IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

EDA 2013 **No. 1121**

COMMONWEALTH OF PENNSYLVANIA

V.

RONALD THOMAS,

Appellant

BRIEF FOR APPELLANT

Appeal from the March 18, 2013 Judgment of Sentence of the Philadelphia County Court of Common Pleas, Criminal Trial Division, Imposed on Information No. CP-51-CR-0013001-2010

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to hear an appeal from the judgment of sentence of the Philadelphia Court of Common Pleas. 42 Pa.C.S.A. § 742.

SCOPE AND STANDARD OF REVIEW

Pennsylvania appellate courts "review a trial court's decision to deny a mistrial for an abuse of discretion." *Commonwealth v. Lopez,* 57 A.3d 74, 83 (Pa. Super. 2012). Likewise, a trial court's decision to admit evidence is subject to abuse of discretion review. *Commonwealth v. Rushing,* 71 A.3d 939, 970 (Pa. Super. 2013).

In reviewing a sufficiency of the evidence challenge, the Pennsylvania Superior Court determines "whether the evidence and all reasonable inferences deducible therefrom, when viewed in the light most favorable to the verdict-winner...are sufficient to establish all elements of the crime charged beyond a reasonable doubt." *Commonwealth v. Rakowski,* 987 A.2d 1215, 1217 (Pa. Super. 2010).

The Commonwealth always bears the burden of demonstrating "harmless error." *Commonwealth v. Simmons,* 662 A.2d 621, 633 (Pa. 1995). An error is harmless only where an appellate court is "convinced beyond a reasonable doubt that there is no reasonable possibility that the error could have contributed to the verdict." *Commonwealth v. Green,* 76 A.3d 575, 582 (Pa. Super. 2013). The Commonwealth must demonstrate that:

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

Id. (internal citations omitted).

ORDER IN QUESTION

Appellant timely appeals from the March 18, 2013 judgment of sentence of the Philadelphia Court of Common Pleas (CP-51-CR-0013001-2010).

STATEMENT OF THE ISSUES PRESENTED

I. Under the Sixth, Thirteenth, and Fourteenth Amendments of the U.S. Constitution as well as Article I, §§ 1, 9 of the Pennsylvania Constitution, did the Trial Court err in permitting the prosecution to present Appellant's rap lyrics and rap-related visual images as inculpatory evidence?

(Answered in the negative below).

II. Under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, did the Trial Court err in admitting the decedent's purported hearsay statement as evidence?

(Answered in the negative below).

III. Under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, did the Trial Court err in denying Appellant's mistrial motion?

(Answered in the negative below).

IV. Under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, did the Trial Court erroneously allow the prosecution to repeatedly present extensive evidence of purported witness intimidation?

(Answered in the negative below).

V. Under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, was the evidence insufficient to sustain Appellant's convictions?

(Answered in the negative below).

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

On April 28, 2010, the Commonwealth charged Appellant with First-Degree Murder (18 Pa.C.S.A. § 2502); Uniform Firearms Act violations (18 Pa.C.S.A. §§ 6105, 6106, 6108); and Possessing an Instrument of Crime (18 Pa.C.S.A. § 907).

After a jury trial before the Honorable Sandy L.V. Byrd, Appellant was convicted on March 18, 2013 of First-Degree Murder and PIC. (3p). The remaining charges were *nolle prossed*. For the First-Degree Murder conviction, Appellant received a mandatory sentence of life imprisonment without the possibility of parole. (6p). For the PIC conviction, Appellant was sentenced to two-and-a-half to five (2 ½-5) years of incarceration. (6p).[1]

No oral or written post-sentence Pa. R. Crim. P. 607 motions were made on Appellant's behalf. On April 16, 2013, Appellant timely filed a Notice of Appeal to the Pennsylvania Superior Court. (APPENDIX A). On July 29, 2013, Appellant timely filed a Pa. R. App. P. 1925(b) statement. (APPENDIX B).[2] On December 20, 2013, the Trial Court issued a Pa. R. App. P. 1925(a) Opinion. (APPENDIX C).

II. FACTUAL BACKGROUND

On April 22, 2010, at 9:00 p.m., the Philadelphia police responded to a fatal shooting near Stanley and Huntingdon Streets in Philadelphia. (28g-33g). Known as

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[1]At sentencing, the Trial Court stated that the PIC sentence was "concurrent." (6p). Yet, the CPCMS docket sheet terms the PIC sentence as "consecutive." (APPENDIX A).

[2]Appellant's Pa. R. App. P. 1925(b) Statement challenged the sufficiency of the evidence; he has thus adequately preserved his fifth appellate claim. Pa. R. App. P. 2117(c), 2119(e).

"Igbug or "Ig," Anwar Ashmore ("decedent") had been fatally shot. (28g-33g, 43g, 27j, 57j). Two or three bullets had struck the decedent. (36j, 47j). There was no evidence of close-range firing. (31j).

Near the decedent's body, the police recovered an empty cigarette box and a cigarette. (9h, 6i, 9i). The police also recovered from the scene two fired cartridge casings and a bullet. (30g, 34g, 4i-8i, 44j-45j).

On the night of his death, the decedent had ingested alcohol, PCP, and Xanax. (34j). PCP causes a user to become aggressive. (35j-36j). The decedent had been non-fatally shot on a previous occasion. (35j).

The decedent had been a member of the "Team-A," a group of young males that frequented the Stanley and Huntington Streets corner. (44g).Some of the Team-A members were involved in writing and performing rap music. (42-44g, 55g). Males associated with Team-A included Appellant ("Hollow" or "H"), Jeffrey Jones ("Haiti"), Kaheem Brown ("Bay Bay"), Dennis Williams ("Den-Den"), Troy Devlin ("Smoke"), Tyree Tucker ("Wink"), Raphael Spearman ("Murder," "Ralph," or "Bracey"), and Darren Haynesworth ("Dee"). (43g-44g, 91g, 15i, 56j-57j). Appellant was a close friend of the decedent. (42g, 22h, 14i-15i, 79i, 56j, 76j, 20k).

Critically, the decedent had previously shot "Den-Den" Williams in 2009. (9h-10h, 35h, 152k). Williams had not cooperated with the investigation. (60L-61L).

Less than an hour after the fatal shooting, the police observed "Den-Den" Williams, carrying a loaded firearm, near the crime scene. (153k, 245k, 61L-62L). Upon seeing the police, Williams attempted to discard the firearm. (38i, 153k). After

Williams' arrest, detectives questioned him concerning the homicide. (153k). Inexplicably, the detectives failed to elicit a statement from Williams. (160k-62k, 61L-62L).

On April 23, 2010, the police questioned "Smoke" Devlin concerning the homicide. (57h, 63h, 157k-58k). On April 24, 2010, the police questioned "Haiti" Jones concerning the homicide. (57h, 63h, 159k). Law enforcement was unable to locate Devlin and Jones prior to Appellant's trial. (159k, 241k-44k).

On April 28, 2010, the police searched Appellant's home. (137k). They recovered two rap music CDs, one of which contained the song, "Take It How You Wanna." (137k). They also recovered Appellant's tee-shirt mourning the decedent's death. (137k). Appellant was an aspiring rap artist. (26h, 29i).

On April 28, 2010, the police arrested Appellant. (59i, 64i, 52k, 134k, 66L). From his arrest through October 9, 2010, Appellant was imprisoned at the Philadelphia prison "CFCF." (66L). From October 9, 2010 through his sentencing, Appellant was imprisoned at the Philadelphia prison "PICC." (66L).

A. RAPHAEL SPEARMAN

On May 22, 2010, the police arrested Spearman for carrying a .45 caliber firearm. (51g, 48j-50j, 55k, 78k, 65L). In July 2010, ballistic testing linked the firearm to the fatal shooting. (10h, 47j-48j, 56k, 65L).

Spearman was high on Xanax, PCP, alcohol, and other substances when he gave a statement to detectives on August 5, 2010. (90g, 10h-11h). Before questioning, the detectives had cuffed him and detained him in a holding cell for approximately

24 hours. (10h-11h). Spearman's statement claimed that Appellant had shot the decedent and had given him the firearm to safeguard. (51-53g, 66g, 10h, 53h-59h, 57k, 214k). Spearman boasted, "I love guns." (54h).

Notably, Spearman's statement falsely alleged that the firearm had continuously remained in his home between the decedent's death and May 22, 2010. (49j). Yet, ballistics indicated that Spearman had, in fact, fired the weapon on May 7, 2010 in "Den-Den" Williams' drug territory. (26h, 65h, 239k-40k, 63L). Spearman was a drug-dealer who worked for Williams. (23h, 36h).

At trial, Spearman testified that he had falsely accused Appellant in his August 2010 statement; he explained that the detectives told him that if he "didn't play ball" with them, he and other Team-A members would be charged in the homicide. (53g-57g, 72g, 13h-17h). Spearman testified that detectives discussed favors on his open case in exchange for inculpating Appellant. (5h, 13h, 26h). Spearman opted to accuse Appellant because Appellant had already been charged with the fatal shooting. (53g-57g, 12h).

At Appellant's October 19, 2010 preliminary hearing, Spearman testified that he was not present during the fatal shooting and denied providing the statement. (13g, 69g, 72g, 71k).

On November 9, 2010, Spearman, awaiting a hearing on his own pending charges, was inside a courthouse holding cell. (48h). At some point, two or three inmates began beating Spearman. (48h, 74g). Because he had assaulted the responding sheriffs, Spearman was later convicted of Resisting Arrest. (95g, 48h-

49h). Inexplicably, homicide detectives did not question any of the inmates who had assaulted Spearman. (166k-67k). There was no evidence linking these individuals to Appellant. (19h).

On November 12, 2010, an incarcerated Spearman speculated during a telephone conversation with his brother that Appellant was somehow responsible for the beating. (78g-85g, 18h-19h). Spearman's brother responded that it was illogical for Appellant to be involved. (19h). At trial, Spearman later explained that his own sense of guilt in falsely accusing Appellant of the homicide had led him to erroneously assume Appellant's involvement. (75g-76g, 19h).

On November 25, 2010, Spearman mailed to Appellant's then-attorney an affidavit claiming that he killed the decedent. (88g, 24h). In January 2011, a defense investigator working for Appellant visited Spearman; Spearman disavowed the affidavit. (92g). Spearman told the investigator that someone had slipped a letter under the door telling him to write the letter. (25h). He told the investigator he had implicated Appellant because the detectives offered him favors concerning his gun charge. (92g, 25h, 254k). At trial, Spearman testified that the entire story about the letter "under the door" was a lie. (89g-90g, 25h).

In a December 4, 2010 telephone conversation with his child's mother, Spearman acknowledged his awareness of a feud between "Bay Bay" Brown and "Wink" Tucker over a block party wholly unrelated to Appellant's case; Spearman was aware that Tucker and other individuals had retaliated against Brown's mother, Stephanie Alexander, because of the "block party" feud. (21h-23h, 46h, 169k, 176k-

77k). Spearman admitted in his conversations that he provided the August 2010 statement in order to "get the other ones off." (84g-86g, 22h, 217k, 223k). He also acknowledged an awareness that Appellant was "hurt because [Spearman] went in there and lied, and put this case on him." (84g-86g, 22h).

