*" *Commonwealth v. Bennett*, 303 A.2d 220, 221 (Pa. Super. 1973) (emphasis in original).

1. *In the Interest of J.B.*

The most recent example of the "equipoise" principle came in *In the Interest of J.B.*, 189 A.3d 390 (Pa. 2018). In *J.B.*, authorities charged an 11-year-old, J.B., with the shotgun shooting death of his stepmother. The stepmother was pregnant at the time and her unborn child died as a result of her death. Thus, J.B. was also charged with homicide of an unborn child. *Id.* at 393. A juvenile court judge found J.B. delinquent of first-degree murder and homicide of an unborn child. A divided Superior Court affirmed, *In re J.B. III*, 147 A.3d 1204 (Pa. Super. 2016), but the Supreme Court reversed, finding the record evidence was insufficient as a matter of law to sustain J.B.'s convictions because it supported two equally reasonable, but mutually inconsistent, theories as to how and when J.B.'s stepmother was shot and killed.

According to the Supreme Court, the primary factor relied on by the juvenile court to adjudicate J.B. delinquent of the murders was its finding that the .20 gauge shotgun recovered from J.B.'s room was "established to be the murder weapon." *Id.* at 417. The Supreme Court acknowledged this was a reasonable inference based on the record evidence but said the reasonableness of this inference "did not make this the *only* reasonable inference which could be drawn therefrom." *Id.* (emphasis added).

The Supreme Court supported this proposition by pointing to the fact the Commonwealth's firearms expert could not individualize the shotgun pellets removed from the stepmother's body to the .20 gauge shotgun recovered from J.B.'s bedroom. *Id.* at 417. The lack of individualizing evidence supported the reasonable inference that another shotgun could have easily fired the fatal shot that killed J.B.'s stepmother. *Id.*

The Supreme Court also said the juvenile court supported its finding that the .20-gauge shotgun recovered from J.B.'s bed room was the murder weapon because the state police officers who had examined it opined that it "smelled" as if it had been recently fired. *Id.* at 417. Again, the Supreme Court said this was a reasonable inference based on the record evidence, but said it was not the only reasonable inference:

> this testimony did not reasonably support the sole inference that the shotgun had been fired on the morning of the murder, inasmuch as both officers acknowledged they were not offering an expert opinion on when the shotgun had been fired, and, in fact, admitted they could not determine with any degree of scientific certainty exactly when the shotgun had been fired based on its smell.

Id. at 417-418.

The Supreme Court said J.B.'s evidence, which came in the form of his father's testimony, offered an equally reasonable explanation as to why the shotgun still "smelled." According to J.B.'s father, J.B. had repeatedly fired the .20 gauge shotgun at a turkey shoot in an indoor facility less than a week before it had been seized from his bedroom. The state police confirmed this testimony, meaning it "yield[ed] an equally likely inference that the shotgun odor lingered from its use at the turkey shoot." *Id.* at 418.

While the record evidence permitted a fact-finder to reasonably conclude the .20-gauge shotgun recovered from J.B.'s bedroom was the murder weapon, the Supreme Court said the record evidence also "supported an equally reasonable conclusion that [the] .20 gauge shotgun was *not* the murder weapon[.]" *Id.* at 418 (emphasis added). For instance, while the forensic pathologist claimed the fatal shot was fired from a distance of less than two inches from the stepmother's neck, "when the .20 gauge shotgun... was examined by the state police crime laboratory, no blood, skin, or other biological material was detected in the interior of the shotgun barrel, on the exterior of the barrel, or on the frame of the weapon." *Id.*

To explain the absence of this forensic evidence, the Commonwealth theorized that J.B. had wiped the shotgun clean. The Supreme Court, though, found this theory "wholly speculative" and devoid of evidentiary support. *Id.* at 418. For instance, when police arrested J.B., he still had on the clothes he wore to school the morning of the shooting. Despite the "undisputed fact" the murder weapon had been discharged only inches from the stepmother's head, and had caused massive blood loss, "when J.B.'s clothes were tested, no blood stains or other biological material was found on them." *Id.*

The juvenile court also based its delinquency finding on the fact J.B. "knew how to handle a shotgun" because he had previously fired shotguns with his father. Again, while the record evidence made this a reasonable inference, the Supreme Court said the record evidence also supported "an equally plausible inference" that "J.B. lacked the capability to surreptitiously retrieve the shells from the armoire, quickly load them into the shotgun, and fire one lethally precise shot into the victim in the calculated and efficient manner which the Commonwealth contended he acted." *Id.* at 419.

The juvenile court also relied "heavily" on the fact that two GSR particles were identified on J.B.'s shirt and pants. *Id.* at 419. The juvenile court inferred that the presence of these GSR particles meant they "could only have been

deposited" if J.B. had, in fact, fired the shotgun the morning of his stepmother's death. *Id.* The Supreme Court disagreed, finding that the GSR evidence "at best, support[ed] only a lesser, more equivocal inference" because "the mere presence of such particles [did] not scientifically establish that they originated from the discharge of a firearm," a fact confirmed by Commonwealth's own GSR expert. *Id.* at 419.

Moreover, the Commonwealth's own GRS expert testified that GSR particles are easily transferrable. The day police arrested J.B. he had on the jacket he wore during the turkey shoot the week before, meaning it could be reasonably inferred that his jacket likely had GSR particles on it from the turkey shoot, not from the fact J.B. shot and killed his stepmother that morning. *Id.* at 420.

Additionally, the juvenile court determined that a spent shotgun shell, which officers found the day after the murder along the fence line running parallel to the driveway down which J.B. had walked to catch the school bus that morning, "reasonably supported an inference that this was the shell J.B. had used in the murder, and that he had discarded it on the way to the bus in an effort to conceal it." *Id.* at 420. The Supreme Court said the record evidence made this a reasonable inference but said "other uncontradicted" record

evidence "reasonably support[ed] an equally strong inference that the shell was not discarded by J.B. on the morning of the murder." *Id.* at 420.

Finally, the juvenile court inferred J.B. had to have been the shooter because he was inside the trailer with his stepmother after his father had left for work that morning and officers found not signs of forced entry. Again, the Supreme Court found this inference reasonable, but said these facts "d[id] not yield the sole reasonable inference that J.B. was the murderer." *Id.* at 420. Mere presence at a murder scene, the Supreme Court said, "does not establish sufficient evidence of a defendant's guilt of that offense." *Id.* Moreover, the lack of evidence regarding forced entry "lead only to a reasonable inference that no one entered the home after the children departed for school." *Id.* at 420-421.

Lastly, the Supreme Court said a critical piece of "unrebutted" evidence supported the "reasonable inference" that J.B. was *not* the shooter, *i.e.*, the fact J.B.'s 7-year-old stepsister, J.H., was present in the home with J.B. the entire morning on the day of the murder before they left for school. Had J.B. discharged his shotgun inside of the family home, as the Commonwealth claimed, it was reasonable to conclude the jarring noise from the discharge would have been heard by J.H., who was downstairs on the first floor of the

home watching TV in the room near where her mother was murdered. J.H., though, told investigators she heard nothing. *Id.* at 421.

