IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	
	:	**CR-1634-2017**
	:	**CR-1635-2017**
v.	**:**	
	:	
GRAHAM NORBY-VARDAC,	**:**	**POST SENTENCE MOTION**
Defendant	**:**	

OPINION AND ORDER

Graham Norby-Vardac (Defendant), through Counsel, filed a Post-Sentence Motion pursuant to Pa. R. Crim. P. 720 on December 23, 2019.[1] Defendant then filed a Supplemental Post-Sentence Motion on February 3, 2020. A hearing on the Motion was held on March 19, 2020. In his Motions, Defendant contends the following: This Court erred in determining Defendant was competent to stand trial;[2] This Court erred in allowing introduction of the autopsy report at Defendant's competency hearing; This Court erred in failing to sustain Defendant's objection to questioning related to lack of fingerprints at Defendant's competency hearing; This Court erred in admitting Commonwealth's Exhibit #57A, a DVD of a Pennsylvania State Police (PSP) interview that occurred in Buffalo;[3] The evidence was insufficient to sustain the verdict

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[1] Defendant was sentenced on December 11, 2019, therefore his post-sentence motions were due within ten days or December 21, 2019. Since December 21, 2019 was a Saturday, Defendant's Motion is timely as it was filed the following Monday. *See* 1 Pa. C.S. § 1908 ("Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.").

[2] For this issue the Court shall rely solely on its Opinion and Order dated October 16, 2018. In that Opinion and Order the Court found Defendant competent to stand trial and outlined both the facts established at the competency hearing on August 30, 2018 and the Court's reasoning for making its determination.

[3] The Court finds the issue has been waived as Defendant withdrew his Motion to Suppress at a conference on his Omnibus Pretrial Motion due to defense expert's inability to testify that "Defendant was mentally impaired to the degree that he was incompetent to waive his Miranda rights." Order 3/1/18, at 1; *see also* N.T. 8/30/18, at 72-73. Additionally, Defendant did not object to its admittance at the time of trial for any other reason. N.T. 6/27/19, at 36.

as to First Degree Murder, Second Degree Murder, Robbery, and Burglary; The verdict was against the weight of the evidence; This Court erred in not finding Defendant guilty but mentally ill; and This Court erred in precluding Defendant's mother, Marlys Norby (Marlys), from testifying as to Defendant's mental condition. For the following reasons Defendant's Motions are denied.

Background and Testimony

On December 11, 2019, Defendant was convicted and sentenced on the above docket numbers of Murder of the First Degree, Murder of the Second Degree, two counts of Aggravated Assault, Burglary, Robbery, Criminal Trespass, Possession of an Instrument of a Crime, Criminal Mischief, two counts of Theft by Unlawful Taking, and Receiving Stolen Property. This Court additionally refused to find Defendant guilty but mentally ill at the behest of defense counsel, as an insanity defense was not properly raised at the time of trial.

Competency Hearing[4]

On August 30, 2018, this Court conducted a competency hearing in Defendant's case. Dr. Pogo Voskanian (Voskanian) and Dr. John O'Brien (O'Brien) testified at the time of the hearing. Voskanian testified that Defendant's appreciation of factual evidence was not present. N.T. 8/30/18, at 12. More specifically, Defendant believed that because there were no fingerprints on the shovel used to attack Donald Kleese (Victim), he could not be convicted. *Id.* Defendant refused to focus on any evidence other than the lack of fingerprints on the shovel. *Id.* On cross examination, Voskanian agreed that lack of fingerprints in many cases is significant evidence. *Id.* at 19. As the Commonwealth attempted to explain further, defense counsel

[4] As the factual findings of the hearing have been previously laid out in this Court's Opinion and Order dated October 16, 2018, only the facts related to Defendant's unresolved issues raised shall be reiterated.

objected to the continuing questioning related to the fingerprints for "getting a little far afield." *Id.* at 20. The objection was overruled and questioning was permitted to continue. *Id.* The Commonwealth then asked if it is unusual for a defendant to give an exculpatory version of events, which was objected to and overruled. *Id.* at 20-21. Voskanian stated it was not unusual. *Id.* at 21.

At the end of the hearing the Commonwealth submitted Victim's autopsy report as Exhibit #5. *Id.* at 66. Defendant objected to the relevancy of the report. *Id.* at 66-67. This Court allowed its introduction for the observations of the forensic psychologist, but not for any conclusions on the cause or manner of death. *Id.* at 67.