At the time of Appellant's March 2013 trial, Spearman was serving a sentence for VUFA and Burglary. (50g, 95g). He also had an Unauthorized Use of a Vehicle conviction and a vehicle theft juvenile adjudication. (3h, 213k).[3]

At trial, Spearman testified that he, "Den-Den" Williams, and the decedent had been standing on the corner of Stanley and Huntingdon Streets. (44g). Appellant was not present. (45g, 62g, 7h). High on PCP, Spearman was drinking alcohol; meanwhile, Williams and the decedent were arguing. (44g, 8h). Williams asked Spearman if he was carrying a firearm; he replied affirmatively and began brandishing it. (45g). While holding a lit cigarette, Spearman accidentally discharged the firearm, shooting the decedent. (45g-47g, 86g). Williams then grabbed the gun and shot the decedent. (47g-50g). Spearman was unaware of Williams' death in July 2012. (4h, 36h, 38i).

Spearman testified that no one had threatened him in connection with Appellant's case. (50g, 5h-7h, 17h, 26h). Spearman and Appellant were housed in different prisons. (70g, 18h).

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[3]In February 2013, detectives and the prosecutor met with Spearman to prepare for trial. (7h, 123k). According to the detectives, Spearman claimed at the meeting that both he and Appellant had shot the decedent. (124k-27k). Yet, Spearman testified that his statements during the February 2013 meeting were the same as his trial testimony. (4h-5h). The detectives did not write any notes from the meeting. (206k-10k, 232k).

B. KAHEEM BROWN AND STEPHANIE ALEXANDER

At trial, the prosecution presented the testimony of "Bay Bay" Brown and his mother, Stephanie Alexander. (16i, 56j).[4] Brown and Alexander lived two blocks from the Huntingdon and Stanley Streets corner. (57j). Brown was close friends with the decedent. (61k). On the night of the homicide, Alexander heard shots; she ran outside and observed Brown talking to two females. (57j).

The police had arrested Brown on several previous occasions. (72j-73j). In December 2009, Brown had been shot because of his "beefs" with other individuals. (22i, 57i-58i, 51k). Brown refused to tell the police who shot him. (178k-79k). Brown testified that he does not provide information to the police. (66i-67i). Brown was frequently involved in "fights and shootouts." (21h).

Detectives questioned the then-sixteen-year-old Brown two weeks after the homicide. (17i, 62i, 73j, 185k-86k). With his mother present, Brown told them that he did not have any information about the homicide. (57i, 63i). At trial, the detectives denied that this meeting had occurred. (59k, 186k).

In late July 2010, the police arrested Brown for a shooting; Brown was placed into pre-trial custody. (18i, 62i, 80i, 72j). On August 31, 2010, Detective Nathan Williams and Detective Brian Peters transported a hand-cuffed Brown from prison to the police station for questioning. (84i, 4j-8j, 58k, 62k, 183k, 193k). The detectives held Brown for six hours before eliciting a statement. (41i, 84i, 87i, 58k). Although

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[4] In violation of a sequestration order, Alexander had been present in the courtroom for at least two days of evidence; the Trial Court denied Appellant's motion to exclude Alexander as a witness. (27h, 52j-54j).

the detectives had been speaking to Brown during the six-hour delay, they did not write any notes concerning the conversation. (8j-9j, 187k-88k, 230k). The detectives did not contact Alexander prior to the questioning. (229k).

Brown's statement alleged that Appellant shot the decedent. (28i-29i, 87i, 64k). The detectives noted Brown's visible gunshot injuries from the 2009 shooting incident. (19j, 69k, 186k). At some point during the questioning, Detective Williams photographed Brown and Detective Peters without their knowledge. (14j, 21j, 68k). The photograph did not show the front or face of Brown. (190k).

Upon returning to the prison, Brown reported to Alexander and prison staff that the detectives had physically assaulted him and forced him to sign the statement. (22i, 44i, 70i, 58j). No injuries were reportedly observed. (45i-46i, 70i). At trial, Brown again stated that the detectives had physically assaulted him and forced him to sign the statement. (18i-25i, 39i).

By October 2010, Brown had returned home from prison. Receiving a "break," Brown's July 2010 shooting case received a juvenile disposition. (18i, 74i).

On October 26, 2010, Alexander telephoned Detective Peters to report that "Dee" Haynesworth and a male named "Merse" had fired shots at Brown. (59j, 76j-78j, 101k-02k). Brown testified, however, that he too had been shooting at Haynesworth and Merse; he had been "beefing" with "Wink" Tucker and Haynesworth because of a dispute at a block party. (47i, 59i, 181k).

On November 19, 2010, Alexander and another son, Khailil ("Boogie"), were inside a neighborhood laundromat. (16i, 57j, 60j). She had observed a male (later

identified as Rashann James) talking to Tucker outside. (61j-63j). Entering the laundromat, James placed a gun to Alexander's head. (63j). Alexander called the police and later testified at James' trial. (64j-69j). Brown testified that the laundromat incident was unrelated to Appellant's case; he testified that it was because he was "beefing on the street." (19i, 60i).

On November 27, 2010, gunshots were fired through the windows of Alexander's home. (50i, 65j, 79j, 106k). At trial, Brown testified that he had been "beefing" well before the decedent's death. (51i). He stated the autumn 2010 incidents were unrelated to Appellant. (52i).

Also, the prosecution presented evidence that Brown's statement had been posted in the neighborhood; Alexander believed that the police had posted the statement. (66j, 110k). Brown denied that his statement had been posted. (51i).

"Den-Den" Williams was murdered on July 6, 2012. (236k). A week before Appellant's trial, homicide detectives questioned Brown as a suspect in Williams' murder. (236k).

At the time of Appellant's trial, Brown was serving a state prison sentence for a VUFA and False Reports conviction. (53i-54i). Brown had accidentally shot himself in 2012; yet, he lied to the police, claiming that "two unknown persons were shooting" at him. (53i-54i).

At trial, Brown testified that he was not present during the homicide. (16i, 61i). The prosecution failed to present any evidence that (1) Appellant had communicated with Brown or (2) Appellant was involved in any of the acts involving Brown or

Alexander. (55i, 70j). Brown denied that he had been threatened in connection with Appellant's case. (37i, 54i-55i). Brown and Appellant were housed in different prisons. (80i, 84i). Alexander did not wish to relocate from the neighborhood. (82i, 109k, 113k).

C. HASAN ASHMORE AND "TAKE IT HOW YOU WANNA"

Prosecution witness Hasan Ashmore was the decedent's older brother. (13k). Ashmore testified that on a winter night in late 2008 or early 2009, the decedent had shown him a sandwich bag purportedly containing raw powder cocaine. (14k-15k, 152L). Ashmore, who was a drug-dealer, weighed the cocaine for the decedent; the cocaine weighed approximately 80 grams. (25k-27k).

According to Ashmore, the decedent boasted that he had purportedly stolen the cocaine from Appellant's "stash house." (16k-17k).[5] After laughing with the decedent, Ashmore recommended several individuals who could "cook" the cocaine for distribution. (28k). The decedent eventually sold the cocaine in exchange for money. (18k). Neither Brown nor Spearman had ever heard Appellant mention anything about missing cocaine. (63g-64g, 33i-34i).

Ashmore claimed that he first listened to the rap song "Take It How You Wanna" after the decedent's funeral. (20k, 29k). "Take It How You Wanna" was a track on the CD *Ear Bleed*. (21k; APPENDIX D). The decedent had kept a copy of *Ear Bleed* in his room. (21k). In fact, the decedent had worn a tee-shirt promoting the *Ear*

[5] In February 2009, Tyrell Smith ("Speedy") was in juvenile custody. (65L). "Speedy" Smith was the male who purportedly helped steal the cocaine; however, no evidence was presented to the jury that even associated Smith with the alleged theft.

Bleed CD. (APPENDIX E; 55g, 6h; 30i-31i). Spearman, Williams, and Appellant had co-authored the song. (63g; APPENDIX D). Appellant had recorded at least thirty to forty rap songs. (79i).

Ashmore assumed the "half a brick missing" lyric referred to the stolen cocaine. (21k-22k). Ashmore claimed that he told the police about the song approximately three weeks after the April 2010 homicide. (30k, 130k). However, it was not until July 29, 2010 that Ashmore provided a statement to detectives. (22k-23k). Oddly, Ashmore's statement failed to mention the song or the "stolen" cocaine. (37k-38k, 204-05k). The detectives did not know when Ashmore had first presented the song to them. (200k-02k).

At Appellant's trial, the prosecution repeatedly referred to and played "Take It How You Wanna." During his opening statement, the prosecutor read aloud the lyrics, remarking, "I apologize for the offensive language used, but they are not my words. They are the words of [Appellant]." (9g-10g).

The prosecution alleged that cocaine was stolen from Appellant's supposed "stash house." (9g). The prosecution argued that Appellant "penned a song about, one, who he thought stole [the drugs]..., and two, what he was going to do when he found out who that person was." (9g).

During the testimony of both Spearman and Detective Peters, the prosecution played the song. (8h, 132k). During Brown's testimony, the prosecutor read aloud the lyrics. (33i). Brown testified, "I remember a lot of songs like that. Everybody should be locked up then." (33i). He added, "People just make songs. That's what rappers

do." (34i). Brown explained that "all the songs are about drugs, and fighting" and are fictitious. (79i). Spearman explained that the song was "old" and involved a "made up" narrative. (64g).

During Ashmore's testimony, the prosecution referred to the song lyrics. During his summation, the prosecutor again recited the entire song. (156L-58L).

Additionally, the prosecution presented video stills from rap artist Beanie Sigel's music video, "In the Ghetto." (31i; APPENDIX F). Spearman, Brown, Haynesworth, the decedent, and Appellant were in the video. (APPENDIX F; 31i, 62j). The stills from Sigel's video depicted a drug deal between Spearman and Brown as well as Appellant's tattoos. (APPENDIX F). The prosecution also presented the *Ear Bleed* CD cover featuring Appellant. (131k; APPENDIX G).

D. APPELLANT WAS UNINVOLVED IN THE INTIMIDATION

On March 15, 2012, the police entered an abandoned house in the Stanley and Huntingdon Streets neighborhood. (82j-83j, 114k). They discovered in a bag an opened envelope addressed to Haynesworth; the return address indicated that it was sent from Appellant at "CFCF." (85j). The envelope contained a copy of Brown's statement. (85j). The envelope was postmarked August 2010. (160c). Critically, however, the Philadelphia District Attorney's Office had provided Brown's statement to Appellant on November 12, 2010. (261k, 66L). In November 2010, Appellant was housed at PICC - not CFCF. (260-61k, 66L). Thus, it was impossible that the statement had been mailed in the envelope. On a table, the police recovered a letter addressed to Wink; nothing linked the letter to Appellant. (84j-89j, 115k, 119k).

Additionally, the prosecution presented a recording of a December 22, 2010 prison telephone conversation in which Appellant, speaking with a friend, said "What's a call him did what he was supposed to do, so that should come through." (63c, 72k, 80k-85k). It is ambiguous as to what Appellant was precisely referring to.

Throughout Appellant's trial, the prosecution claimed that witness intimidation existed. (67k, 75k, 91k). Yet, as one detective conceded, a general unwillingness to testify is "the way of the hood." (181k).

At one point during Appellant's trial, the Trial Court issued an instruction, "you just heard testimony that Raphael Spearman was threatened by a party other than [Appellant], prior to his testimony at this trial. This evidence may be considered by you for one purpose only: That is, to explain why he made an earlier statement that was different from what he testified to at this trial. You may not use this evidence for any other purpose." (77g-78g).

Yet, during its summation, the prosecution impermissibly attributed the witness intimidation to Appellant. (184L-85L, 224L). Defense counsel objected. (272L).

During the jury charge, the Trial Court instructed that evidence concerning witness intimidation could be considered:

> ....only for its effect on the state of mind of the witnesses in this case, and in so doing, use it to assist you in deciding which version, if any, of the events surrounding this Homicide, you find credible: the ones contained in the prior inconsistent statements of the witnesses, or the ones offered here in Court, for example.