In sum, the Supreme Court said all the "reasonable inferences" derived from the record evidence were "in equipoise" because they "equally" supported the two competing narratives: (1) a person or persons other than J.B. shot his stepmother while she slept after J.B. and his sister, J.H., had left for school that morning; and (2) after his father had left for work that morning, J.B. shot and killed his stepmother in full view of J.H. and then wiped the shotgun clean and dumped the shell casing near the fence when he walked to the school bus. *Id.* at 421. Because the record evidence "equally" and "reasonably" supported both narratives, the Supreme Court said the record evidence was "insufficient as a matter of law" to overcome J.B.'s presumption of innocence, meaning his convictions had to be vacated. *Id.* at 421-422.

2. *Woong Knee New*

In *Commonwealth v. Woong Knee New*, 47 A.2d 450 (Pa. 1946), the Supreme Court reversed a murder conviction when the circumstantial evidence presented at trial was in equipoise regarding the guilt-innocence question. Put differently, "the trial evidence equally supported two reasonable but diametrically opposed ultimate inferences: one that the defendant

committed the murder, and the second that he did not commit the murder." *In the Interest of J.B.*, 189 A.3d at 409 (summarizing *Woong Knee New*).

In *Woong Knee New*, the victim had been bludgeoned to death with a hammer in his apartment. The apartment had been ransacked and there was extensive blood spatter throughout. The victim owned a laundromat and stored money in his apartment. The money was missing. A brown hat with a red feather in the band and a human hair inside was discovered on the victim's bed, and a half empty bottle of beer was on the victim's kitchen table. The defendant and victim were friends and the defendant visited him regularly.

Sometime after the victim's murder, the defendant was detained for an immigration violation. When taken into custody, the defendant denied having money on him but when authorities searched him they found $1,200 in cash on him. While detained, he became a suspect in the victim's murder and was questioned extensively by detectives, which was problematic because the defendant was not fluent in English. According to the detectives, the defendant said he and the victim were drinking beer in the victim's apartment until 4:00 a.m. the morning of the murder. However, when detectives asked additional questions about the victim, the defendant terminated the interview, claiming illness.

The defendant was arrested and charged with first-degree murder. At trial, the Commonwealth introduced substantial circumstantial evidence that reasonably suggested the defendant had murdered the victim: (1) the defendant's alleged statements admitting he was with the victim until 4:00 a.m. that morning; (2) the fact he had left for New York later that morning at 10:30 a.m.; (3) testimony of witnesses who claimed to have seen the defendant in Chester County on the night of the murder; (4) testimony from the coroner who approximated the time of the victim's death at between 2:30 and 4:30 a.m. based on the progress of rigor mortis in the victim's body; (5) testimony that, on the night before the murder, a witness saw the defendant wearing a brown hat that looked like the one found in the victim's bedroom; (6) the fact there was no evidence of forced entry into the victim's apartment, suggesting the killer knew the victim; (7) testimony that the victim was known to carry large sums of money, and the defendant was found with $1,200, even though witnesses testified they had never seen the defendant carrying such a large amount of cash, and he did not earn substantial pay at his employment.

The defendant, through cross-examination and the testimony of his own witnesses, presented the following evidence: (1) the coroner's admission he could not fix the exact time of death, given the varying speeds with which rigor

mortis progresses depending on the age and physical condition of the body; (2) the hammer, which the FBI examined, had no fingerprints or other physical evidence linking the defendant to the hammer or the murder; (3) the fact the defendant's fingerprints were not found on the half-empty beer bottle in the victim's apartment; (4) testimony from a hair expert who said the hair found in the brown hat was the victim's, not the defendant's; (5) expert testimony that, despite the considerable amount of blood at the scene, forensic testing of the defendant's clothing revealed no traces of blood; (6) testimony of three witnesses who said the defendant was with them in New York City on the night of the murder gambling; (7) the defendant's testimony wherein he denied making the statements detectives attributed to him because he did not understand their questions and how detective had physically coerced him; (8) testimony and evidence that the defendant was preparing to be deported during the week of the murder, and had shipped his clothes to New York the Thursday before the murder, and had actually left Chester County that Friday morning before the murder; (9) testimony that some of the money in his possession was from his savings he had withdrawn from his bank earlier in the week due to his impending deportation; (10) and

bank records showing withdrawals of money, albeit not the entire amount he was found with.

The jury, after hearing this evidence, convicted the defendant of first-degree murder, but the Supreme Court reversed. As the Supreme Court recently explained in *J.B.*, the *Woong Knee New* Court "highlighted" the evidence's "contradictory nature" and "found" it "supported two equal but fundamentally inconsistent inferences on this question." *In the Interest of J.B.*, 189 A.3d at 411 (summarizing *Woong Knee New*).

For instance, the coroner could not fix the exact time of death based on rigor mortis. Instead, he only provided a range of times when death could have occurred. Thus, while it could be reasonably inferred the defendant may have murdered the victim during these time ranges, the coroner's testimony did *not* preclude another reasonable, but contradictory, inference, *i.e.*, because the victim's time of death cannot be pinpointed exactly, it is anyone's guess as to whether the defendant was with the victim when murdered.

Also, the Supreme Court said even if the defendant was in the victim's company at or near the time of his murder, "this fact alone did not justify an inference that he killed the defendant." *Id.* at 411 (referencing *Woong Knee*

New). Instead, it simply raised "conjectural suspicion" which was "itself insufficient to convict." *Id.*

Similarly, the Supreme Court said it was reasonable to infer the money found on the defendant was the money missing from the victim's apartment. However, the Supreme Court said it was equally reasonable to infer the money came from the withdrawal of the defendant's savings and his gambling activities. *Id.* at 411 (summarizing *Yong Knee New*).

As to whether the defendant was in Chester County on the night of the murder, or in New York as he had claimed, the Supreme Court "scrutiniz[ed]" the testimony of the Commonwealth's witnesses and concluded it was "likel[y]" they "had the dates wrong" as to when they had seen the defendant in Chester County. This, the Supreme Court said, "called their reliability into question." *Id.* at 411 (summarizing *Woong Knee New*). The testimony of the defendant's witnesses, though, "suffer[ed] no such infirmity of credibility." *Id.*

The Supreme Court also said the inference that the defendant was in New York, as he had claimed, was bolstered by the uncontradicted evidence that the defendant had shipped his clothes to New York the Thursday before the murder. Furthermore, and perhaps most importantly, the Supreme Court said the Commonwealth's "central theory of the case," *i.e.*, only the defendant

had the opportunity to kill the victim because he was the last person to be with the victim before he was found dead, was "unsupported by the evidence," because the Commonwealth "failed to prove" the defendant "was the only person with the exclusive opportunity to kill the victim." *Id.* at 411.