Non-Jury Trial

A non-jury trial was held in Defendant's cases on June 24, 2019, June 27, 2019, and December 11, 2019.[5] On behalf of the Commonwealth, Christine Heim (Christine), Veronica Heim (Veronica), Brittnee Roan (Roan), Claudia Eck (Eck), Bonnie Wheeland (Bonnie), Megan Wheeland (Megan), Roger Chapman,[6] Christine Martes (Martes), Scott Wheeland (Scott), Rachel Campbell (Campbell), Margret Bower (Bower), and paramedic Nathan Katzmaier (Katzmaier) testified on June 24, 2019. Sergeant Travis Doebler (Doebler) and Trooper Russell Ramin (Ramin) of the PSP also testified on June 24, 2019. On June 28, 2019, Detective Scott Malec (Malec) of the Buffalo, New York Police Department and Trooper Daniel Switzer (Switzer) of the PSP testified for the Commonwealth. On December 11, 2019 Dr. Samuel Land

[5] The lengthy amount of time between the first two days and the last day of the trial was due to Dr. Land's inability to testify due to medical reasons, which was no objected to by Defendant.
[6] Although Mr. Chapman testified, this Court gives no deference to his testimony. As displayed on cross the testimony was contradictory to the evidence. Mr. Chapman claimed to identify Defendant on April 5, 2017 to "[m]e, myself, and I," but never identified the individual to police. Therefore, this Court does not take his testimony or identification of Defendant into consideration in rendering its decisions. *See* N.T. 6/24/19, at 62-67.

(Land) testified for the Commonwealth. In addition, the Commonwealth provided eighty-eight exhibits and a number of stipulation as evidence. Marlys testified on Defendant's behalf and Defendant submitted eight exhibits as evidence. The testimony and evidence submitted established the following.

Victim lived approximately two miles from Christine's home. N.T. 6/24/19, at 9. On her way to work on April 5, 2017 at approximately 6:35 a.m., Christine observed an individual, wearing dark clothing and a backpack, pushing a bike up the hill. *Id.* at 10-11. It was dark at the time and Christine could not identify the individual. *Id.* at 13. The individual was traveling towards Victim's house. *Id.* at 11. Approximately ten minutes later, Christine's daughter, Veronica, was traveling in the same direction and saw a man in the middle of the road with a bike. *Id.* at 15. Veronica did not remember the individual having a backpack. *Id.* at 21. The individual then came to Veronica's window to speak with her, and asked her to take him to the campground in Williamsport. *Id.* at 15. Veronica was thrown off because she was unaware of any campground in Williamsport and after the man stepped back she drove off. *Id.* at 15-16. Veronica was then asked to come to the PSP barracks to look at a lineup, at which time she identified Defendant as the person she encountered on April 5, 2017. *Id.* at 18-19; *see also* Commonwealth's Exhibit #1. Veronica also identified Defendant in the courtroom as the individual she saw on that day. N.T. 6/24/19, at 16-17. At approximately 6:40 a.m., Roan was on her way to her babysitters when she witnessed an individual riding his bike with a collapsible laundry hamper on his back on her side of the road. *Id.* at 25. The individual was traveling in the direction of Victim's house. *Id.* On her way back from the babysitters approximately ten minutes later, she again saw the individual riding his bike in the same direction. *Id.* at 27-29. PSP officers came to Roan's house to show her pictures and ask her to identify the individual she saw on

April 5, 2017. *Id.* at 31. Roan identified a picture of Defendant as the individual she saw. *Id.* at 32; *see also* Commonwealth's Exhibit #2. Roan also identified Defendant in the Courtroom. N.T. 6/24/19, at 31-32. Eck was driving from her house at around 7:00 a.m. on April 5, 2017, when she was flagged down by an individual with a bike in the vicinity of Victim's residence. *Id.* at 43-44. She spoke with the individual for less than five minutes before she drove off. *Id.* at 45. Eck identified Defendant as the individual she spoke with that day. *Id.* at 42.

On April 5, 2017, Bonnie was driving her daughter, Megan, to work at approximately 7:10 a.m. *Id.* at 47. She observed a man attempting to flag her down at the foot of Victim's (her husband's uncle) driveway as she was driving by. *Id.* Although Defendant could not subsequently identify Defendant at the police station, she described him as transient looking with dark eyes. *Id.* at 47, 50. The individual was pushing a bike and wearing a heavy winter jacket. *Id.* at 48, 51. Megan, who was in the passenger's seat of the vehicle that day, was able to identify Defendant in photographic lineup. *Id.* at 57-58; Commonwealth's Exhibit #3. Megan also identified Defendant as the individual she saw on that day in the courtroom. N.T. 6/24/19, at 57.