(255L). Additionally, the Trial Court instructed, "You must not regard the evidence as showing that [Appellant] is a person of bad character, or criminal tendencies, from

which you might be inclined to infer guilt." (279L). Also, the jury was instructed that it could "not attribute such conduct to [Appellant]." (278L).

E. MOTIONS IN LIMINE

Prior to trial, the prosecution sought to present evidence that included (1) Appellant's rap music and related visual images; (2) the decedent's purported hearsay statement; and (3) purported witness intimidation. As to all of the evidence, defense counsel argued, "99 percent of what [the prosecution] is asking the Court to accept into evidence constitutes either hearsay, speculation, or conclusions." (47a; APPENDIX H). Defense counsel added that all of the evidence was unfairly prejudicial. (31d; APPENDIX H).

First, the prosecution sought to present evidence of Appellant's involvement in rap music. (11a). The evidence included (1) the rap song "Take It How You Wanna"; (2) stills from the Beanie Sigel rap music video "In the Ghetto" that depicted Appellant and other "Team-A" members; and (3) the *Ear Bleed* CD cover depicting Appellant. (15a-16a, 73c; APPENDICES D, F-G). The prosecution argued that "Take It How You Wanna" showed Appellant's alleged "motive" for the homicide. (16a, 84a). The prosecution termed it "a statement saying he was the actual killer." (38a). Appellant is a young African-American male. (8c).

Defense counsel objected, arguing that the prosecution was misusing the "artistic" intent of the materials. (86a, 49c, 140c-41c). He argued that the rap materials were irrelevant and unfairly prejudicial. (42c-46c, 50c-51c). He explained that "what it is depicting is the lifestyle - whether you like it or not, ...of some of what

goes on in North Philadelphia." (50c). He also objected to the admission of the *Ear Bleed* CD cover; a tattoo reading "Money, Sex, Murder" was visible on Appellant's chest. (48c, 130c-31c).

Defense counsel urged, "The prejudicial nature...is absolutely clear-cut and poignant, from the CD cover, and as far as the song goes, it is exactly that...[i]t is a song." (131c). Defense counsel explained that the materials would serve "no purpose, other than to portray [Appellant], once again, as a drug dealer...who utilizes firearms, and shooting firearms in a song." (142c). Appellant has therefore preserved his first appellate claim. Pa. R. App. P. 2117(c), 2119(e).

Second, the prosecution sought to present as evidence the decedent's hearsay statement to Hasan Ashmore. Defense counsel objected, explaining that the "state of mind" exception was inapplicable. (APPENDIX H; 51a, 98c, 132c). He also noted that it was unclear when the drugs were purportedly stolen. (52a, 132c). Appellant has therefore preserved his second appellate claim. Pa. R. App. P. 2117(c), 2119(e).

Third, the prosecution also sought to present evidence of purported witness intimidation: (1) the November 9, 2010 cell room beating; (2) Spearman's November 12, 2010 telephone conversation; (3) the false affidavit incident; (4) Appellant's December 22, 2010 telephone conversation; (5) the October 26, 2010 shooting; (6) the laundromat incident; (7) the November 27, 2010 shooting; (8) the posting of Brown's statement; and (9) the abandoned property items.

In response, defense counsel argued that the prosecution had failed to produce any evidence linking Appellant to the purported intimidation. (APPENDIX H; 14a, 48a-

56a, 42c, 147c-48c, 169c-70c, 7d-9d). Defense counsel noted that Appellant had been incarcerated since April 2010. (48a, 54a-55a). Defense counsel argued that all of the intimidation evidence was irrelevant and unfairly prejudicial. (56a, 44c-46c). Appellant has therefore preserved his fourth appellate claim. Pa. R. App. P. 2117(c), 2119(e).

Despite defense counsel's objection, the Trial Court admitted the evidence. (3e-4e). The Trial Court stated that "Take It How You Wanna" and the decedent's hearsay statement were admissible to show motive. (3e). The Trial Court initially precluded the laundromat incident. (3e-4e). Yet, upon the prosecution's request, the Trial Court later permitted introduction of the laundromat incident. (28h-34h). The prosecution claimed that it wanted to "rebut" the defense evidence presented in Spearman's December 4, 2010 conversation. (28h-34h).

F. JURY DELIBERATIONS

The prosecution began presenting evidence on Tuesday, March 5, 2013. (27g). On March 12, 2013, the prosecution and defense rested, and the jury began deliberating. (68L, 284L).

On March 14, 2013, at 1:55 p.m., the jurors sent a note stating, "We cannot come to a unanimous conclusion, after several votes, and deliberations have stalled. Please re-instruct and clarify reasonable doubt." (8n; APPENDIX I). The judge complied with the jurors' request. (9n).

On March 15, 2013, at 11:00 a.m., the jurors sent a note stating that "the jury remains deadlocked. At this point after extensive discussion, we cannot come to a

unanimous conclusion. It is clear that further discussion will not result in a verdict." (4o; APPENDIX I). The Trial Court observed that the jury had been deliberating for "approximately 18 hours. Obviously [the jury is] having some difficulty resolving the issues raised in the case." (5o).

The Trial Court asked the jury if "there was a reasonable probability of the jury reaching a unanimous verdict on all the charge in this case?" (5o-6o). The jury foreperson replied, "I do not think, so sir." (6o). The Trial Court gave a *Spencer* charge. (6o-8o).[6]

Later that day, the jurors asked, "Can we the jury make a reasonable assumption regarding the content of the unread statements of Tyrell Smith and Jeffrey Jones given that an arrest warrant was issued and no specific evidence was proffered as to what evidence was used to issue the warrant?" (14o; APPENDIX I).

In response, defense counsel objected and asked for a mistrial. (16o-17o). He argued, "This troubles me on a number of grounds, your Honor...[Y]ou cannot assume the contents of the statements. [Also, t]hey use the word 'evidence' to describe what's in an arrest warrant. That's not an accurate statement of the law." (14o). Defense counsel noted that (1) Smith never gave a "statement" and (2) Jones' statement had never been presented as evidence. (15o-16o).

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[6]*Spencer* instructions are "instructions to a deadlocked jury to continued to deliberate, with an open mind to reconsideration of views, without giving up firmly held convictions." *Commonwealth v. Greer*, 951 A.2d 346, 348 (Pa. 2008) (citing *Commonwealth v. Spencer*, 275 A.2d 299, 305 n. 7 (1971)).

In requesting a mistrial, defense counsel argued "I think it's pretty clear from two notes ago that this jury said they were deadlocked and you *Spencer*-ed them. We are at a point, sir, where they are asking things that don't exist." (16o-17o). Defense counsel added, "I think it has gotten to the point now, based on their misstatement of the law, based on they are talking about a witness that never gave a statement in this case, that they have gone too far afield." (17o).

The Trial Court denied the mistrial motion. (17o). The Trial Court instructed the jurors that they "may not rely upon supposition or guess on any matters which are not in evidence." (22o). Appellant has therefore preserved his third appellate claim. Pa. R. App. P. 2117(c), 2119(e).

The deliberating jury had also requested to see the *Ear Bleed* CD cover and the lyric sheet; they also wished to examine the items recovered from the abandoned home. (2m-6m). The jury also asked what the release date was for "Take It How You Wanna." (APPENDIX I; 9o). Defense counsel noted that "there was never anything put in the record in this particular trial about the release date for the song and CD." (9o). The Trial Court instructed the jury that the release date "is a matter for your recollection." (13o).

SUMMARY OF THE ARGUMENT

First, the Trial Court erred in permitting the prosecution to present Appellant's rap lyrics and rap-related visual images as inculpatory evidence. The evidence deprived Appellant of due process and equal protection as well as a fair trial.

Second, the Trial Court erred in allowing the prosecution to present as evidence the decedent's purported hearsay statement. The statement was not admissible under the state of mind hearsay exception. Its admission violated Appellant's constitutional confrontation rights and deprived him of due process and a fair trial.

Third, the Trial Court erred in denying Appellant's mistrial motion. After three days of deliberation, the jury was unable to reach a verdict. The jury therefore began to improperly speculate about information extraneous to the evidence at trial. Appellant was deprived of due process and a fair trial.

Fourth, the Trial Court abused its discretion in allowing the prosecution to repeatedly present evidence of purported witness intimidation. The prosecution failed to adequately link (1) the incidents to Appellant's case or (2) Appellant to the purported intimidation. Appellant was deprived of due process and a fair trial.

Fifth, the evidence was insufficient to sustain Appellant's convictions, which were premised largely on the prior inconsistent statements of two prosecution witnesses. Although the statements were admissible as substantive evidence, the jury could not reasonably rely on these statements. Appellant was deprived of due process and a fair trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE CONCERNING APPELLANT'S RAP MUSIC AND RAP-RELATED VISUAL IMAGES

The Trial Court abused its discretion in admitting evidence concerning Appellant's rap music and rap-related visual images. At trial, the prosecution repeatedly referred to "Take It How You Wanna," a rap song that Spearman, Williams, and Appellant had co-authored. (63g; APPENDIX D). The song tells the fictional story of a person who is angered that another person has stolen his cocaine brick. (63g, APPENDIX D). Additionally, the prosecution presented stills from the Beanie Sigel rap video, "In the Ghetto." (APPENDIX F). The prosecution also presented the *Ear Bleed* CD cover depicting Appellant; a tattoo reading "Money, Sex, Murder" was visible on Appellant's chest. (APPENDIX G).

The prosecution improperly cited the "Take It How You Wanna" lyrics as evidence of a purportedly "inculpatory story." The prosecution claimed that Appellant's motive for killing the decedent was that the decedent had stolen powder cocaine. (9g). Furthermore, the prosecutor impermissibly used the lyrics and visual images to "'paint a picture of [Appellant]'" that (1) would buttress its purported evidence and (2) would bias the jurors against Appellant. *See, e.g.,* Andrea L. Dennis, *Poetic (In)Justice: Rap Music Lyrics as Art, Life, and Criminal Evidence,* 31 COLUM. J. L. & ARTS 1, 2 (2007).

Under the Sixth, Thirteenth and Fourteenth Amendments of the U.S. Constitution as well as Article I, §§ 1, 9 of the Pennsylvania Constitution, the evidence was irrelevant and constituted impermissible character evidence. The evidence deprived Appellant of a fair trial and violated his Equal Protection and Due Process protections.

A. THE RAP MUSIC AND RELATED VISUAL IMAGES WERE IRRELEVANT

The evidence was irrelevant. Evidence is relevant if (1) "it has any tendency to make a fact more or less probable than it would be without the evidence" and (2) "the fact is of consequence in determining the action." Pa. R. Evid. 401. "Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in light of reason, experience, scientific principles, and the other testimony offered in the case." Pa. R. Evid. 401 cmt. Evidence that is not relevant is inadmissible. Pa. R. Evid. 402.

1. The Record Demonstrates That "Take It How You Wanna" Was Wholly Extraneous to the Case

As a critical preliminary matter, the Trial Court erroneously asserts that "Appellant was involved in the sale of drugs." (TCO, 12/20/13, at 11). Yet, other than Ashmore's inadmissible hearsay testimony, the prosecution presented absolutely no evidence that Appellant was involved in drug trafficking. See *infra* Part II. Absolutely no evidence was presented that Appellant had even been aware of any purportedly missing cocaine that would have corroborated the prosecution's "interpretation" of "Take It How You Wanna." (63g-64g, 33i-34i).