In this regard, the Supreme Court said the Commonwealth's evidence supported an equally reasonable, yet opposite, inference, *i.e.*, an unknown person entered the victim's apartment that morning and bludgeoned him to death with the hammer. The Supreme Court said it was "[un]necessary" for the defendant to "identify" the unknown person "to be acquitted." Rather, to obtain a conviction, it was the Commonwealth's "duty" to "show circumstances that [were] consistent *only* with the hypothesis of his guilt." *Id.* at 411 (quoting *Commonwealth v. Woong Knee New*, 47 A.2d at 467-468 (emphasis in original)).

The Supreme Court said the Commonwealth's "desired inference" was "further undercut" by the fact forensic tests revealed no blood or incriminating physical evidence on the defendant's clothing. Moreover, the Commonwealth's forensic evidence "yielded an equally if not more likely conclusion that defendant was not in the apartment at any time that evening,

given that the defendant's fingerprints were not found on the murder weapon or the half-consumed beer." *Id.* at 412 (summarizing *Woong Knee New*).

In the end, because the record evidence "supporting the inference of the defendant's guilt was in equipoise with the evidence supporting the conclusion that the defendant did not commit the offense," the Supreme Court concluded the Commonwealth had failed to prove the defendant's guilt beyond a reasonable doubt. In so doing, it articulated the "parameters of this principle" when it wrote:

> When two equally reasonable and mutually inconsistent inferences can be drawn from the same set of circumstances, a [finder of fact] must not be permitted to guess which inference it will adopt, especially when one of the two guesses may result in depriving a defendant of his life or his liberty. When a party on whom rests the burden of proof in either a criminal or a civil case, offers evidence consistent with two opposing propositions, he proves neither.

Id. at 412 (quoting *Commonwealth v. Woong Knee New*, 47 A.2d at 468)

3. Other Cases Applying the Equipoise Principle

As the Supreme Court noted in *J.B.*, after *Woong Knee New* it had "reversed convictions" where the record evidence "yield[ed] competing ultimate inferences equally consistent with the defendant's innocence as with

his guilt[.]" *In the Interest of J.B.*, 189 A.3d at 412.[87] These reversals were warranted, the Supreme Court said, because when reasonable inferences of guilt and innocence are in equipoise, a "factfinder's guilty verdict" is "the "product" of nothing more than "surmise or conjecture." *Id.*

B. The Equipoise Principle is Applicable Here

If there were ever a case where the equipoise principle applied, it is Mr. Guggenheimer's case. The record evidence permitted for two equally reasonable, yet mutually inconsistent, set of inferences for both shootings.

1. The Turtle Creek Shooting

Regarding the Turtle Creek shooting, the Commonwealth's botched robbery narrative was reasonable, but so too was Mr. Guggenheimer's

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[87] *See, e.g.*, *Commonwealth v. Tribble*, 467 A.2d at 1131-1132 (where Commonwealth's evidence showed that defendant's fingerprints were on trucks which had been broken into, but record evidence also showed the defendant had been in regular physical contact with the trucks as part of his employment, the evidence, as a whole, yielded two mutually inconsistent inferences — that defendant transferred the fingerprints while breaking into the truck, or that he did so on a previous occasion while working — hence it was insufficient to sustain defendant's conviction); *Commonwealth v. Garrett*, 222 A.2d at 905 (evidence insufficient to sustain defendant's robbery conviction because it established only that defendant was in the company of four individuals, one of whom robbed a pedestrian, and defendant was found and arrested in the vicinity of the robbery immediately thereafter, and defendant gave a written statement admitting to committing other crimes and being with the group prior to the robbery, but disclaimed participation in the robbery; thus, inference that he participated in the robbery was "no more cogent than the version of the events contained in his statement"); *Commonwealth v. Bauswine*, 46 A.2d at 493 (reversing defendant's conviction on the grounds of evidentiary insufficiency, as "[t]he facts shown were consistent with defendant's innocence, and could reasonably be explained on a theory other than that of guilt").

testimony that (1) he, Granda, and Benton went to Sean Sperber's residence for the sole purpose of purchasing marijuana, (2) but once Sean tried to short him on the marijuana after he had already given him $1,600 for 8 ounces, (3) a struggle broke out, (4) during which the firearm accidentally discharged and struck Seth in the leg.

Because both narratives are reasonable based on the record evidence, the Court can scrutinize the evidence more closely. *In the Interest of J.B.*, 189 A.3d at 409. Here, multiple facts support the inference Mr. Guggenheimer *did not* go to Sean's Turtle Creek residence with the intent of robbing him, but instead went there to purchase 8 ounces of marijuana for $1,600.

First, there is no evidence Mr. Guggenheimer told Granda or Benton of his intent to rob Sean. For instance, Jones, the cab driver, never testified to hearing any discussion amongst the three of them that suggested they were planning a robbery. Also, Granda's cell phone contained no text or phone messages remotely suggesting a plan to rob Sean. Thus, to believe the Commonwealth's theory and the Sperber's testimony, one would have to believe Mr. Guggenheimer was going to try to pull off a robbery on his own, even though he had two people with him who could have easily helped him facilitate the robbery.

Second, Mr. Guggenheimer did not know Sean Sperber, had never met him, and had never been to his Turtle Creek residence. Likewise, while Granda knew Sean from the dealership, he had never purchased marijuana from him and he had never been to his Turtle Creek residence. Consequently, neither Mr. Guggenheimer, nor Granda knew (1) the layout of Sean's residence, (2) whether he carried a firearm with him during his drug transactions, (3) whether other associates of his would be present during the drug transactions, and (4) if so, whether these associates carried firearms during the drug transactions. To plan a robbery without knowing these very rudimentary facts or tendencies regarding Sean – and Seth for the matter – is the definition of stupidity.

Third, the record evidence plainly establishes Seth was in the kitchen before the shooting and could have easily identified Mr. Guggenheimer. Seth's presence, therefore, significantly increased the risk of successfully robbing Sean. However, according to the Commonwealth's botched robbery theory, Mr. Guggenheimer knowingly disregarded the substantial risk created by Seth's presence and moved forward with the robbery anyway. Keep in mind, Mr. Guggenheimer, Sean, and Seth all testified that Mr. Guggenheimer

did not smoke marijuana that night, meaning a *sober* Mr. Guggenheimer knowingly disregarded the significant risk presented by Seth's presence.

Fourth, the large sum of cash photographed in Seth's apartment after the shooting corroborates Mr. Guggenheimer's testimony that he gave Sean $1,600 in cash before the struggle started. Seth, as mentioned, was broke, had not worked in months, and needed Sean's financial support to get by. Thus, the money could not have been Seth's and he repeatedly admitted this at trial. Likewise, Sean repeatedly testified he hid his drug business – and its proceeds – from his wife by not bringing his marijuana, scales, and profits into the apartment he shared with his wife. This testimony, consequently, supported the inference that, after the shooting, Sean had to stash the $1,600 in Seth's apartment to keep his wife in the dark about his clandestine and illegal drug business.