Mertes is Victim's next door neighbor and was out front of her residence at approximately 1:00 p.m. on April 5, 2017. *Id.* at 68-69. At that time Victim's car was not parked outside and his car was still not back at 10:00 p.m. when she next looked. *Id.* at 69-70. Scott, who is Victim's nephew, noticed that around 11:00 p.m. Victim's living room and basement lights were on, which he stated was unusual for that time of night. *Id.* at 72-73. When Scott went by again the next morning the lights were still on. *Id.* at 73. Scott then contacted Campbell, Victim's daughter, so that she could check on him. *Id.* at 73-74. Scott could not recall whether Victim's car was the residence at either of the times he drove by. *Id.* at 76. After receiving a

message from Scott regarding the lights being on at Victim's house, Campbell went to the residence at approximately 6:20 a.m. on April 6, 2017. *Id.* at 77-78, 80. When she arrived Victim's vehicle, a blue Subaru, was not there. *Id.* at 83. The window above the back door was smashed out. *Id.* at 84. The door was unlocked, which was unusual as Campbell stated Victim kept the doors locked. *Id.* at 82. After going inside and yelling for her dad, but receiving no answer she went outside and called her sister, Bower. *Id.* at 84-85, 96. After Bower arrived, Bower went into the basement, which the door was open to, and Campbell went to the back of the house. *Id.* at 86, 97. When Campbell got to the back bedroom she saw blood on the bed and Victim on the floor dead with his face battered. *Id.* at 86-87. She then told Bower that Victim was dead and they went outside where one of their other sisters, who was on the phone with Bower, called 911. *Id.* at 87, 99. Katzmaier arrived at the scene and deemed Victim "deceased and unworkable." *Id.* at 101. A shovel was lying beside Victim and there was blood on Victim's face and the edge of the bed. *Id.* at 101-02.

Doebler then responded to the residence. *Id.* at 103. When Doebler arrived he described the residence as not "immaculately kept, but it appeared to be that somebody was residing there." *Id.* at 104. In the driveway scattered about were a number of items including keys, a blue milk crate, and a red bicycle helmet. *Id.* at 106-07. Doebler and another trooper entered the house through the basement, until they found the stairs to the main floor. *Id.* at 108. While clearing the house Doebler marked that the house was "extremely cluttered." *Id.* at 108-09. Upon entering the back bedroom, Doebler found Victim deceased on the floor with a shovel next to his body. *Id.* at 109. Victim had significant damage to the head and neck area and a lot of blood covering those areas. *Id.* at 114. There was blood on the pillows and the end of the mattress. *Id.* at 112-13. Upon, determining Victim was deceased, the troopers went back outside the residence and

called Switzer. *Id.* at 118. Doebler believed that the perpetrator had gained entry into the home through the backdoor, which had broken glass on both the outside and inside of the residence, but he admitted he was unaware of how long the window had been broken, as a plastic bag and tape were on the outside of the window when he viewed it. *Id.* at 109, 121-22, 129. Ramin then was called in to photograph and videotape the residence. *Id.* at 131. Victim had four firearms in his bedroom, none of which were loaded. *Id.* at 133. The shovel found next to the victim had both blood on the spade and handle. *Id.* at 136. Pants were also found next Victim with blood on them and Victim's wallet was in the pocket with money still inside. *Id.* at 145-46. Switzer arrived at the residence on April 6, 2017 at approximately 7:15 a.m. and spoke with Doebler. N.T. 6/27/19, at 25-26, 28. After obtaining the registration information for Victim's vehicle, Switzer reported the vehicle stolen. *Id.* at 29-30.

Agent Stephen Habinski was working as a customs officer for the Canada Border Service Agency on April 6, 2017 at approximately 10:36 a.m. when he began an inspection on Defendant who was driving a blue Subaru.[7] N.T. 6/24/19, at 153. Defendant stated that he was going to Canada on business for a few days and he did not have a passport. *Id.* at 153-54. Due to Defendant not knowing what city he was going to, inconsistent answers, and inability to state where he was staying, he was asked to pull over to the immigration counter for further questioning. *Id.* at 153-55. Another customs officer, Agent Doug Hornyak, greeted Defendant inside, where he was informed due to the lack of money and lack of employment he may be denied entry.[8] *Id.* at 155-57. When asked how he arrived, Defendant stated that he had borrowed his grandfather's car. *Id.* at 157. Upon searching the vehicle, the agent found the registration