Appellant had recorded at least thirty to forty rap songs. (79i). The prosecution failed to produce any other rap song concerning any supposed theft of his drugs. This absence strongly rebutted the prosecution's claim that Appellant was "angered" by the alleged theft. Additionally, the decedent actively promoted the *Ear Bleed* CD with the "Take It How You Wanna" song. He wore a tee-shirt promoting the CD and kept a copy of the CD in his room. (APPENDIX E; 55g, 6h; 30i-31i; 21k).

Furthermore, the prosecution failed to produce evidence establishing the date on which the song lyrics were written. The Trial Court erroneously asserts, "In September 2009, feeling betrayed because he believed that a friend was responsible for the theft, [Appellant] recorded a song called 'Take It How You Wanna'...." (TCO, 12/20/13, at 2). However, recording a song is wholly distinct from writing the song lyrics. Ashmore testified that the decedent claimed in late 2008 or 2009 that he stole the drugs. (13k-15k). Yet, Appellant may have written the song in 2007 but did not record it until 2009. No evidence was presented concerning the composition date of the song. At trial, Spearman explained that the song was "old." (64g).[7]

Notably, the prosecution alleged that the decedent had stolen a sandwich bag of powder cocaine from Appellant. (13k-15k, 25k-27k). Yet, "Take It How You Wanna" discusses "half a brick." (APPENDIX D). This discrepancy further militates against the relevancy of the song.

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[7]During deliberations, the jurors asked what the release date was for "Take It How You Wanna." (APPENDIX I; 9o). Defense counsel noted that "there was never anything put in the record in this particular trial about the release date for the song and CD." (9o). The Trial Court instructed the jury that the release date "is a matter for your recollection." (13o).

2. *Rap Music Lyrics Are Inherently Fictitious*

The Trial Court erroneously terms the rap song as a "demonstration of [Appellant's] motive...." (TCO, 12/20/13, at 11). Yet, rap music lyricists are fiction writers; rap music lyrics commonly contain "structured images, metaphor, braggadocio, or exaggerated story lines." Dennis, *supra,* at 25. Rap music lyrics "are neither inherently truthful, accurate, self-referential depictions of events, nor necessarily representative of an individual's mindset." *Id.* at 4.

Homicide and firearms are frequent metaphors in rap music lyrics. *Id.* at 22. Rap music inherently contains more lyrical and visual violence than other music genres. Sean-Patrick Wilson, Comment, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 352 (2005). Common rap characters "include the outlaw, thug, gangster, pimp, Hollywood-style mafioso, drug-dealer, and hustler." Dennis, *supra,* at 23. As the prosecution witnesses testified at Appellant's trial, rap songs are "about drugs and fighting" and relate fictitious narratives. (64g, 34i, 79i).

The Massachusetts Supreme Court has cogently instructed that even if a rap video or song contains "direct statements" seemingly relevant to the issues in the case, "we are not persuaded by the opinions of courts in other jurisdictions that view rap music lyrics 'not as art but as ordinary speech' and have allowed their admission in evidence as literal statements of fact or intent 'without contextual information vital to a complete understanding of the evidence.'" *Commonwealth v. Gray,* 978 N.E.2d 543, 561 (Pa. 2012) (internal citations omitted). *Gray* cautioned, "We discern no

reason why rap music lyrics, unlike any other musical form, should be singled out and viewed *sui generis* as literal statements of fact or intent." *Id.*

In short, "'Exaggerated and invented boasts of criminal acts [in rap lyrics] should be regarded as part of a larger set of signifying practices.... Growing out of a much older set of cultural practices, these masculinist narratives are essentially verbal duels over who is the baddest motherf_____ around.'" Dennis, *supra,* at 22 (internal citations omitted). Rap lyrics "do not necessarily represent depictions of actual violence or an intention to commit violence." *Id.* (emphasis added). As one observer has aptly argued:

> Courts often characterize defendant-authored lyrics as autobiographical statements that are inculpatory or confessions of criminal conduct rather than art. To the contrary, when viewed in light of social constraints and artistic conventions, it is evident that at times rap music lyrics may falsely or inaccurately depict the occurrence of events. In such instances, juries are exposed to what may be likened to false confessions.

Id. at 24 (emphasis added).

Erroneously asserting that the lyrics were relevant to Appellant's motive, the Trial Court cites *Commonwealth v. Hall,* 565 A.2d 144, 149 (Pa. 1989) and *Commonwealth v. Reid,* 642 A.2d 453, 461 (Pa. 1994). (TCO, 12/20/13, at 11). Yet, *Hall* and *Reid* are wholly distinguishable from the instant case. Neither *Hall* nor *Reid* involved motive evidence introduced through a rap song.

Hall held that the prosecution properly questioned the defendant and other witnesses about the defendant's past drug dealings in order to establish the defendant's motive for the murder; specifically, the defendant had killed the victims

because they had cheated him in drug deals. 565 A.2d at 149. In the *Reid* murder trial, the prosecution properly elicited witness testimony that the defendant was connected with the Junior Black Mafia in order to prove motive; the inference from the evidence was that the defendant was a gang enforcer who killed the victim for stealing drugs. 642 A.2d at 461.

Neither *Reid* nor *Hall* confronted the issue of using rap lyrics as a "confessional" statement. Unlike the instant case, the prosecutions in *Hall* and *Reid* did not use rap music evidence in order to establish the defendants' motives.

In short, the prosecution's evidence of Appellant's involvement in rap music was irrelevant because it lacked "any tendency" to make the existence of any "fact of consequence" at Appellant's trial "more probable or less probable than it would be without the evidence." Pa. R. Evid. 401, 402. The outcome-determinative issue at Appellant's trial was whether the prosecution had proven beyond a reasonable doubt that Appellant committed the April 22, 2010 homicide. Given the inherently fictitious nature of rap music, "Take It How You Wanna" was irrelevant to this issue.

Likewise, (1) the video stills from "In the Ghetto" and (2) the CD cover failed to make any "fact of consequence" at Appellant's trial "more probable or less probable than it would be without the evidence." Pa. R. Evid. 401; *Commonwealth v. Ly,* 599 A.2d 613, 616-17 (Pa. 1991) (holding evidence that defendant had dragon tattoo on his arm was not relevant).

B. THE RAP MATERIALS WERE INADMISSIBLE UNDER PA. R. EVID. 404(B)

The evidence of (1) "Take It How You Wanna"; (2) the rap video stills; and (3) the CD cover were inadmissible under Pa. R. Evid. 404(b). Evidence of other crimes, wrong or acts is inadmissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Pa. R. Evid. 404(b)(1); *Commonwealth v. Ross,* 57 A.3d 85, 98 (Pa. Super. 2012).

Nonetheless, evidence of other crimes, wrongs, or acts "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Pa. R. Evid. 404(b)(2). Evidence of other crimes, wrongs, or acts may be admitted in a criminal case "only if the probative value of the evidence outweighs its potential for unfair prejudice." Pa. R. Evid. 404(b)(2).

The particular prejudice that Pa. R. Evid. 404(b)(2) seeks to prevent is the misuse of the other-act evidence; otherwise, fact-finders might improperly convict a defendant because they perceive the defendant to have a bad character or a propensity to commit crimes. *Commonwealth v. Dillson,* 925 A.2d 131, 137 (Pa. 2007). Whether relevant evidence is unduly prejudicial is partially a function of the degree to which it is necessary to prove the case of the opposing party. *Commonwealth v. Gordon,* 673 A.2d 866, 870 (Pa. 1996). The balance of probative value against prejudicial impact "must be struck with close attention to the facts surrounding the criminal case, as well as those surrounding the prior act." *Commonwealth v. Lockcuff,* 813 A.2d 857, 861 (Pa. Super. 2002).

Here, (1) the song lyrics; (2) the video stills; and (3) CD cover were inadmissible under Pa. R. Evid. 404(b). The "probative value of the evidence" did not outweigh its potential for unfair prejudice." Pa. R. Evid. 404(b)(2).[8]

As in the instant case, rap music evidence often constitutes a "'back door' method of admitting excludable character and propensity evidence." Dennis, *supra,* at 27 (emphasis added). As one scholar has explained, "The admission of defendant-composed lyrical evidence plays on the biases of jurors against rap music and those who listen to or associate themselves with rap music. Juror bias arises both from the artistic aspects of rap music lyrics as well [as] the social constructs surrounding the music." *Id.* at 29. Prosecutors are aware that jurors associate rap music with "familiar images of criminal defendants." *Id.* at 29-30 (emphasis added).

The bias is often "strong enough that the relevance of the evidence, if there is any, is outweighed by the prejudicial nature of the evidence." *Id.* at 29. As researchers have discovered, jurors are more disposed to believe that a defendant committed a murder when his rap music is admitted into evidence than when the music is not admitted into evidence. *Id.* at 28; Jason E. Powell, Note, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L. J. 479, 525 (2009).

Critically, the prosecutor's excessive emphasis on "Take It How You Wanna: exacerbated the unfair prejudice. The prosecutor did not merely elicit evidence

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[8]Under Pa. R. Evid. 403, "[t]he court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa. R. Evid. 403. Here, the evidence was also inadmissible under Pa. R. Evid. 403.

concerning the song. Instead, during his opening statement, the prosecutor read aloud the lyrics, remarking, "I apologize for the offensive language used but they are not my words. They are the words of [Appellant]." (9g-10g). During the testimony of both Spearman and Detective Peters, the prosecution played the song. (8h, 132k). During Ashmore's testimony, the prosecution referred to the song lyrics. During summation, the prosecutor again recited the entire song. (156L-58L).

The violent visual images and words depicted both on the *Ear Bleed* CD cover and in the Beanie Sigel music video stills also exacerbated the unfair prejudice that the rap music lyrics created. (APPENDICES F-G). The images depicted a drug deal between Spearman and Brown as well as Appellant's tattoos. (APPENDIX F).

Unsurprisingly, the jurors became inordinately focused on the rap music evidence. During their deliberations, the jury requested to see the *Ear Bleed* CD cover depicting Appellant. (APPENDIX I; 6m). They also wanted to examine the lyric sheet. (APPENDIX I; 2m-6m). The jurors also asked what the release date was for "Take It How You Wanna." (APPENDIX I; 9o).

The situation in *Hannah v. State* is instructive. 23 A.3d 192 (Md. 2011). The *Hannah* defendant was charged with attempted murder for a shooting incident. On direct examination, the defendant denied any substantive knowledge about or interest in guns. *Id.* at 194. In response, the prosecution presented the defendant's rap lyrics about "glocks," "burners," and "Bring da whole click, we put em permanently sleep." *Id.* at 195-96. The Maryland Court of Appeals held that the evidence unfairly prejudiced the defendant. *Id.* at 201. *Hannah* explained, "[the defendant's] writings

were probative of no issue other that the issue of whether he has a propensity for violence." *Id.* Importantly, *Hannah* reasoned that the "situation was exacerbated by the State's emphasis upon [the defendant's] lyrics...." *Id.* at 202 (emphasis added).