Fifth, the CSI photographs showed marijuana scattered throughout Seth's apartment. These photographs corroborated Mr. Guggenheimer's and Sean's testimony that a struggle had, in fact, occurred inside Seth's apartment.

Sixth, the following aspects of Sean's testimony were incredible: (1) his claim the money in Seth's apartment was not his or Seth's, coupled with his claim of not knowing whose money it was or how it got into Seth's apartment

in the first place; and (2) his claim he had not discussed price or quantity with Granda before escorting Granda and Mr. Guggenheimer into Seth's kitchen.

Seventh, that Sean put his own interests over his severely injured brother's interests, by lying to authorities for more than two weeks, can be used to infer that Sean would have said anything to detectives and at trial to minimize his culpability as much as possible. Indeed, Sean refused to be "truthful" with detectives until he was assured the DAO would not prosecute him for his actions in connection with the Turtle Creek shooting. Collectively, Sean's lies and incessant requests for immunity can be used to reasonably infer that a full-blown drug transaction had, in fact, occurred between him and Mr. Guggenheimer before the struggle started, and that the struggle started because Sean shorted Mr. Guggenheimer regarding the marijuana he had purchased with the $1,600.

Eighth, Seth's testimony could be used to reasonably infer that Sean collected the $1,600 and tried to hide it in the spare bedroom while waiting for EMS and responding officers to arrive. According to Seth, the first responding officers arrived 12 to 15 minutes after Sean called 911. When they entered his apartment, they drew their weapons and aimed them at Sean. This contradicted Sean's testimony where he claimed he went outside, met the

officers, and escorted them into Seth's apartment. Seth's testimony reasonably suggests Sean remained in apartment for the 12 to 15 minutes before officers arrived for the purposes of tending to Seth and trying to figure out what to do with Mr. Guggenheimer's $1,600.

In the end, jurors did not buy the Commonwealth's botched robbery narrative because they acquitted Mr. Guggenheimer of the robbery and attempted murder counts in case number 1637-2016.[88]

2. Granda's Murder and Mr. Guggenheimer's Third-Degree Murder Conviction

The jury's robbery and attempted homicide acquittals in case number 1637-2016 are relevant to the murder count in case number 1624-2016. These acquittals destroyed the Commonwealth's central theory as to why Mr. Guggenheimer allegedly murdered Granda. According to the Commonwealth, Mr. Guggenheimer killed Granda because Granda accidentally left his cell phone inside Seth's apartment. Granda's cell phone, the Commonwealth argued, would have allowed Sean and Seth to easily

[88] Tp. 1091.

identify Mr. Guggenheimer as the man who tried to rob them and to report him to the authorities or to retaliate against him.[89]

Thus, because Granda's negligence put Mr. Guggenheimer's liberty, freedom, and safety at risk, Mr. Guggenheimer had to kill him. The Commonwealth, though, never explained whether Mr. Guggenheimer killed Granda (1) simply out of anger, (2) to eliminate him as someone who could link him to the botched robbery and shooting in Turtle Creek, or (3) both.

While the jury's acquittals in case number 1637-2016 destroyed the Commonwealth's motive argument regarding Granda's murder, the Commonwealth was not required to prove motive to meet its burden regarding Mr. Guggenheimer's third-degree murder conviction in case number 1624-2016.[90] The Commonwealth, though, had to prove beyond a reasonable doubt Mr. Guggenheimer was one of the two gunmen who shot and killed Granda: "[I]n every criminal prosecution... the Commonwealth must prove beyond a reasonable doubt that the defendant was the perpetrator of the offense, and that identity is an implicit element of each crime.

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[89] Despite the jury's acquittals in case number 1637-2016, the trial court relied on the Commonwealth (debunked) motive argument when it rejected Mr. Guggenheimer's sufficiency claim. Rpp. 24-25.

[90] The trial court instructed the jury the Commonwealth did not have to prove motive. (Tp. 978)

Commonwealth v. Cooley, 188 A.3d 578 n.9 (Pa. Super. 2018); *accord Commonwealth v. Broadwater*, 90 A.2d 284, 285 (Pa. Super. 1952).

In proving a defendant's guilt, the Commonwealth cannot carry its burden by simply pointing to the defendant's "mere presence" at the murder scene. "It has long been established that the mere presence of an individual at the scene of a homicide does not in itself make him a participant in it." *Commonwealth v. Woong Knee New*, 47 A.2d at 456. "The mere presence at a homicide and knowledge of its commission, does not make a person guilty unless he aids, assists and abets[.] If one is only a terrified on-looker, neither his presence at the homicide nor his failure to report it would make him an accomplice[.]" *Commonwealth v. Giovanetti*, 19 A.2d 119, 123 (Pa. 1941).

It is here – regarding the record evidence concerning Granda's murder – where the equipoise principle is at its apex. Put differently, the record evidence reasonably and equally supports the Commonwealth's incriminating inference as well as Mr. Guggenheimer's exonerating inference.

The Commonwealth's incriminating inference is supported by the following facts: (1) the surveillance footage that placed Mr. Guggenheimer, Benton, and Granda on Arlington Avenue, near Choung's Market, at 12:18 a.m.; (2) Luis Rodriguez's testimony that he saw two men chasing Granda shooting

at him; (3) the forensic examinations of the FCCs collected from the murder scene and bullets collected from Granda's autopsy that demonstrated two firearms – a 9 mm and .32 caliber – were used to kill Granda; (4) expert testimony that the 9 mm FCCs collected at the murder scene and the 9 mm FCC collected from the Turtle Creek shooting were discharged from the same 9 mm firearm; (5) Mr. Guggenheimer's testimony that he possessed the 9 mm firearm during the Turtle Creek shooting; (6) evidence that the first 911 call occurred at 12:25 a.m., only seven minutes after the surveillance footage captured Mr. Guggenheimer and Benton with Granda; and (7) Luis Rodriguez's testimony that one of the gunmen had on a hoody and the surveillance footage that showed Mr. Guggenheimer wearing a hoody only minutes before the shooting.

Mr. Guggenheimer's equally reasonable innocence inference is based on the following facts: (1) his testimony that: (a) before going to Sean Sperber's Turtle Creek residence, Stone had picked him up near Rt. 51 after his (Guggenheimer's) car had broken down, and gave him $800 in cash to buy 8 ounces of marijuana from Sean; (b) after the Turtle Creek incident, he used one of his three cell phones and called Stone from the cab shortly before midnight and briefly explained what had happened; (c) Stone told him to meet

on Arlington Avenue; (d) he had Jones drop him, Benton, and Granda off at the corner or Fernleaf Street and Arlington Avenue near Choung's Market; (e) once on Arlington Avenue, he called Stone again using the same cell phone, and Stone told him to meet at the Will Way city steps; (f) he, Granda, and Benton walked east on Arlington Avenue until they met up with Stone and his associate Mello at the Will Way city steps; (g) he told Stone what had happened in Turtle Creek and that he had lost his (Stone's) $800; (h) he gave Stone his 9 mm firearm for collateral and told Stone he would also give him $400 cash to compensate him for the $800 he (Guggenheimer) had lost; (i) angered by the fact his (Stone's) $800 had gone missing with no marijuana to show for it, and knowing Sean Sperber was Granda's connection, Stone accused Granda of setting them up; (j) Stone's accusation angered Granda, resulting in a brief argument, during which Stone pointed the 9 mm firearm (which Mr. Guggenheimer had just handed him) at Granda and fired; (k) he immediately ran when he saw Stone point and fire; (l) as he ran, he heard several shots, a pause, and then several more shots; and (m) he ran to his aunt's house who lived nearby in the Arlington area.