[7] This testimony was entered into the record on June 24, 2019, as a matter of stipulation.
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showing Victim was the owner. *Id.* at 158. Agent Hornyak was then informed the vehicle was reported stolen at which time Defendant taken into custody. *Id.* Agent Jordan Richards of the Canada Border Service Agency arrested Defendant.[9] *Id.* He asked Defendant if he should be concerned for the owner of the vehicle, to which Defendant responded "there wasn't supposed to be anyone in there." *Id.* at 158-59. Defendant was then turned over to the Buffalo Police Department. *Id.*

Malec then placed Defendant in a room where he was interviewed. N.T. 6/27/19, at 6-7, 10. When Malec began questioning Defendant about the vehicle, Defendant stated that he had found it in the middle of Pennsylvania, in an area with little to no houses around. Commonwealth's Exhibit #55, at 18:41:00. According to Defendant, the vehicle appeared to be abandoned for some time and the key was lying nearby. *Id.* at 18:42:00. At this point, Defendant had been biking for days from Virginia and was attempting to get to Canada to meet with someone. *Id.* at 18:42:50-44:10. When Malec showed Defendant Victim's house, Defendant stated that he saw the house, but he did not go in. *Id.* at 19:35:00. Defendant reiterated that he believed the house was abandoned, but he did not go inside. *Id.* at 19:36:45. Before he saw that house, Defendant had attempted to signal many drivers for help, but no one would help him. *Id.* at 19:51:00. Defendant continually denied entering the residence even after Malec informed him the owner of the vehicle had died, before Defendant finally stated that he managed to break in with a shovel. *Id.* at 20:00:00. Defendant stated that he then took the key to the car and left, and then asked Malec how the owner of the house had died. *Id.* at 20:01:10. Upon further prodding by Malec, Defendant stated that when he was in the house looking around for food and he got to "the very end of the house," he "was absolutely horrified by what [he] saw." *Id.* at 20:01:55.

[9] This testimony was entered into the record on June 24, 2019, as a matter of stipulation.

Defendant told Malec a description of Victim's bloody corpse with blood on the sheets, but he did not know what happened to him and he was already dead when he saw him. *Id.* at 20:02:10. Malec kept asking what Victim said to Defendant, before Defendant stated that "he was holding a shotgun" that Victim was going to fire at him. *Id.* at 20:03:00. After Victim missed with his shot, Defendant stated he tried to tell him to stop and knocked the weapon out of his hand. *Id.* at 20:04:30. Malec questioned Defendant further and he stated he "never wanted to kill a person." *Id.* at 20:08:50.When asked he stated he only hit him with a shovel once to stop him from reaching for another weapon. *Id.* at 20:10:00. Malec asked Defendant when this occurred, he stated around 8:30 in the morning. *Id.* at 20:37:45. Defendant stated that when got to the back bedroom, Victim was going to go for the shotgun. *Id.* at 20:38:35. After everything was done Defendant stated he looked around for food and the keys to the vehicle. *Id.* at 20:39:00.

Switzer was informed that Defendant was being held in Buffalo, New York and on April 7, 2017, he and Corporal Rob Reeves (Reeves) went to the Buffalo Police Department to interview Defendant. N.T. 6/27/19, at 32-33. Reeves began the interview by asking Defendant about his trip from Virginia. Commonwealth's Exhibit #57A, at 12:28:00. Defendant stated he used a combination of Lyft and biking to reach the Williamsport area. *Id.* at 12:30:00. Prior to reaching Victim's house, Defendant stated he tried to flag someone down to help him, but only a few individuals stopped and none helped him. *Id.* at 12:32:30. When asked about Victim, Defendant stated he "just panicked when he realized someone was in the house." *Id.* at 12:33:45. Reeves asked him about remorse and Defendant stated he did not want to kill Victim. *Id.* at 12:34:00. When asked about how he got into the residence, Defendant stated he found a shovel and broke a window on the back door. *Id.* at 12:36:00. Defendant then went to the back of the house looking for food or a blanket. *Id.* at 12:39:30. When Victim encountered Defendant, he

stated he was going to call the cops, at which point Defendant panicked. *Id.* at 12:40:30-43:00. Defendant hit Victim in the head with the shovel, but only wanted to knock him out. *Id.* at 12:45:00. Reeves asked Defendant why he strangled Victim after he hit him with the shovel and Defendant responded because he could not have him calling the police. *Id.* at 12:49:30. Defendant stated this was the only time he has done something like this. *Id.* at 12:51:00. Defendant stated that Victim made it out of bed, so Defendant hit him with the shovel. *Id.* at 12:52:00. Defendant found the keys to the vehicle and left. *Id.* at 13:09:30. Before Defendant left he took a jar of coins and canned food. *Id.* at 13:12:00. Reeves then asked Defendant if he would write something to the family, like an apology letter, which Defendant said he would. *Id.* at 13:15:10. Defendant filled out a Custodial Written Statement. *See* Commonwealth's Exhibit #57C. At the end of that statement, Defendant wrote "I wish I had never hit him with the shovel, and strangeld [sic] him. I wish I had asked for help instead." *Id.* at 2.