To that extent, *Commonwealth v. Ragan* is distinguishable from the instant case. 645 A.2d 811 (Pa. 1994). Testifying at his first-degree murder trial, the *Ragan* defendant portrayed himself as a "college student and an artist." *Id.* at 820. In response, the trial court permitted the prosecution to present evidence that the defendant's rap group had recorded a song purportedly discussing the necessity of murder. *Id.* On appeal from his conviction, the *Ragan* defendant argued that the evidence was irrelevant. *Id. Ragan* rejected this argument, asserting "the fruits of [the defendant's] artistic leanings were clearly relevant to rebut [his direct examination] testimony." *Id.*

A two-decades old case, *Ragan* did not address (1) the inherently fictional nature of rap music or (2) jurors' strong negative reactions to rap music. Furthermore, in stark contrast to *Ragan,* the prosecution used the rap music evidence in its case-in-chief - not as rebuttal evidence.[9]

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[9]At the first-degree murder trial in *Commonwealth v. Flamer,* the prosecution sought to present evidence concerning the co-defendants' conspiracy to kill a prosecution witness. 53 A.3d 82, 84 (Pa. Super. 2012). The prosecution sought to present the writings and raps of one of the defendants. *Id.* In the raps, the defendant talked "about people 'keeping their mouths shut,' sending his friends to kill for him, and 'popping shells' in people that 'run their mouth.'" *Id.* at 89. The Pennsylvania Superior Court held that the statements were relevant. *Id.* Unlike Appellant, the *Flamer* defendant failed to make any arguments concerning the inherently fictional and exaggerated nature of rap music lyrics. Critically, *Flamer* also held that other proffered rap music evidence was inadmissible because of its "vagueness." *Id.* at 90 n.10.

C. THE ADMISSION OF THE EVIDENCE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant is a young African-American male. (8c). The Trial Court erroneously asserts that Appellant's trial counsel "failed to raise any objections of constitutional significance" concerning the rap materials; the Trial Court thus concludes that Appellant has waived his Equal Protection and Due Process challenges. (TCO, 12/20/13, at 9). Yet, Appellant has, in fact, adequately preserved his constitutional challenge.

Defense counsel had objected to the admission of the rap music evidence and related visual images; he noted "what it is depicting is the lifestyle - whether you like it or not, ...of some of what goes on in North Philadelphia." (50c).

The Fourteenth Amendment of the U.S. Constitution provides, "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV; *see also* PA. CONST. art. I, §§ 1, 9 (providing same). The Due Process and Equal Protection clauses mandate procedures in criminal trials which bar "invidious discriminations" between persons and different groups of persons. *Griffin v. Illinois,* 351 U.S. 12, 17-18 (1956).

The Equal Protection clause also requires that state actors, such as juries, look beyond stigmatizing racial stereotypes. *Cf. Miller et al. v. Johnson,* 515 U.S. 900, 911-12 (1995); *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 130 n.11 (1994); *McCleskey v. Kemp,* 481 U.S. 279, 292 (1987).

The Thirteenth Amendment of the U.S. Constitution provides, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The U.S. Supreme Court has interpreted the Thirteenth Amendment as prohibiting racial discrimination. *City of Memphis v. Greene,* 451 U.S. 100, 124-25 (1981); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968). "[C]laims by African Americans attacking ...inequality in the administration of criminal and civil justice ...would all fall comfortably within the [scope of the Thirteenth Amendment]." William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery,* 40 U.C. DAVIS L. REV. 1311, 1367, 1372 (2007).

As a historical and social matter, rap music has been the artistic product of socio-economically disadvantaged, inner city African-American men. André Douglas Pond Cummings, *Thug Life: Hip-Hop's Curious Relationship with Criminal Justice,* 50 SANTA CLARA L. REV. 515, 533 (2010); Wilson, *supra,* at 347. Rap music inherently expresses the historical and social adversity that poor, urban African-Americans have experienced. Dennis, *supra,* at 21.

As one observer has noted, "Are criminal defendants who write raps, a stereotypically black activity, more prone to being convicted as a result of harsher treatment toward black lifestyle? Is the fact that rap lyrics are allowed into evidence in the first place indicative of this potential bias?" Powell, *supra,* at 491."'The

creative energy of black street music shouldn't be buried under racism and misinterpretation.'" Wilson, *supra,* at 376.

Consequently, the admission of the rap music evidence, including (1) "Take It How You Wanna"; (2) the rap music video stills; and (3) the CD cover violated Appellant's due process and equal protection rights under the Thirteenth and Fourteenth Amendments of the U.S. Constitution as well as Article 1, §§ 1, 9 of the Pennsylvania Constitution.

D. THE ERRONEOUS ADMISSION OF THE EVIDENCE WAS NOT HARMLESS

The erroneous admission of this evidence did not constitute harmless error. The Commonwealth cannot satisfy its burden of establishing beyond a reasonable doubt that "there is no reasonable possibility that the error could have contributed to the verdict." *Green,* 76 A.3d at 582. The erroneous admission of "Take It How You Wanna" and related visual images unfairly prejudiced Appellant. *See id.* The evidence was not "merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence." *Id.*

The Trial Court abused its discretion in admitting (1) "Take It How You Wanna"; (2) the video stills; and (3) the CD cover. Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and grant him a new trial.

II. THE TRIAL COURT ERRED IN ADMITTING THE DECEDENT'S HEARSAY STATEMENTS

The Trial Court abused its discretion in admitting the decedent's hearsay statements to his brother, prosecution witness Hasan Ashmore. The admission of the hearsay violated Appellant's confrontation rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution. The erroneously admitted hearsay evidence deprived Appellant of due process and a fair trial.

Hearsay is "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Pa. R. Evid. 801. Hearsay is generally inadmissible except where controlling authority provides an exception. Pa. R. Evid. 802. Under the "state of mind" hearsay exception, the following is not excluded by the rule against hearsay:

> a statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Pa. R. Evid. 803(3).

The situation in *Commonwealth v. Green* is controlling. 76 A.3d at 581. The *Green* defendant was charged with the murder of his ex-girlfriend. *Id.* Two prosecution witnesses testified that the ex-girlfriend had told them that she was afraid of the defendant and wanted to end her relationship with him. *Id.*

The Pennsylvania Superior Court held that the trial abused its discretion where it admitted the ex-girlfriend's hearsay statements under the state of mind exception. *Id.* The *Green* court reasoned that the victim's state of mind was not relevant to the prosecution's allegations." *Id.* *Green* reasoned that even if the statement were considered to be evidence of the defendant's motive, "it appears impossible to demonstrate such an inference without accepting the statement for the truth of the matter asserted." *Id.*

Specifically, "[t]o be relevant as to [the *Green* defendant's] motive, we would have to accept that the Victim was fearful of [the defendant] and that she was attempting to end their relationship." *Id.* *Green* continued, "To accept those conclusions as the basis for [the defendant's] motive is to accept the literal 'truth' of the hearsay statements. ... Put more succinctly, it is only when the admitted hearsay statements are taken as truthful that they provide competent evidence of motive." *Id.*

Green concluded, "Either these statements were relevant but inadmissible as hearsay without an applicable exception, or they were not hearsay, in which case they were irrelevant." *Id.; see also, e.g., Commonwealth v. Levanduski,* 907 A.2d 3, 19-20 (Pa. Super. 2006); *Commonwealth v. Thornton,* 431 A.2d 248, 249-51 (Pa. 1981) (holding same).

Here, the decedent's hearsay statement constituted a statement of the decedent's "memory or belief to prove the fact remembered or believed." *See id.* Therefore, it was inadmissible. The decedent's "state of mind" concerning the stolen drugs was not relevant to the prosecution's allegations. Pa. R. Evid. 401, 402. Instead,

the prosecution impermissibly used the decedent's hearsay statement to establish that the decedent had, in fact, stolen drugs from Appellant.

The Trial Court's conclusions contradict both the certified record and established law. The Trial Court states, "Explaining that he feared for his life because of his involvement in the theft of defendant's drugs, decedent's fear was ultimately realized when defendant shot and killed him shortly thereafter." (TCO, 12/20/13, at 13-14). Yet, according to the certified record, the decedent had never expressed fear; instead, he laughed and boasted about stealing the sandwich bag. (16k-17k, 28k). Critically, the Trial Court had admitted the hearsay statement as evidence of Appellant's purported motive to kill the decedent. (3e).

Furthermore, the admission of the decedent's statement violated Appellant's Confrontation Clause rights under both the U.S. and Pennsylvania Constitutions. U.S. CONST. amend. VI; PA. CONST. art. I, § 9. Testimonial statements of a witnesses absent from a trial are admissible only where the defendant has had a prior opportunity to cross-examine the absent witness. *Crawford v. Washington,* 541 U.S. 36, 42, 59 (2004).

A statement is non-testimonial "'if it is made with the purpose of enabling police to meet an ongoing emergency.'" *Commonwealth v. Abrue,* 11 A.3d 484, 491 (Pa. Super. 2013) (quoting *Davis v. Washington,* 547 U.S. 813, 822 (2006)). Conversely, a statement is testimonial if: "(1) it was made in absence of an ongoing emergency; and (2) the primary objective of the interrogation or questioning that resulted in the statement was to establish or prove past events." *Id.*

Under this standard, the decedent's statement was testimonial. Therefore, Appellant was deprived of his fundamental confrontation rights where he received no opportunity to cross-examine the decedent.

The erroneous admission of the hearsay did not constitute harmless error. The Commonwealth cannot satisfy its burden of establishing beyond a reasonable doubt that "there is no reasonable possibility that the error could have contributed to the verdict." *Green,* 76 A.3d at 582. The erroneous admission of the hearsay prejudiced Appellant. *See id.* The evidence was not "merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence." *Id.*

The Trial Court abused its discretion in admitting the decedent's hearsay statement. Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and grant him a new trial.

III. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MISTRIAL MOTION

Under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the Trial Court abused its discretion in denying Appellant's mistrial motion. Unable to reach a verdict, the jury began to speculate about information extraneous to the evidence presented at trial. Appellant was deprived of due process and a fair trial.

A mistrial is necessary where "the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial

by preventing the jury from weighing and rendering a true verdict." *Lopez,* 57 A.3d at 83-84. "When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity." Pa. R. Crim. P. 605(B).

A defendant's request for a mistrial need not satisfy the "manifest necessity" standard. A trial court thus subjects a defendant's mistrial request to a considerably less demanding standard than it does a prosecution mistrial request or a *sua sponte* mistrial declaration.

Here, Appellant's mistrial request would have satisfied the more demanding "manifest necessity" standard. Therefore, when the appropriate lesser standard is applied to Appellant's mistrial request, it is apparent that the Trial Court abused its discretion in denying Appellant's mistrial motion.

The "genuine inability of a jury to agree" on a verdict may constitute a "manifest necessity." *Commonwealth v. Smith,* 471 A.2d 510, 512 (Pa. Super. 1984). A genuine inability to agree occurs where "there is no reasonable probability of agreement." *Id.*

"[T]here is no predetermined formula" for deciding whether "no reasonable probability of agreement" exists. *Commonwealth v. Verdekel,* 506 A.2d 415, 417-18 (Pa. Super. 1986). Some factors include, "the length of time the jury deliberated; the complexity of the issues involved; the number of times the jury came back for instructions; the demeanor of the witnesses; the attentiveness of the jury and other

factors the court finds relevant." *Commonwealth v. Curry,* 472 A.2d 1162, 1165 (Pa. Super. 1984). "Each case differs in the complexity of the issues presented, the seriousness of the charges to be considered, and the amount of testimony to be digested and reviewed. These factors are used in weighing the reasonableness of the length of jury deliberations." *Verdekel,* 506 A.2d at 41.

Here, the prosecution and defense presented six days of testimony and evidence. The prosecution evidence began on Tuesday, March 5, 2013; the prosecution and defense rested on Tuesday, March 12, 2013. (27g, 68L). Thus, after five days of testimony, the jury began deliberating on March 12, 2013. (284L).

On March 14, 2013, at 1:55 p.m., the jurors sent a note stating, "We cannot come to a unanimous conclusion, after several votes, and deliberations have stalled. Please re-instruct and clarify reasonable doubt." (8n; APPENDIX I). The judge complied with the jurors' request. (9n).