Mr. Guggenheimer's reasonable innocence inference was also supported by (2) Loretta Sizemore's testimony who said (a) she saw a blue Impala park at the corner of Cologne Street and Arlington Avenue shortly before midnight; (b) after hearing the shooting, she saw a thin black male with very short hair in dark clothing enter the Impala; (c) she saw the Impala "take off" west bound on Arlington Avenue; and (d) she told the police these facts the night of the shooting; (3) Luis Rodriguez's testimony that he could not identify Mr. Guggenheimer as one of the two gunmen he saw shooting at Granda; and (4) Mr. Guggenheimer's testimony that Benton had shoulder length dreadlocks, meaning Benton could not have been the thin black man with very short hair entering the Impala.

If anything, Mr. Guggenheimer's narrative is supported by someone other than himself, namely Loretta Sizemore's testimony regarding the thin black man fleeing west bound on Arlington Avenue in the Impala. In other words, Mr. Guggenheimer presented evidence that reasonably suggested another person or persons, *i.e.*, Stone and his associate Mello, opened fire on Granda, chased him down, and then shot him execution style once he fell to the ground. Benton, as noted, could not be the thin black man Sizemore saw because Benton had shoulder length dreadlocks.

Likewise, the Commonwealth presented no evidence whatsoever proving Benton was armed with a .32 caliber firearm that night – which is a fundamental predicate underlying the Commonwealth's theory of the shooting. According to the Commonwealth, Mr. Guggenheimer and Benton shot and killed Granda: Mr. Guggenheimer's 9 mm firearm fired the 9 mm FCCs collected from the murder scene, while Benton fired the .32 caliber firearm that discharged the .32 caliber bullets recovered from Granda's body. The Commonwealth's theory regarding Benton, however, is "conjectural speculation," *In the Interest of J.B.*, 189 A.3d at 411, because it has no evidentiary basis.

At trial, the Commonwealth presented the officer who detained Benton that night – officer Gary Lis. According to Lis, he received a "shots fired" call at 12:25 a.m. regarding an Arlington Avenue shooting. While driving to the scene, Lis heard the dispatcher say, "a male fled up the city steps." Lis, therefore, went to Spring Street and Will Way and saw a black man who appeared lost because he was looking at his cell phone. The man was Benton. Lis detained Benton at 12:26 a.m. but did not find him in possession of a firearm. Likewise, the police canvass never uncovered a discarded .32 caliber firearm near the Will Way city steps, Will Way itself, Spring Street, or

Arlington Avenue. Indeed, the Commonwealth never produced the .32 caliber firearm - or any .32 caliber firearm for that matter – that fired or could have fired the .32 caliber bullets recovered during Granda's autopsy.

The inability to eliminate the possibility that two people other than Mr. Guggenheimer and Benton shot and killed Granda is another fact that makes Mr. Guggenheimer's innocence inference equally plausible and reasonable. As the Supreme Court emphasized in *Woong Knee New*, "It [is] not necessary for th[e] defendant, in order to be acquitted, to identify the unknown who may have committed this murder." It is, however, "the duty of the Commonwealth in order to obtain the accused's conviction to show circumstances that are consistent *only with the hypothesis of his guilt*. *Commonwealth v. Woong Knee New*, 47 A.2d at 467-468 (emphasis added).

In the end, in a murder case where the victim was shot and killed, the jury cannot simply guess as to the gunman's or gunmen's identity or identities. Yet this is what happened in Mr. Guggenheimer's case because the record evidence was in equipoise regarding the guilt-innocence issue. Yes, as the Commonwealth argued, it can be reasonably inferred from the record evidence that Mr. Guggenheimer shot and killed Granda because Granda's negligence jeopardize his safety and freedom, *i.e.*, the Sperbers could easily

identify him and either report him to authorities, retaliate against him, or both. However, as Mr. Guggenheimer argued, the record evidence also supported an equally reasonable, yet mutually inconsistent, theory that Stone and his associate Mello shot and killed Granda because they believed Granda had set up Mr. Guggenheimer regarding the botch marijuana deal with Sean Sperber.

In these "atypical situations," the Court is "not bound" by jury's verdict and is "compelled" to "reverse a legally erroneous conviction." *In the Interest of J.B.*, 189 A.3d at 409. Put differently, "[t]he instant matter is the atypical situation where upon appellate review, the evidence although found sufficient by the fact-finder, when viewed in its entirety is deemed insufficient as a matter of law." *Id.* at 423.

The Court, therefore, must vacate Mr. Guggenheimer's third-degree murder and firearm not to be carried without a license convictions in case number 1624-2016.

CONCLUSION

WHEREFORE, based on the forgoing facts and authorities, Mr. Guggenheimer respectfully requests this Court to overturn his third-degree murder conviction in case number 1624-2016.

Respectfully submitted this the 11th day of November, 2018.

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CERTIFICATE OF SERVICE

On November 11, 2018, counsel e-filed this pleading on PAC-File. By e-filing the pleading, the Allegheny County District Attorney's Office received email notification of its filing allowing it to access a PDF copy of this pleading.

CERTIFICATE OF COMPLIANCE

Counsel certifies Mr. Guggenheimer's brief does not exceed 14,000 words.

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

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	CC No. 2016-01624
	)	2016-01637
LUCAS GUGGENHEIMER,	)	
	)	
Defendant.	)	
	)	

OPINION

Mariani, J.

This is a direct appeal wherein the defendant appeals the Judgment of Sentence of May 4, 2017. At CC No. 201601624, the defendant was convicted of Third Degree Murder and Firearms Not To Be Carried Without A License. Relative to the Third Degree Murder conviction, he was sentenced to a term of imprisonment of not less than 20 years nor more than 40 years. Relative to the firearm conviction, he was sentenced to a consecutive term of imprisonment of not less than two years nor more than four years. At CC No. 201601637, the defendant was convicted of Firearms Not To Be Carried Without A License and two counts of Recklessly Endangering Another Person. Relative to the firearm conviction, he was sentenced to no further penalty. Relative to the Recklessly Endangering Another Person counts, he was sentenced to consecutive terms of imprisonment of not less than one year nor more than two years. His aggregate sentence was a term of imprisonment of not less than 24 years nor more than 48 years. This direct appeal followed.