Victim's vehicle was taken from Buffalo and transported back to the PSP barracks. N.T. 6/27/19, at 45. Within the vehicle were a number of articles belonging to Defendant including a ski mask, laundry bag, sleeping bag and additionally, a jar of change. *Id.* at 49-51. A number of items were sent to the lab for DNA analysis including: the shovel, an orange jacket found next to Victim, pillows and bedsheets, a long sleeve shirt, a tan jacket, and pants belonging to Defendant with blood on them, and swabs taken from Defendant's nails. *Id.* at 52-53. Further analysis and conclusions were presented as an exhibit at the time of trial.[10] Victim's DNA matched DNA that was located on the handle and head of the shovel and on the long sleeve shirt belonging to Defendant. Commonwealth's Exhibit #74, at 3. A mixture of DNA was found on

[10] Commonwealth's Exhibit #74 is the PSP Forensic DNA Division's DNA Analysis, which was entered into evidence as a matter of stipulation on December 11, 2019.

Defendant's pants, which a major component of the DNA matched that of Victim. *Id.* at 4.

Land performed the autopsy of Victim in this case on April 7, 2017. N.T. 12/11/19, at 6. Victim suffered blunt force trauma to his head and neck. *Id.* at 7. Specifically, the wounds to the head would be considered chop wounds, which occur from a sharp edged object that is heavy. *Id.* at 8. Land concluded this type of wound would be consistent with the use of a shovel and these injuries on their own would be sufficient to cause death. *Id.* at 8-9. Additionally, Victim suffered a number of wounds to his neck area including a fractured hyoid bone, which can be caused by strangulation or blunt force trauma to the neck. *Id.* at 9-10. This injury by itself would also be sufficient to cause death. *Id.* at 11. Victim also had a number of defensive wounds to his hands and arms. *Id.* at 15. Land reached the conclusion to a reasonable degree of medical certainty that Victim's manner of death was homicide by blunt force trauma to the head and neck. *Id.* at 16.

Discussion

Whether the Court Erred in Failing to Sustain Defendant's Objections at the Competency Hearing

At the outset, Defendant contends this Court fatally erred by failing to sustain his objections to the Commonwealth's line of questioning regarding lack of fingerprints and by allowing the Commonwealth to introduce the autopsy report at that hearing. Although this Court is relying solely on its Opinion and Order dated October 16, 2018 for Defendant's main contention in his Post Sentence Motion and Supplemental Post Sentence Motion (whether this Court erred in finding Defendant competent to stand trial), the two issues stated above have not been previously addressed.

As for Defendant's contention regarding the introduction of the autopsy report, it is irrelevant. Nowhere in this Court's Opinion and Order from October 16, 2018 does it rely upon

the substance of the autopsy report or even mention the autopsy report. Further this Court did not rely on the information provided in the autopsy report in reaching its conclusion, which the rationale is fully outlined in the ***Analysis*** section the Opinion and Order.

The second objection Defendant raised was to the Commonwealth's questioning of Voskanian on whether Defendant's focus on fingerprints being found on the shovel was outside the scope of direct examination. "Cross-examination of a witness other than a party in a civil case should be limited to the subject matter of the direct examination and matters affecting credibility, however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Pa. R. Evid. 611(b). On direct examination the following was asked and answered:

> Q. So would he be able to assist me in defending him in this case in a rationale [sic] basis?
> A. No. Even his appreciation of factual evidence he's not there.
> Q. Can you explain a little bit more for Your Honor.
> A. He's focused on one detail in evidence, which is fingerprints on the shovel and he believes that there is no fingerprints on the shovel and there cannot be fingerprints on the shovel and, therefore, he cannot be convicted and there is nothing else to this case other than that shovel. When I questioned him, you know, there was blood on the shovel, you used the same shovel to break the glass, it doesn't make any difference to him. He believes that there are no fingerprints on the shovel, therefore, he is completely innocent and he would not consider any other options and there is no evidence that one can discuss with him other than the shovel business.
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> N.T. 8/30/18, at 12.

The issue is then broached by the Commonwealth on cross-examination. *See id.* at 18-23. The Commonwealth asks the questions to establish whether Defendant's fixation on the fingerprints is irrational, being as it was the suspected murder weapon. As the issue was voluntarily presented by Voskanian on direct examination to explain why Defendant is irrational and cannot defend himself, the Commonwealth's questioning on cross examination to establish it is a rational

defense is permitted as relevant and within the scope. Therefore the objection was properly overruled.