On March 15, 2013, at 11:00 a.m., the jurors sent a note stating that "the jury remains deadlocked. At this point after extensive discussion, we cannot come to a unanimous conclusion. It is clear that further discussion will not result in a verdict." (4o; APPENDIX I). The Trial Court observed that the jury had been deliberating for "approximately 18 hours. Obviously [the jury is] having some difficulty resolving the issues raised in the case." (5o). The Trial Court asked the jury if "there was a reasonable probability of the jury reaching a unanimous verdict on all the charge in this case?" (5o-6o). The jury foreperson replied, "I do not think, so sir." (6o). The Trial Court gave a *Spencer* charge. (6o-8o).

Later that day, the jurors asked, "Can we the jury make a reasonable assumption regarding the content of the unread statements of Tyrell Smith and Jeffrey Jones given that an arrest warrant was issued and no specific evidence was proffered as to what evidence was used to issue the warrant?" (14o; APPENDIX I).

In response, defense counsel requested a mistrial. (16o). He argued, "This troubles me on a number of grounds, your Honor...[Y]ou cannot assume the contents of the statements. [Also, t]hey use the word 'evidence' to describe what's in an arrest warrant. That's not an accurate statement of the law." (14o).

Defense counsel also noted that (1) Smith never gave a "statement" and (2) Jones' statement had never been presented as evidence. (15o-16o). Defense counsel argued, "I think it's pretty clear from two notes ago that this jury said they were deadlocked and you *Spencer*-ed them. We are at a point, sir, where they are asking things that don't exist." (16o-17o). He added, "I think it has gotten to the point now...that they have gone too far afield." (17o).

Yet, the Trial Court denied the mistrial motion. (17o). The Trial Court instructed the jurors that they "may not rely upon supposition or guess on any matters which are not in evidence." (22o).

Here, a mistrial should have been granted. The facts surrounding the decedent's homicide were relatively simple. The case should have been resolved primarily on issues of witness credibility. Yet, on two separate occasions, the jury stated that they would not be able to agree. After the Trial Court told them to resume deliberating, the jury began considering inappropriate considerations. (15o-16o). Given these

circumstances, a mistrial would have been necessary even under the more demanding "manifest necessity" standard.[10]

The Trial Court incorrectly asserts, "[Appellant] cannot successfully argue that after the voluminous testimony presented, the jury disregarded the evidence and instead speculated to reach its guilty verdicts." (TCO, 12/20/13, at 28). The Trial Court adds, "The jurors' inquiry was related to statements referenced throughout the trial, but never placed into evidence, and did not inquire about anything specifically relevant to [Appellant's] guilt or innocence." (TCO, 12/20/13, at 28).

The certified record contradicts the Trial Court's assertions. The statements were not referenced throughout the trial. In fact, Tyrell Smith never gave any "statement." Instead, after three days of deliberating, the jurors were unable to agree on a verdict. (8n, 4o-8o; APPENDIX I). At that point, they began to focus on improper considerations. The Trial Court's instruction that the jurors "may not rely upon supposition or guess on any matters which are not in evidence" failed to sufficiently remedy the jurors' confusion. (22o).

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[10]*See, e.g., Curry,* 472 A.2d at 1165 (holding mistrial appropriate under demanding "manifest necessity" standard where jury deliberated for three days on rape and PIC charges and twice reported deadlock); *Commonwealth v. Hoover,* 460 A.2d 814, 816 (Pa. Super. 1983). (holding mistrial appropriate under demanding "manifest necessity "standard where the issues largely "revolve[d]...on the witnesses' credibility" and where jury "definitely expressed its inability to reach a verdict to the trial court...."); *Commonwealth v. Jones,* 418 A.2d 346, 352 (Pa. Super. 1980) (holding "manifest necessity" required mistrial where nearly six hours of deliberations on rape case was "reasonable period in which to accept the jury's conclusion that they were deadlocked" in rape case).

The Trial Court abused its discretion in denying Appellant's mistrial motion. Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and grant him a new trial.

IV. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF PURPORTED WITNESS INTIMIDATION

Under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the Trial Court abused its discretion in admitting evidence concerning purported witness intimidation. The evidence deprived Appellant of due process and a fair trial.

A. THE TRIAL COURT MISAPPREHENDS THE CERTIFIED RECORD

The Trial Court erroneously asserts that in proving its case, the prosecution properly used "circumstantial evidence [that] included [Appellant's] own statements and inferences drawn from the timing and subject matter of [Appellant's] recorded conversations." (TCO, 12/20/13, at 24). The Trial Court adds, "in those instances where defendant actually made threats, such as to Spearman or on the recorded prison telephone line, such evidence was properly attributed to him." (TCO, 12/20/13, at 24).

The Trial Court's assertions contradict the certified record. At trial, the prosecution presented a recording of a prison telephone conversation in which Appellant, speaking with a friend, said "What's a call him did what he was supposed to do, so that should come through." (63c, 72k, 80k-85k). It is ambiguous as to what Appellant was precisely referring to.

Saliently, the prosecution failed to present any evidence that (1) Appellant had threatened Brown or Spearman or (2) Appellant was involved in the purported intimidation. (17h, 55i, 70j). Critically, beginning in April 2010, Appellant was incarcerated; Appellant was incarcerated in prisons different from the prisons in which Brown and Spearman were incarcerated. (70g, 18h, 18i, 62i, 80i, 84i, 72j, 66L). At most, Spearman acknowledged an awareness that Appellant was "hurt because [Spearman] went in there and lied, and put this case on him." (84g-86g, 22h).

The Trial Court further asserts, "possession and distribution of Brown's statement was linked to [Appellant] when it was discovered by police on March 25, 2012, in an envelope, sent to Haynesworth arguably from [Appellant] at the county prison." (TCO, 12/20/13, at 25).

The Trial Court's assertion contradicts the certified record. In March 2012, the police recovered from an abandoned home an opened envelope addressed to Haynesworth; the return address indicated that it was sent from Appellant at "CFCF." (85j). The envelope contained a copy of Brown's statement. (85j). Critically, however, the envelope was postmarked August 2010. (160c). Prior to November 12, 2010, Appellant did not have a copy of Brown's statement. (261k, 66L). In November 2010, Appellant was housed at PICC - not CFCF. (260-61k, 66L). Thus, it was impossible that the statement had been mailed in the envelope. On a table, the police recovered a letter addressed to Wink; nothing linked the letter to Appellant. (84j, 89j, 115k, 119k).

B. THE EVIDENCE WAS IRRELEVANT

Threats by third persons against witnesses are not relevant evidence unless it is shown that the defendant is linked in some way to the making of the threats. *Commonwealth v. Carr*, 259 A.2d 165, 167 (Pa. 1969). "Thus, evidence that a witness received an unsigned letter of a threatening nature should be excluded when there is no evidence to connect the accused with it." *Id.*

Yet, an important exception to the rule exists where the evidence in question was not offered to prove the accused's guilt "but to explain a [witness's] prior inconsistent statement." *Commonwealth v. Bryant*, 462 A.2d 785, 788 (Pa. Super. 1983). Thus, a witness may properly testify on redirect examination that a letter that he had written exonerating the defendant was induced by a third defendant's threats against the witness' family where the purpose of the evidence was not to establish the defendant's guilt but to explain a prior inconsistent statement. *Carr*, 259 A.2d at 167.

In such instances, limiting instructions are appropriate in order to preclude the jury from improperly considering evidence about witness fear or threats as evidence of a defendant's guilt or character. *See, e.g., Commonwealth v. Randall*, 758 A.2d 669, 677 (Pa. Super. 2000).

Pennsylvania courts have cited the reasoning of Pennsylvania Superior Court Judge Hoffman in *Commonwealth v. Schaffer:*

> The admission of such evidence, in the absence of such a charge, could only serve to inflame the minds of the jury and prejudice his case by implying that these threats had been made either directly by [the defendant] or by somebody at his behest. I am not convinced that even such a cautionary statement to the jury would sufficiently remove the

great prejudice resulting from the admission of these notes. A new trial is certainly warranted, however, when, as here, no such cautionary instruction was given.

236 A.2d 530, 532 (Pa. Super. 1968).[11]

Here, the purported "intimidation" evidence was irrelevant. Pa. R. Evid. 401, 402. The evidence lacked "any tendency" to make a fact "of consequence" more or less probable than it would be without the evidence

First, the "intimidating incidents" may have been wholly unrelated to Appellant's prosecution. Attempts to link the incidents to Appellant's case were, at best, speculative. Unfortunately, constant and violent "beefing"appeared to be a way of life for Spearman, Brown, and many of the young men in the Stanley and Huntingdon Streets neighborhood.

The police had arrested the sixteen-year-old Brown on several previous occasions (72j-73j). Prior to the decedent's death, Brown had been shot in 2009 because of his "beefs" with other individuals. (22i, 57i-58i, 51k). Brown was frequently involved in "fights and shootouts." (21h, 51i).

At the time of Appellant's trial, Brown was serving a state sentence for a VUFA and False Reports conviction. (53i-54i). Brown had accidentally shot himself in 2012; yet, he lied to the police, claiming that "two unknown persons were shooting" at him. (53i-54i).

[11]Because an equal number of the Pennsylvania Superior Court judges were divided, the trial court decision was automatically affirmed without any considerations on the merits.

The prosecution alleged that the October 26, 2010 shooting; (2) the laundromat incident; and (3) the November 27, 2010 shooting were somehow intended to intimidate Brown in connection with Appellant's case. (76j-78j, 101k-02k). Yet, Brown testified that he had been "beefing" with Tucker and Haynesworth because of a dispute at a block party. (47i, 52i, 59i 181k). Brown testified that the incidents were unrelated to Appellant's case. (19i, 37i, 52i-55i, 60i). Notably, Alexander did not wish to move from the neighborhood. (82i, 109k, 113k).

Notably, in a December 4, 2010 telephone conversation with his child's mother, Spearman acknowledges his awareness of a feud between Brown and Tucker over the block party. (21h-23h, 46h, 169k, 176k-77k).

Additionally, the prosecution alleged that the November 9, 2010 cell room beating of Spearman was connected to Appellant's case. Inexplicably, homicide detectives did not question any of the individuals who had assaulted Spearman. (166k-67k). There was no evidence linking these individuals to Appellant or Appellant's case. (19h).

Spearman had speculated to his brother that the beating was related to Appellant's case. (78g-85g, 18h-19h). Yet, at trial, Spearman later explained that his own sense of guilt in falsely accusing Appellant of the homicide had led him to erroneously assume Appellant's involvement. (75g-76g, 19h). Spearman testified that no one had threatened him in connection with Appellant's case. (50g, 5h-7h, 26h).

Second, the unwillingness of the witnesses' to cooperate was more likely attributable to a general dislike of law enforcement and a "no snitching" norm. As

one homicide detective testified at Appellant's trial, a general unwillingness to testify is "the way of the hood." (181k). Notably, Brown had refused to tell the police who had shot him in 2009. (178k-79k). Brown testified that he does not provide information to police. (66i-67i).

The failure of the prosecution witnesses to fully cooperate with the prosecutor and the police may have therefore been attributable to factors wholly unrelated to any speculative "intimidation." Many historical and sociological factors understandably have caused economically-challenged urban residents to distrust and dislike law enforcement; therefore, they often do not wish to cooperate with law enforcement even where no witness intimidation has occurred. Montré D. Carodine, *"Street Cred,"* 46 U.C. DAVIS L. REV. 1583, 1585, 1594-95 (2013) (discussing these factors); Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty,* 89 OR. L. REV. 1257, 1293-1300 (2011).