On October 11, 2015, City of Pittsburgh police officers were dispatched to the 2800 block of Arlington Avenue for a 911 report of shots being fired. Upon arrival, police officers observed a male, Justin Granda (referred to herein as, "the victim"), lying on a sidewalk near the street. The victim had been shot several times and was deceased. The victim sustained four gunshot wounds to the rear area of his head and four gunshot wounds to his shoulder and his lower back. He was found lying face down with his head resting on the downside of the slope of the sidewalk. Ten spent PMC 9 millimeter Luger shell casings and three live PMC 9 millimeter Luger rounds were recovered from the scene of the shooting.[1] The cause of death was multiple gunshot wounds to the trunk and head and the manner of death was homicide. During the autopsy, 9 millimeter bullets and .32 caliber bullets were recovered from the victim's body, indicating that two different firearms were used to kill the victim.

During the investigation, officers identified Sean Sperber as a possible witness. Sperber had received a telephone call from the victim in the late evening of October 10, 2015 during which the victim asked Sperber to supply him with marijuana. Sperber and the victim had worked together at a car dealership. The victim went to Sperber's apartment along with the defendant. The apartment was located in Turtle Creek, Pennsylvania, in the eastern suburbs of the City of Pittsburgh. Sperber was married and had a child. His apartment was on the top floor of an apartment building. Because he did not want to bring the victim into his apartment to conduct a drug transaction with his wife

[1] According to trial testimony, live rounds are sometimes ejected from semiautomatic firearms when the firearms malfunction ("jam").

and child present, Sperber walked outside of his apartment. He met the victim outside. When Sperber noticed the victim was with the defendant, Sperber advised the victim that he was wary of conducting a drug transaction with someone he did not know. After seeing the defendant flash a substantial amount of cash, Sperber relented and allowed the victim and the defendant into his brother's apartment, which was located on the first floor of the apartment building. After some discussion about the marijuana purchase, the defendant asked where the bathroom was located. As he walked to the bathroom, the defendant pulled a firearm out and pointed it at Sperber's head. Sperber realized the defendant was going to rob him. When the victim saw what was happening, he reacted in a way which suggested he didn't know that the defendant was going to pull a gun and/or that he disapproved of the defendant's actions.

A fight ensued between Sperber and the defendant as Sperber tried to gain control of the firearm. Sperber's brother came out from a bedroom and, thinking the victim was also a threat, was able to remove the victim from the apartment. During the altercation, the defendant discharged the firearm and shot Sperber's brother in his upper thigh, breaking his leg. The defendant attempted to fire the handgun again but it jammed. The defendant and Sperber struggled as the defendant tried to fix the jam. Eventually, the defendant was physically removed from the apartment. Sperber called 911. A cell phone and a spent 9 millimeter casing were later recovered from the scene. The cell phone belonged to the victim in this case. The spent 9 millimeter casing matched the casing found at the scene of the victim's subsequent shooting. Expert testimony confirmed that both casings were fired from the same firearm. On October 30, 2015, the

defendant was arrested and charged with the homicide of the victim in this case and with the shooting of Sperber's brother.

Investigators also located a witness, Johanna Jones, who was driving a cab on October 10, 2015. Ms. Jones testified that she received a call from the defendant, who she personally knew as "James." Ms. Jones had known the defendant for about six months prior to October 10, 2015. At approximately 11:00 p.m. that night, the defendant sent her a text message and asked her to pick him up. She picked him up in the Manchester section of the City of Pittsburgh. The defendant was with Amirae Benton when Ms. Jones arrived to pick him up. After the two men got into the cab, they asked Ms. Jones to drive them to another friend's house not far from Manchester. There, she picked up the victim. The defendant then gave Ms. Jones directions to another residence. Ms. Jones testified that she drove on the Parkway East highway to the Turtle Creek exit. Once they arrived at the Turtle Creek residence, the defendant told Ms. Jones that they would be in the house for only a few minutes and she could take them back. The defendant told Ms. Jones to "go up and come around and come back." The defendant and the victim exited the vehicle. Benton remained in the cab. Ms. Jones drove away. About fifteen minutes later, the victim and the defendant returned to the cab. They appeared "hurried," "out of breath" and "worked up." Ms. Jones was instructed by the defendant to drive the three men to the Arlington section of the City of Pittsburgh. While en route to Arlington, the victim complained that he had lost his cell phone at the Sperber residence. The defendant told the victim to "shut up" and that he'd get him another phone. Ms. Jones drove the men to Fernleaf Street in Arlington and dropped

them off near Choung's Market. The defendant spoke to Ms. Jones about a week later and told her he'd be "laying low" for a while.

Cell phone tower records analysis demonstrated that between 11:00 p.m. on October 10, 2015 and 12:20 a.m. on October 11, 2015, the cell phone of Ms. Jones contacted or "pinged" cell phone towers located along a path consistent with her travel from Manchester to the east suburb of Turtle Creek and then back to Arlington. Cell phone tower records analysis also confirmed that between 11:32 p.m. on October 10, 2015 and 1:44 a.m. on October 11, 2015, the cell phone of the victim contacted or "pinged" cell phone towers located along a path consistent with travel from Arlington to the east suburb of Turtle Creek and that it remained in the area of Turtle Creek.

Luis Rodriguez testified that he resided in a house at 2228 Arlington Avenue. Mr. Rodriguez testified he was readying himself to go to bed in the very early hours of October 11, 2015 when he heard screaming coming from outside. He looked out his bedroom window and he observed two men chasing another man down the street, firing handguns at him. He could not see the firearms but he could hear the gunshots and see the flashes coming from the firearms. He believed he had heard two different, distinct sounding firearms. He never saw any flashes coming from the person being chased. The three men were running down Arlington Avenue toward Mr. Rodriguez's house. Mr. Rodriguez observed the person being chased fall down. The other two men caught up to him. Mr. Rodriguez then saw five flashes right over the victim's body. After the two men left the scene, Mr. Rodriguez went outside to check on the victim. The victim was

gasping. Mr. Rodriguez tried to move the victim's head to help him breathe and he noticed the multiple bullet wounds in the victim's head. He got scared and ran back into his house.

Shortly after responding to the scene of the shooting, police officers encountered Amirae Benton near Spring Street about two blocks from where the victim was found. They had received a call that a male was seen fleeing the shooting scene and running toward that area. Benton was not arrested at that time.

Investigators retrieved surveillance footage from two local businesses. The surveillance footage disclosed that approximately seven minutes before the first 911 call about the shooting, the victim, the defendant and Benton were walking near Choung's Market in Arlington toward the location where the victim was found. The victim was walking closest to the curb of the sidewalk.