Whether the Evidence was Insufficient to Sustain a Conviction

Defendant asserts the Commonwealth's evidence presented at trial was insufficient to justify a verdict of guilty and therefore requests either Judgment of Acquittal, or relief in Arrest of Judgment. Specifically, Defendant contends insufficient evidence was presented to establish Murder of the First Degree, Murder of the Second Degree Murder, Robbery, or Burglary. When evaluating the sufficiency of the evidence a Court "must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt." *Commonwealth v. Brown*, 52 A.3d 320, 323 (Pa. Super. 2012). All reasonable inferences are drawn in favor of the verdict winner. *Commonwealth v. Watley*, 81 A.3d 108, 113 (Pa. Super. 2013). "[T]he evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented." *Brown*, 52 A.2d at 323.

First, an individual commits the crime of Burglary, under the subsection for which Defendant was convicted, when:

> [W]ith the intent to commit a crime therein, the person enters a building or occupied structure, or separately secured or occupied portion thereof, that is adapted for overnight accommodations in which at the time of the offense any person is present and the person commits, attempts or threatens to commit a bodily injury crime therein.
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> 18 Pa. C.S. § 3502(a)(1)(i).

A bodily injury crime includes acts under chapter twenty-five of the criminal crimes code relating to Criminal Homicide and chapter twenty-seven relating to Assault. 18 Pa. C.S. §

3502(e). Additionally, although, Abandonment is a defense to Burglary under 18 Pa. C.S. § 3502(b)(1), Pennsylvania courts have long held that no mental element exists. *Commonwealth v. Henderson*, 419 A.2d 1366, 1367-68 (Pa. Super. 1980). Therefore, a defendant's belief that a building is abandoned is irrelevant, regardless of whether reasonableness or good faith can be demonstrated. *Id.* Similarly, the defense of Necessity can be established by showing that a defendant (1) was faced with a clear and imminent harm, not one which is debatable or speculative; (2) he could reasonably expect that his actions would be effective in avoiding this greater harm; (3) no legal alternative existed, which would be effective in abating the harm; and (4) Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue. *Commonwealth v. Capitolo*, 498 A.2d 806, 809 (Pa. 1985).

Defendant argues the evidence provided to demonstrate Burglary is not sufficient because he did not enter with the intent to commit a crime therein. *See* N.T. 12/11/19, at 44-45. More specifically, Defendant contends that he believed the house was abandoned and only broke in out of necessity for food, water, and shelter. *Id.* at 45. The Court finds Defendant's rationale does not negate his intent to enter the residence with the intent to commit Theft by Unlawful Taking. First, Defendant's belief, whether reasonable or in good faith, that the residence was abandoned is not a defense to Burglary, as Victim was present in the residence. Also the Court finds the contention is not supported by the record. While Victim's residence was cluttered and unkempt, Doebler testified it was apparent someone lived there, it was apparent from the photographs of the residence, and the presence of the vehicle outside the residence, which prompted Defendant to enter, all show signs the residence was inhabited. *See* Commonwealth's Exhibit #5-8, 13-15. In addition, no necessity was present. Although Defendant was tired and hungry, there is no evidence of a clear and imminent harm to his person. A legal alternative

existed, as Defendant had a cellphone and could have called for help or either one of his parents for assistance. Since Defendant entered the residence to commit theft and it is not disputed once inside Defendant committed at a minimum Aggravated Assault, a bodily injury crime, sufficient evidence was presented to establish Burglary.

Next, an individual commits Robbery when, "in the course of committing a theft, he inflicts serious bodily injury upon another." 18 Pa. C.S. § 3701(a)(1)(i). The term "in the course of committing a theft" is considered when the serious bodily injury "occurs in an attempt to commit theft or in flight after the attempt or commission." 18 Pa. C.S. § 3701(b).

Defendant contends the evidence establishes that a Robbery did not occur as Defendant did not take Victim's wallet and instead only took some coins and food and fled in Victim's vehicle. *See* N.T. 12/11/19, at 45. As stated above, it is clear Defendant entered the residence with the intent to commit Theft by Unlawful Taking. Once inside Defendant was alerted of Victim's presence, who as a result suffered serious bodily injury inflicted by Defendant. Defendant stated he committed his actions so Victim would not call the police. After the serious bodily injury was inflicted, Defendant took coins and food and fled upon completing the Theft by Unlawful Taking. As Defendant, inflicted the serious bodily injury during the commission of the Theft by Unlawful Taking in furtherance of completing the crime, the elements of Robbery were satisfied.