C. THE EVIDENCE WAS UNFAIRLY PREJUDICIAL AND ITS ERRONEOUS ADMISSION WAS NOT HARMLESS

The pervasiveness of the evidence far exceeded what was necessary to explain the witnesses' prior inconsistent statements. Under Pa. R. Evid. 403, "[t]he court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa. R. Evid. 403. Here, the evidence concerning intimidation was needlessly cumulative and unfairly prejudiced Appellant. Pa. R. Evid. 403; *Schaffer,* 236 A.2d at 532 (noting

that witness intimidation evidence possesses immense potential to create unfair prejudice).

The Trial Court instructed the jury that the intimidation evidence was relevant "only for its effect on the state of mind of the witnesses in this case...." (255L). Additionally, the Trial Court instructed, "You must not regard the evidence as showing that [Appellant] is a person of bad character, or criminal tendencies, from which you might be inclined to infer guilt." (279L). Also, the Trial Court cautioned that the jury could "not attribute such conduct to [Appellant]." (278L).

Yet, during its summation, the prosecution impermissibly attributed the witness intimidation to Appellant. (184-85L, 224L, 272L). Therefore, the evidence constituted impermissible propensity evidence under Pa. R. Evid. 404.[12] The prosecutor's arguments exacerbated the unfair prejudice that the evidence created.

The Commonwealth cannot satisfy its burden of establishing beyond a reasonable doubt that "there is no reasonable possibility that the error could have contributed to the verdict." *Green,* 76 A.3d at 582. The erroneous admission of the hearsay prejudiced Appellant. *See id.* The evidence was not "merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence." *Id.*

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[12]"Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Pa. R. Evid. 404(a)(1). "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Pa. R. Evid. 404(b)(1).

The Trial Court abused its discretion in admitting the evidence. Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and grant him a new trial.

V. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS

The evidence was insufficient to sustain Appellant's First-Degree Murder and PIC convictions. The evidence failed to prove beyond a reasonable doubt that Appellant was responsible for the fatal shooting. Critically, (1) no prosecution witness made a positive in-court identification of Appellant as the shooter; and (2) no forensic evidence linked Appellant to the fatal shooting. Appellant's convictions therefore deprived him of due process and a fair trial in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution.

To establish a defendant's guilt of First-Degree Murder, the prosecution must prove beyond a reasonable doubt: (1) a human being was unlawfully killed; (2) the accused is responsible for the killing; and (3) the accused acted with specific intent to kill. 18 Pa.C.S.A. § 2502; *Commonwealth v. Johnson,* 42 A.3d 1017, 1025-26 (Pa. 2012); *Commonwealth v. Smith*, 985 A.2d 886, 895 (Pa. 2009).

To establish a defendant's guilt of PIC, the prosecution must prove beyond a reasonable doubt that he "possesse[d] any instrument of crime with intent to employ it criminally." 18 Pa.C.S.A. § 907(a). An "instrument of crime" is "(1) anything

specially made or specially adapted for criminal use, or (2) anything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have." *Commonwealth v. Brown,* 23 A.3d 544, 561 (Pa. Super. 2011) (citing 18 Pa.C.S.A. § 907(d)).

Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000). When reviewing a sufficiency claim, courts view the evidence in the light most favorable to the verdict winner, giving that party the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 599 A.2d 630, 633 (Pa. 1991).

Yet, these inferences must flow from facts and circumstances proven in the record and must be of "such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt." *Commonwealth v. Clinton*, 137 A.2d 463, 466 (Pa. 1958). A conviction premised upon suspicion or conjecture will fall even under the limited scrutiny of appellate review. *Commonwealth v. Scott*, 597 A.2d 1220, 1221 (Pa. Super. 1991); *Commonwealth v. Jones,* 459 A.2d 11, 12 (Pa. Super. 1983). Even where the evidence is "circumstantial," the prosecution must link the accused to the crime beyond a reasonable doubt. *Commonwealth v. Koch*, 39 A.3d 996,1001 (Pa. Super. 2011).

Here, Appellant's convictions were unsupported by sufficient evidence because the Commonwealth failed to prove beyond a reasonable doubt that Appellant was

"responsible for the killing." *Johnson,* 42 A.3d at 1025-26. Where a witness testifies "positively and without qualification" that a defendant "perpetrated the offenses," the evidence is sufficient to sustain a conviction. *Commonwealth v. Patterson,* 940 A.2d 493, 502 (Pa. Super. 2007).

The prior inconsistent statement of a declarant witness does not constitute hearsay if the statement "(A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; (B) is a writing signed and adopted by the declarant; or (C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement." Pa. R. Evid. 803.1. The declarant must testify and be subject to cross-examination. Pa. R. Evid. 803.1.

"[C]riminal convictions which rest only on prior inconsistent statements of witnesses who testify at trial do not constitute a deprivation of a defendant's right to due process of law, as long as the prior inconsistent statements, taken as a whole, establish every element of the offense charged beyond a reasonable doubt, and the finder-of-fact could reasonably have relied upon them in arriving at its decision." *Commonwealth v. Brown,* 52 A.3d 1139, 1171 (Pa. 2012) (emphasis added). "Prior inconsistent statements ...must, therefore, be considered by a reviewing court in the same manner as any other type of validly admitted evidence when determining if sufficient evidence exists to sustain a criminal conviction." *Id.*

Here, the prior inconsistent statements of both Spearman and Brown inculpated Appellant as the shooter. (51-53g, 66g, 10h, 53h-55h, 59h, 28i-29i, 87i, 57k, 64k, 214k). The statements were ostensibly admissible as substantive evidence under Pa.

R. Evid. 803.1. However, the jury could not "reasonably have relied upon them in arriving at its decision." *See, e.g., Brown,* 52 A.3d at 1171.

Spearman, who had multiple crimen falsi convictions, told several wholly irreconcilable "stories" throughout the homicide investigation. (13g, 45g-50g, 69g, 72g, 86g-95g, 3h, 213k). Spearman's August 2010 statement inculpated Appellant after the police found Spearman in possession of the homicide weapon. (51g, 10h, 47j-50j, 55k-56k, 78k, 65L). Spearman was high when he gave the statement. (90g, 10h-11h). Spearman accused Appellant in order to prevent himself and other "Team-A" members from being charged. (53g, 57g, 72g, 13h, 16h-17h). Spearman desired favors on his open case in exchange for inculpating Appellant. (5h, 13h, 26h).

Notably, in his statement, Spearman lied that the firearm had continuously remained in his home between the decedent's death and May 22, 2010. (49j). Instead, Spearman had, in fact, fired the weapon on May 7, 2010 in "Den-Den" Williams' drug territory. (26h, 65h, 239k-40k, 63L).

In custody for his own criminal conduct, Brown gave a statement on September 1, 2010. (41i, 84i, 87i, 58k). Before giving the statement, Brown and the detectives spoke for approximately six hours; the detectives did not memorialize any of this conversation. (41i, 84i, 87i, 8j-9j, 58k, 187k-88k). Brown later claimed that the detectives had physically assaulted him.(22i, 44i-46i, 70i, 58j). By October 2010, Brown had returned home. Receiving a "break," Brown's open case had received a juvenile disposition. (18i, 74i). Brown had crimen falsi convictions. (53i-54i). At trial, Brown testified that he was not present during the homicide. (16i, 61i).

Consequently, even where the (1) circumstantial evidence is viewed "in the light most favorable" to the prosecution and (2) the prosecution is given the "benefit of all reasonable inferences," the evidence is insufficient to sustain Appellant's guilt of First Degree Murder and PIC. *See, e.g., Chambers*, 599 A.2d at 633; *Tibbs v. Florida*, 457 U.S. 31, 38 n.11 (1982). The prosecution failed to prove beyond a reasonable doubt that Appellant was responsible for the decedent's death. *Clinton*, 137 A.2d at 466. Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and dismiss the charges.

CONCLUSION

For all of the above stated reasons, Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and dismiss the First-Degree Murder and PIC charges. Alternatively, Appellant respectfully requests that this Honorable Court vacate his judgment of sentence and remand this matter for a new trial.

Respectfully submitted,

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June 3, 2014

VERIFICATION

The below parties (1) verify that the statements made in the foregoing Appellant's Brief are true and correct and (2) understand that false statements are subject to the penalties of 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities.

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CERTIFICATION OF SERVICE

The below parties hereby certify that a true and correct copy of Appellant's Brief has been served on:

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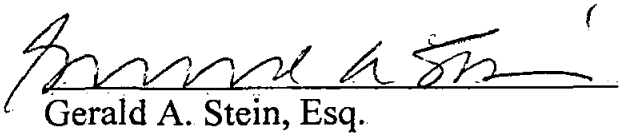

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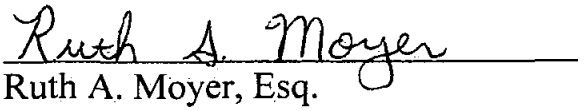

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June 3, 2014

APPENDIX A

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Ronald Thomas

CASE INFORMATION

Cross Court Docket Nos: 1121 EDA 2013

Judge Assigned: Byrd, Sandy L.V.
Date Filed: 10/20/2010 Initiation Date: 10/20/2010
OTN: N 677678-1 LOTN:
Originating Docket No: MC-51-CR-0017941-2010
Initial Issuing Authority: Jimmie Moore
Final Issuing Authority: Jimmie Moore
Arresting Agency: Philadelphia Pd
Arresting Officer: Mocharnuk, Michael J.
Complaint/Incident #:

Case Local Number Type(s)	Case Local Number(s)
District Control Number	1022034775

RELATED CASES

Related Docket No	Related Case Caption	Related Court	Association Reason
Civil Judgment - Fines/Costs/Restitution			
130841096		Civil	Civil Judgment - Fines/Costs/Restitution

STATUS INFORMATION

Case Status: Closed
Arrest Date: 04/28/2010

Status Date	Processing Status
07/27/2013	Awaiting Appellate Court Decision
05/16/2013	Awaiting Status Hearing
03/18/2013	Awaiting Appellate Court Decision
03/18/2013	Sentenced/Penalty Imposed
03/18/2013	Awaiting Sentencing
02/26/2013	Awaiting Trial
02/22/2013	Awaiting Status Hearing
02/15/2013	Awaiting Trial
02/15/2013	Awaiting Status Hearing
02/08/2013	Awaiting Trial
01/25/2013	Awaiting Status Hearing
09/27/2012	Awaiting Trial
09/20/2012	Awaiting Trial Readiness Conference
09/20/2012	Awaiting Trial
09/13/2012	Awaiting Pre-Trial Conference
09/13/2012	Awaiting Trial
09/05/2012	Awaiting Pre-Trial Conference
07/12/2011	Awaiting Trial
11/05/2010	Awaiting Pre-Trial Conference
10/26/2010	Awaiting Formal Arraignment
10/20/2010	Awaiting Filing of Information