Defendant's first claim is that this Court erred by refusing to suppress a writing confiscated from the defendant, which writing was admitted at trial. The writing contained what the Commonwealth believed were notes of the defendant's drug associates. This Court does not believe the defendant raised this issue at trial and it is, therefore, waived on appeal. It is axiomatic that issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

The record clearly reflects that the defendant filed a motion to suppress a different writing that was confiscated from him while he was incarcerated in the Allegheny County Jail. The record created at a suppression hearing on December 14, 2016, revealed that the defendant was about to attend chapel services at the Allegheny County Jail on June 19, 2016. As he was entering the chapel area, he was searched by a jail guard. As a result of the search, a note was seized from the defendant's front shirt pocket. According to officials at the Allegheny County Jail, the jail maintained a policy of searching inmates as they entered the chapel room to ensure that only religious materials were brought into and out of the chapel. This policy existed because of the concern that inmates could have discussions and/or exchange information about criminal cases instead of participating in chapel services. According to jail officials, the policy was designed to maintain the safety of inmates at the jail. All inmates attending chapel services were subject to this policy. The note seized from the defendant as he entered chapel services contained a written description of the events that transpired on October 10, 2015 and October 11, 2015. The description of events in the note was consistent with the defendant's testimony at trial. After the hearing, this Court denied the suppression motion. This note, however, was never introduced as evidence at trial. The only writing that was introduced at trial, the writing containing information concerning other reputed associates of the defendant, was never challenged by a suppression motion or at a suppression hearing by the defendant. It cannot be raised for the first time on appeal.

The defendant next claims that the evidence was not sufficient to convict him of two separate crimes of violating the Uniform Firearms Act, 18 Pa. C.S. §6106, because

there was only one criminal episode. This claim is based solely on a sufficiency challenge. The standard of review for sufficiency of the evidence claims is well settled:

> 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 proof [of] proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all the 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. Lehman, 820 A.2d 766, 772 (Pa. Super. 2003). In addition, "[a]ny 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." Commonwealth v. Cassidy, 668 A.2d 1143, 1144 (Pa.Super. 1995). When considering a challenge to the sufficiency of the evidence, the appellate court must determine whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in a light most favorable to the Commonwealth, establish all of the elements of a crime beyond a reasonable doubt. Commonwealth v. May, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005).

The crime of carrying a firearm without a license is set forth in 18 Pa. C.S. §6106(a), which states:

> Any person who carries a firearm in any vehicle or any person who carries a firearm on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this Chapter commits a felony of the third degree.

In order to convict a defendant for carrying a firearm without a license, the Commonwealth must prove: "(a) that the weapon was a firearm, (b) that the firearm was unlicensed, and (c) that the firearm was possessed in a vehicle or where the firearm was concealed on or about the person, it was outside his home or place of business." Commonwealth v. Parker, 847 A.2d 745 (Pa.Super. 2004) citing Commonwealth v. Bavusa, 2000 PA Super 85, 750 A.2d 855, 857 (Pa. Super. 2000), *affirmed*, 574 Pa. 620, 832 A.2d 1042 (2003) (citations omitted).

There was no evidentiary dispute that the defendant did not possess a valid license to carry a firearm. Moreover, as set forth above, the evidence presented at trial indicated that the defendant possessed a firearm concealed on his person, on October 10, 2015, when he pulled it out in the Sperber residence. The defendant traveled by automobile to the Sperber residence. That evidence was clearly sufficient to convict the defendant of one count of violating the Uniform Firearms Act. The evidence surrounding the shooting of the victim in this case, as set forth below, was sufficient to circumstantially prove that the defendant was one of the shooters who shot and killed the victim. The

defendant was seen with the victim minutes before the victim was shot. The defendant had again traveled by vehicle to get to the Arlington location. The defendant, the victim and Benton are seen in surveillance video walking on the street just before the murder. No firearm is visible on the defendant. Most importantly, the evidence introduced at trial demonstrated that the firearm possessed by the defendant when he was at the Sperber's apartment was the same firearm used to shoot and kill the victim. The shooting of the victim occurred on October 11, 2015. This evidence was sufficient to prove a second count of violating the Uniform Firearms Act as the defendant possessed a firearm on two separate days to commit two separate crimes. Accordingly, the evidence was sufficient to convict the defendant of those two counts.

Defendant next claims that the evidence relied on to convict him of third degree murder was legally insufficient. "Third degree murder occurs when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice." Commonwealth v. Kling, 731 A.2d 145, 147 (Pa. Super. 1999), appeal denied, 560 Pa. 722, 745 A.2d 1219 (1999) (citing 18 Pa.C.S.A.§ 2502(c)). Importantly,

> The elements of third degree murder, as developed by case law, are a killing done with legal malice but without specific intent to kill required in first degree murder. Malice is the essential element of third degree murder, and is the distinguishing factor between murder and manslaughter.

Commonwealth v. Cruz-Centeno, 668 A.2d 536, 539 (Pa.Super.1995). *appeal denied,* 676 A.2d 1195 (Pa.1996).

> [E]vidence of intent to kill is simply irrelevant to third degree murder. The elements of third degree murder

> absolutely include an intentional *act,* but not an act defined by the statute as intentional murder. The act sufficient for third degree is still a purposeful one, committed with malice, which results in death-clearly, one can conspire to such an intentional act.

Commonwealth v. Fisher, 80 A.3d 1186, 1191 (Pa.2013), *cert. denied sub nom.* Best v. Pennsylvania, 134 S.Ct. 2314, 189 L.Ed.2d 192 (2014) (emphasis in original).

"Malice exists where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured." Id., at 147-148 (citation and quotation marks omitted). Commonwealth v. Tielsch, 934 A.2d 81, 94, (Pa.Super.2007). As set forth in Commonwealth v. Thomas, 594 A.2d 300, 301-302 (Pa. 1991):

> [m]alice was defined in Commonwealth v. Drum, 58 Pa. 9, 15 (1868), as follows:
>
> The distinguishing criterion of murder is malice aforethought. But it is not malice in its ordinary understanding alone, a particular ill will, spite or a grudge. Malice is a legal term, implying much more. It comprehends not only a particular ill will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Murder, therefore, at common law embraces cases where no intent to kill existed, but where the state or frame of mind termed malice, in its legal sense, prevailed.
>
> The crime of third degree murder under the Crimes Code incorporates the common law definition of malice. Commonwealth v. Hinchcliffe, 479 Pa. 551, 556, 388 A.2d 1068, 1070, *cert. denied*, 439 U.S. 989, 99 S.Ct. 588, 58 L.Ed.2d 663 (1978). The question is whether the evidence in this case supports a finding of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty sufficient to constitute legal malice.

Malice has been deemed present where a defendant only intended only to "scare" a victim by shooting at the victim when the conduct nevertheless unjustifiably creates an extremely high degree of risk, thereby evincing a wanton and reckless disregard for human life. Intentionally aiming a gun at another "exhibit[s] that type of cruel and wanton conduct of which legal malice is made." Commonwealth v. Young, 494 Pa. 224, 228-229, 431 A.2d 230, 232 (1981). Evidence showing that a defendant acted with "recklessness of the consequences", had "a mind with no regard for social duty", and that a defendant "consciously disregarded an unjustified and extremely high risk that his actions might cause serious bodily injury" is sufficient to establish malice. Commonwealth v. DiStefano, 2001 PA Super 238, 782 A.2d 574, 582 (Pa. Super. 2001). Furthermore, the Commonwealth may prove third-degree murder by reasonable inferences drawn from the circumstances of the killing, and malice may also be inferred from the use of a deadly weapon upon a vital part of the body. Commonwealth v. Cruz-Centeno, 668 A.2d 536, 540 (Pa.Super. 1995), appeal denied, 676 A.2d 1195 (Pa. 1996).