Since there was sufficient evidence to establish Defendant committed Burglary and Robbery, evidence is sufficient to establish Murder of the Second Degree. Murder of the Second Degree is "committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa. C.S. § 2502(b). Both above convictions are felonies and the killing was committed in "perpetration of" the crimes to keep Victim from notifying the

authorities, therefore the evidence was sufficient for the conviction of Murder of the Second Degree.

Lastly, a defendant commits Murder of the First Degree when the killing is intentional. 18 Pa. C.S. § 2502(a). A killing is defined as intentional when it is accomplished "by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa. C.S. § 2502(d). "The period of reflection necessary to constitute premeditation may be very brief; in fact the design to kill can be formulated in a fraction of a second." *Commonwealth v. Fisher*, 769 A.2d 1116, 1124 (Pa. 2001). A specific intent to kill can sufficiently be established by evidence demonstrating "use of a deadly weapon on a vital part of a human body." *Commonwealth v. Bolden*, 753 A.2d 793, 797 (Pa. 2000). The Commonwealth in demonstrating specific intent may do so by solely circumstantial evidence. *Commonwealth v. Spell*, 28 A.3d 1274, 1278-79 (Pa. 2011).

The Court finds the evidence presented was sufficient to satisfy Murder of the First Degree. Defendant in his interview with both Malec and PSP admitted to striking Victim in the head with a shovel. Further, in his interview with PSP and in his "apology letter" to Victim's family he admits to strangling Victim after striking him in the head with a shovel, because he did not want him calling the police. Defendant's actions demonstrate a willful, deliberate, and premeditated killing. Although there is no evidence Defendant intended to kill Victim prior to entering the house, it is not required. Once Defendant found out Victim was present in the house, he did not want Victim calling the police, so to stop him from doing so, he struck him in a vital part of the human body with a deadly weapon, before putting the weapon down and strangling him. This is corroborated by the number of wounds Land described on Victim's head and neck, in addition to the breaking of Victim's hyoid bone, which Land testified is consistent with

strangulation. Therefore the evidence was sufficient to establish Defendant had specific intent to kill Victim prior to committing the murder, satisfying the elements of Murder of the First Degree.

Whether the Verdict was Against the Weight of the Evidence

Defendant contends that the verdict reached was against the weight of the evidence provided at trial. "[T]he trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence." *Commonwealth v. Knox*, 50 A.3d 749. 754 (Pa. Super. 2012). This finding rest exclusively with the trier of fact. *Commonwealth v. Rice*, 902 A.2d 542, 546 (Pa. Super. 2006).

> The weight given to trial evidence is a choice for the factfinder. If the factfinder returns a guilty verdict, and if a criminal defendant then files a motion for a new trial on the basis that the verdict was against the weight of the evidence, a trial court is not to grant relief unless the verdict is so contrary to the evidence as to shock one's sense of justice.
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> *Commonwealth v. West*, 937 A.2d 516, 521 (Pa. Super. 2007).

First, an individual commits Criminal Trespass when, "knowing that he is not licensed or privileged to do so, he breaks into any building or occupied structure or separately secured or occupied portion thereof." 18 Pa. C.S. § 3503(a)(1)(ii). An individual "breaks" into a building, for purposes of the statute, when "he gain[s] entry by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access." 18 Pa. C.S. § 3503(a)(3). The evidence, as presented by a number of witnesses, shows Defendant traveling towards Victim's house on the day of the murder, then Defendant admits in his interviews he entered the house. Although defense counsel infers that it cannot be known when the back window was broken, Defendant stated in his interview with Malec and with Switzer and Reeves that he used the shovel to break the back window for the purpose of entering the house.

Regardless, even if the back window was previously broken, the unauthorized opening of the back door's lock, which Bower and Campbell testified was kept locked, satisfies the statute. Therefore, his conviction of Criminal Trespass was not against the weight of the evidence.

Second, an individual commits Criminal Mischief when he "intentionally damages real or personal property of another." 18 Pa. C.S. § 3304(a)(5). Based on the above, Defendant breaking the window with the shovel constitutes Criminal Mischief. Additionally an individual violates 18 Pa. C.S. § 907(a) when he "possesses any instrument of crime with intent to employ it criminally." This is satisfied by Defendant admitting he used the shovel to enter the residence. Therefore his convictions of Criminal Mischief and Possession of an Instrument of a Crime were not against the weight of the evidence.

Third, an individual commits Theft by Unlawful Taking when "he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa. C.S. § 3921(a). Defendant again admits to taking the canned food and a jar of coins from the residence. Circumstantial evidence of this is seen as Victim's effects were found lying in the yard near where his vehicle would have been and a jar of coins was found in the vehicle once Defendant was brought into custody. Therefore, his conviction of Theft by Unlawful Taking was not against the weight of the evidence.

Fourth, and individual commits Aggravated Assault when he "attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life" and/or "when he attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon." 18 Pa. C.S. § 2702(a)(1), (4). Defendant admits to striking Victim with a shovel in both interviews. Defendant also admits to strangling Victim in his interview with Reeves and

Switzer, and Victim's DNA was found on Defendant's shirt and pants. The bloody shovel was located next to Victim and Land's testimony concluded that either the strikes from the shovel or the broken hyoid bone could have, on their own, resulted in Victim's death. Therefore his convictions of Aggravated Assault were not against the weight of the evidence.

Lastly, Defendant was convicted of Burglary, Robbery, Murder of the Second Degree, and Murder of the First Degree as defined above. The testimony of witnesses presented at trial places Defendant traveling towards and then outside of Victim's house. Defendant in two interviews states that he did in fact enter the house by breaking in with a shovel to find food to eat and a blanket. Victim was in fact in the residence at the time of the break in. Defendant admits to striking Victim with a shovel and strangling him. Regardless of that fact, Victim died while Defendant was attempting to commit Theft by Unlawful Taking, he then completes the act of Theft by Unlawful Taking as Victim's car and items from his house were found with Defendant at the Canadian border. The shovel Defendant states he used to break in is bloodied and next to Victim, and Victim's DNA was found on Defendant's clothing. Lastly, Land's testimony of what caused Victim's death matches Defendant's description of blunt force trauma from the shovel and strangulation. Therefore Defendant's convictions for Burglary, Robbery, Murder of the Second Degree, and Murder of the First Degree were not against the weight of the evidence.

The Court's determination does not shock one's sense of justice to the extent that it should overturn its decision. Therefore the Court finds Defendant's claim that the verdict was against the weight of the evidence is meritless.

Whether the Court Erred in Failing to Find Defendant Guilty, but Mentally Ill

Defendant contends that this Court failed to find that he was guilty, but mentally ill, and

in the same vein erred by sustaining the Commonwealth's objection to Marlys's testimony regarding Defendant's mental health treatments, which would have established the same. An individual may be found guilty, but mentally ill, if he/she "timely offers a defense of insanity . . . [and] the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense." 18 Pa. C.S. § 314(a).

Defendant filed a timely Notice of Defense of Insanity or Mental Infirmity and Notice of Expert Evidence as to Mental Condition in compliance with Pa. R. Crim. P. 568 on November 15, 2017. In that notice, Defendant stated "Voskanian's conclusion regarding the mental state at the time of the offense is that the Defendant was under extreme duress and lacked the capacity to form a specific intent to kill." Additionally, Eric Vardac (Defendant's father) and Marlys were listed as individuals Defendant intended to call "in support of Dr. Voskanian's conclusions." As noted in this Court's Order granting Defendant's Motion to Reconsider precluding Voskanian's testimony at trial, Voskanian did not reach a conclusion as to an insanity defense. Order 8/7/19, at 1. In his report, Voskanian specifically stated that he could not, "opine regarding an insanity defense. However, based on the data contained in this report, it is my opinion, to a reasonable degree of medical certainty, that [Defendant] was under extreme duress (in light of his mental illness) and lacked the capacity to form a specific intent to kill." Defendant Exhibit #2, at 35 (exhibit provided at the competency hearing, not at trial). A diminished capacity defense is "an extremely limited defense available only to those defendants who admit criminal liability but contest the degree of culpability based upon an inability to formulate the specific intent to kill." *Commonwealth v. Hutchinson*, 25 A.3d 277, 312 (Pa. 2011). This is not the same as raising an insanity defense as they are two separate principals of law, which Dr. Voskanian verified by

stating he could not reach a conclusion as to insanity. Since a defense of insanity was never raised, it would have been improper to allow Marlys to testify regarding Defendant's mental condition, as it was irrelevant and it would have been similarly improper to find Defendant guilty, but mentally ill.

ORDER

AND NOW, this 8th day of May, 2020, based on the foregoing opinion, Defendant's Post Sentence Motion and Supplemental Post Sentence Motion are hereby **DENIED.**

Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of entry; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal *in forma pauperis* and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

BY THE COURT,

_____
Nancy L. Butts, P.J.

cc: Robert Hoffa, Esq.
DA (MW)
NLB/kp