The evidence in this case was sufficient to convict the defendant of Third Degree Murder. The defendant's main contention is that Commonwealth failed to prove that the defendant fired the shots that killed the victim. As set forth above, the guilty verdict and the identification of the defendant could be based on circumstantial evidence. Based on testimony of Ms. Jones, surveillance videos and the cell phone tower data, the trial evidence established that the defendant and Benton were with the victim immediately prior to the shooting. The victim told the defendant that he (the victim) lost his phone at the Sperber residence. The victim's phone could have led the police to the victim, and

then to the defendant. The Sperbers did not know the identity of the defendant. At the time of the shooting, two men were observed chasing the victim down the street firing gunshots at the victim. All evidence pointed to the fact that the shooting was malicious and intentional. The victim was shot in the back four times and he was shot in his head four more times. Most importantly, ballistic evidence demonstrated that shortly after the defendant used the 9 millimeter handgun to shoot Sperber's brother in Turtle Creek, the same firearm was used to shoot and kill the victim. That the jury rejected the defendant's self-serving version of events is of no avail to the defendant. The jury was well within its province to reject this testimony. The jury was free to assess the Commonwealth's testimony to render the verdict of guilty of third degree murder. Accordingly, the evidence presented in this case was sufficient to prove third degree murder.

The defendant next claims that this Court erred by failing to sentence the defendant within the mitigated range of the sentencing guidelines. This claim is baseless. A sentencing judge is given a great deal of discretion in the determination of a sentence, and that sentence will not be disturbed on appeal unless the sentencing court manifestly abused its discretion." Commonwealth v. Boyer, 856 A2d 149, 153 (Pa. Super. 2004), citing Commonwealth v. Kenner, 784 A.2d 808, 811 (Pa.Super. 2001) appeal denied, 568 Pa. 695, 796 A.2d 979 (2002); 42 Pa.C.S.A. §9721. An abuse of discretion is not a mere error of judgment; it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. See Commonwealth v. Flores, 921 A.2d 517, 525 (Pa.Super. 2007), citing Commonwealth v. Busanet, 817 A.2d 1060, 1076 (Pa. 2002).

Furthermore, the "[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." Boyer, supra, quoting Commonwealth v. Moore, 617 A.2d 8, 12 (1992). Discretion is limited, however, by 42 Pa.C.S.A. §9721(b), which provides that a sentencing court must formulate a sentence individualized to that particular case and that particular defendant. Section 9721(b) provides: "[t]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense, as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant . . . . " Boyer, supra at 153, citing 42 Pa.C.S.A. §9721(b). Furthermore,

> In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigative report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

Boyer, supra at 154, citing Commonwealth v. Burns, 765 A.2d 1144, 1150-1151 (Pa.Super. 2000) (citations omitted).

In fashioning an appropriate sentence, courts must be mindful that the sentencing guidelines "have no binding effect, in that they do not predominate over individualized sentencing factors and that they include standardized recommendations, rather than mandates, for a particular sentence." Commonwealth v. Walls, 592 Pa. 557, 567, 926 A.2d

957, 964 (2007). A sentencing court is, therefore, permitted to impose a sentence outside the recommended guidelines. If it does so, however, it "must provide a written statement setting forth the reasons for the deviation...." Id., 926 A.2d at 963.

A sentencing judge can satisfy the requirement of placing reasons for a particular sentence on the record by indicating that he or she has been informed by the pre-sentencing report; thus properly considering and weighing all relevant factors. Boyer, supra, citing Burns, supra, citing Commonwealth v. Egan, 451 Pa.Super. 219, 679 A.2d 237 (1996). See also Commonwealth v. Tirado, 870 A.2d 362, 368 (Pa.Super. 2005) (if sentencing court has benefit of pre-sentence investigation, law expects court was aware of relevant information regarding defendant's character and weighed those considerations along with any mitigating factors). In Commonwealth v. Moury, 992 A.2d 162, 171 (Pa.Super. 2010), the Superior Court explained that where a sentencing court imposes a standard-range sentence with the benefit of a pre-sentence report, a reviewing court will not consider a sentence excessive.

Moreover, the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court. Commonwealth v. Lloyd, 878 A.2d 867, 873 (Pa. Super. 2005), appeal denied, 585 Pa. 687, 887 A.2d 1240 (2005) (citing Commonwealth v. Hoag, 665 A.2d 1212, 1214 (Pa. Super. 1995). Title 42 Pa.C.S.A. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. Commonwealth v. Marts, 889 A.2d 608, 612 (Pa. Super. 2005) (citing

Commonwealth v. Graham, 661 A.2d 1367, 1373 (1995)). "In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." Commonwealth v. Perry, 883 A.2d 599 (Pa. Super. 2005), quoting Commonwealth v. Wright, 832 A.2d 1104, 1107 (Pa.Super.2003); see also Commonwealth v. L.N., 787 A.2d 1064, 1071 (Pa.Super.2001), appeal denied 569 Pa. 680, 800 A.2d 931 (2002).

The record in this case supports the sentence imposed by this Court. The sentences imposed on each count were within the standard range of the sentencing guidelines. Additionally, this Court considered the presentence report as noted at the beginning of the sentencing proceeding. This Court considered the defendant's prior record that, while not extensive, did include substantial misconduct while he was imprisoned after his arrest. The defendant was involved in many fights while in jail. He was charged and convicted of possessing a weapon while in jail. This Court considered the fact that prior to the events in this case, the defendant had pled guilty to the unlawful possession of a firearm before another judge. Instead of complying with the terms of his probation and the law, the defendant engaged in the conduct in this case, conduct which resulted in the murder of an innocent victim. The facts of this case were that the defendant participated in an intentional, unprovoked murder by chasing the unarmed victim down a street and, along with Benton, fired multiple shots to the victim's back and head area. The last shots were fired into the victim while he lay face down on the sidewalk. The defendant participated in an armed drug transaction earlier in the evening at the Sperbers' residence. Based on the totality of the circumstances, this Court believed

the defendant was a danger to the community. This Court considered the defendant's rehabilitative needs, protection of the public, deterring the defendant from engaging in future similar conduct, deterring the pubic from committing such crimes, retribution and the impact on the victim. Though the sentences were imposed to run consecutively, the sentences imposed in this case was within the standard range of the sentencing guidelines and were not unduly harsh and properly reflected the defendant's culpability in this case.

Accordingly, the judgment should be affirmed.

By the Court:

Date: JULY 17, 2018

J.