Complaint Date: 04/29/2010

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Ronald Thomas

CALENDAR EVENTS

Case Calendar Event Type	Schedule Start Date	Start Time	Room	Judge Name	Schedule Status
Formal Arraignment	11/09/2010	11:00 am	1101	Trial Commissioner Michael Sanuck	Scheduled
Pre-Trial Conference	12/07/2010	9:00 am	1105	Judge Benjamin Lerner	Continued
Pre-Trial Conference	01/12/2011	9:00 am	1105	Judge Benjamin Lerner	Continued
Pre-Trial Conference	01/18/2011	9:00 am	1105	Judge Benjamin Lerner	Continued
Pre-Trial Conference	02/15/2011	9:00 am	1105	Judge Benjamin Lerner	Continued
Pre-Trial Conference	03/16/2011	9:00 am	1105	Judge Benjamin Lerner	Continued
Pre-Trial Conference	04/21/2011	9:00 am	1105	Judge Benjamin Lerner	Continued
Pre-Trial Conference	05/12/2011	9:00 am	1105	Judge Benjamin Lerner	Continued
Pre-Trial Conference	06/02/2011	9:00 am	1105	Judge Benjamin Lerner	Continued
Pre-Trial Conference	06/30/2011	9:00 am	1105	Judge Benjamin Lerner	Scheduled
Scheduling Conference	07/12/2011	9:00 am	1108	Senior Judge Carolyn Engel Temin	Scheduled
Status Listing	02/27/2012	9:00 am	1108	Senior Judge Carolyn Engel Temin	Scheduled
Pre-Trial Conference	09/05/2012	9:00 am	1105	Judge Benjamin Lerner	Continued
Status Listing	09/05/2012	9:00 am	1108	Senior Judge Carolyn Engel Temin	Scheduled
Pre-Trial Conference	09/13/2012	9:00 am	1105	Judge Benjamin Lerner	Continued
Trial	09/18/2012	9:00 am	1108	Senior Judge Carolyn Engel Temin	Cancelled
Scheduling Conference	09/18/2012	9:00 am	908	Judge Barbara A. McDermott	Cancelled
Pre-Trial Conference	09/20/2012	9:00 am	1105	Judge Benjamin Lerner	Scheduled
Trial Readiness Conference	09/27/2012	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Motions Hearing	11/30/2012	9:00 am	607	Judge Sandy L.V. Byrd	Continued

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Ronald Thomas

CALENDAR EVENTS

Case Calendar Event Type	Schedule Start Date	Start Time	Room	Judge Name	Schedule Status
Trial Readiness Conference	01/25/2013	9:00 am	607	Judge Sandy L.V. Byrd	Scheduled
Motions Hearing	01/25/2013	9:00 am	607	Judge Sandy L.V. Byrd	Scheduled
Status	02/08/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Status	02/15/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Status	02/15/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Status	02/22/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Status	02/22/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	02/25/2013	9:00 am	607	Judge Sandy L.V. Byrd	Cancelled
Status	02/26/2013	9:00 am	607	Judge Sandy L.V. Byrd	Scheduled
Trial	02/27/2013	9:00 am	607	Judge Sandy L.V. Byrd	Cancelled
Trial	02/28/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/01/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/04/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/05/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/06/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/07/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/08/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/11/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/12/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/13/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/14/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/15/2013	9:00 am	607	Judge Sandy L.V. Byrd	Continued
Trial	03/18/2013	9:00 am	607	Judge Sandy L.V. Byrd	Scheduled
Trial	04/29/2013	9:00 am	908	Judge Barbara A. McDermott	Cancelled
Status	05/16/2013	9:00 am	607	Judge Sandy L.V. Byrd	Scheduled

CONFINEMENT INFORMATION

Confinement Known As Of	Confinement Type	Destination Location	Confinement Reason	Still in Custody
03/22/2013	DOC Confined	SCI Dallas		Yes

DEFENDANT INFORMATION

Date Of Birth: 01/29/1985 City/State/Zip: Philadelphia, PA 19124

Alias Name
Thomas, Ronald Raheem

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Ronald Thomas

CASE PARTICIPANTS

Participant Type	Name
Defendant	Thomas, Ronald

CHARGES

Seq.	Orig Seq.	Grade	Statute	Statute Description	Offense Dt.	OTN
1	1		**18 § 2502**	Murder	04/22/2010	N 677678-1
2	6		**18 § 6105**	Penalty - Felony	04/22/2010	N 677678-1
3	3		**18 § 6106**	Firearms Not To Be Carried W/O License	04/22/2010	N 677678-1
4	4		**18 § 6108**	Carry Firearms Public In Phila	04/22/2010	N 677678-1
5	5		**18 § 907**	Poss Instrument Of Crime W/Int	04/22/2010	N 677678-1
99999	2		**18 § 6105**	Person Not To Possess Use Etc. Firearms	04/22/2010	N 677678-1

DISPOSITION SENTENCING/PENALTIES

Disposition

Case Event / Sequence/Description / Sentencing Judge / Sentence/Diversion Program Type / Sentence Conditions	Disposition Date / Offense Disposition / Sentence Date / Incarceration/Diversionary Period	Final Disposition / Grade / Section / Credit For Time Served / Start Date
Lower Court Proceeding (generic)		
Preliminary Hearing	10/19/2010	Not Final
1 / Murder	Held for Court	18 § 2502
3 / Firearms Not To Be Carried W/O License	Held for Court	18 § 6106 §§ A1
4 / Carry Firearms Public In Phila	Held for Court	18 § 6108
5 / Poss Instrument Of Crime W/Int	Held for Court	18 § 907 §§ A
99,999 / Person Not To Possess Use Etc. Firearms	Held for Court	18 § 6105 §§ A2i
Proceed to Court		
Information Filed	10/26/2010	Not Final
1 / Murder	Held for Court	18 § 2502
2 / Penalty - Felony	Replacement by Information	18 § 6105 §§ A.11
3 / Firearms Not To Be Carried W/O License	Held for Court	18 § 6106 §§ A1
4 / Carry Firearms Public In Phila	Held for Court	18 § 6108
5 / Poss Instrument Of Crime W/Int	Held for Court	18 § 907 §§ A
99,999 / Person Not To Possess Use Etc. Firearms	Charge Changed	18 § 6105 §§ A2i
Replaced by 18 § 6105 §§ A.11, Penalty - Felony		
Guilty		
Trial	03/18/2013	Final Disposition
1 / Murder	Guilty	18 § 2502
Byrd, Sandy L.V.	03/18/2013	
Confinement	LIFE	

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

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Docket Number: CP-51-CR-0013001-2010

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Ronald Thomas

DISPOSITION SENTENCING/PENALTIES

Disposition Case Event Sequence/Description Sentencing Judge Sentence/Diversion Program Type Sentence Conditions	Disposition Date Offense Disposition Sentence Date Incarceration/Diversionary Period	Final Disposition Grade Section Credit For Time Served Start Date
2 / Penalty - Felony Byrd, Sandy L.V. Life In Prison With Out The Possibility Of Parole.	Nolle Prossed 03/18/2013	18 § 6105 §§ A.11
3 / Firearms Not To Be Carried W/O License Byrd, Sandy L.V.	Nolle Prossed 03/18/2013	18 § 6106 §§ A1
4 / Carry Firearms Public In Phila Byrd, Sandy L.V.	Nolle Prossed 03/18/2013	18 § 6108
5 / Poss Instrument Of Crime W/Int Byrd, Sandy L.V. Confinement	Guilty 03/18/2013 Min of 2.00 Years 6.00 Months Max of 5.00 Years 2 1/2 - 5 years	18 § 907 §§ A
99,999 / Person Not To Possess Use Etc. Firearms Replaced by 18 § 6105 §§ A.11, Penalty - Felony Byrd, Sandy L.V.	Charge Changed 03/18/2013	18 § 6105 §§ A2i

The following Judge Ordered Conditions are imposed:

Condition

Defendant is to pay imposed mandatory court costs.
Defendant responsible for funeral expenses.

LINKED SENTENCES:

Link 1

CP-51-CR-0013001-2010 - Seq. No. 5 (18§ 907 §§ A) - Confinement is Consecutive to
CP-51-CR-0013001-2010 - Seq. No. 1 (18§ 2502 §§) - Confinement

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
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Ronald Thomas

COMMONWEALTH INFORMATION

Name: Philadelphia County District Attorney's Office
Prosecutor

Supreme Court No:

Phone Number(s):
215-686-8000 (Phone)

Address:
3 South Penn Square
Philadelphia, PA 19107

ATTORNEY INFORMATION

Name: Gerald A. Stein
Private

Supreme Court No: 013239

Rep. Status: Active

Phone Number(s):
215-665-1130 (Phone)

Address:
2727 Centre Sq W
1500 Market St
Philadelphia, PA 19102

Representing: Thomas, Ronald

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	10/20/2010		Court of Common Pleas - Philadelphia County
Held for Court			
3	10/20/2010		Unknown Filer
Transferred from Municipal Court			
1	10/26/2010		Commonwealth of Pennsylvania
Information Filed			
5	11/05/2010		Court of Common Pleas - Philadelphia County
Hearing Notice			
1	11/09/2010		*Sanuck, Michael*
Defendant Failed to Retain Counsel			
1	11/15/2010		Wallace, Michael E.
Entry of Appearance			
2	11/15/2010		
Appointment Notice			
4	12/07/2010		Court of Common Pleas - Philadelphia County
Hearing Notice			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
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Ronald Thomas

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
5	12/07/2010		Lerner, Benjamin

Defense Attorney Unprepared - Newly Appointed/Retained

ADA: Eileen Hurley Def. Atty: Roland Jarvis Steno: Kris Vargas Court Clerk: Kathryn Morris

Defense request for further investigation. Discovery passed. Non-capital case. TRE. NCD: 1/12/11 room 1105

1	01/12/2011		Lerner, Benjamin

Status Listing

ADA: Eileen Hurley Def. Atty: Roland Jarvis Steno: Kris Vargas Court Clerk: Kathryn Morris

Status of counsel. TRE. NCD: 1/18/11 room 1105

5	01/12/2011		Court of Common Pleas - Philadelphia County

Hearing Notice

4	01/18/2011		Court of Common Pleas - Philadelphia County

Hearing Notice

1	01/20/2011		Lerner, Benjamin

Order Granting Motion for Continuance

ADA: Hurley; Counsel: Wallace; Steno: K Vargas; Clerk: K Sanders
defense request
counsel R Jarvis removed;
Mike Wallace appointed to represent defendant
continue for pre-trial conference
continue to 2/15/11; TRExcludable
By the court,

4	02/15/2011		Court of Common Pleas - Philadelphia County

Hearing Notice

5	02/15/2011		Commonwealth of Pennsylvania

Defense Request for Further Investigation

ADA: Eileen Hurley Def. Atty: Michael Wallace Steno: Kris Vargas Court Clerk: Kathryn Morris

Defense reuqest for further investigation. Discovery was passed from prior counsel. Time ruled excludable. NCD: 3/16/11 room 1105

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
4	03/16/2011		Court of Common Pleas - Philadelphia County

Hearing Notice

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5 03/16/2011 Commonwealth of Pennsylvania

Defense Request for Further Investigation

ADA: Eileen Hurley Def. Atty: Michael Wallace Steno: Judy Bonner Court Clerk: Kathryn Morris

Defense request request for further investigation to obtain records. Time ruled excludable. NCD: 4/21/11 room 1105

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1 04/21/2011 Commonwealth of Pennsylvania

Defense Request for Further Investigation

ADA: Eileen Hurley Def. Atty: Michael Wallace Steno: Judy Bonner Court Clerk: Kathryn Morris

Defense request for further investigation. Time ruled excludable. NCD: 5/12/11 room 1105

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5 04/21/2011 Court of Common Pleas - Philadelphia County

Hearing Notice

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4 05/12/2011 Court of Common Pleas - Philadelphia County

Hearing Notice

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5 05/12/2011 Lerner, Benjamin

Defense Attorney on Trial Elsewhere

ADA: Jude Conroy Def. Atty: Michael Wallace Steno: Christy Stranowicz Court Clerk: Kathryn Morris

Defense request for further investigation. Counsel is on trial elsewhere. Time ruled excludable. NCD: 6/2/11 room 1105

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5 06/02/2011 Court of Common Pleas - Philadelphia County

Hearing Notice

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6 06/02/2011 Commonwealth of Pennsylvania

Defense Request for Further Investigation

ADA: Jude Conroy Def. Atty: Michael Wallace Steno: Christine Stranowicz Court Clerk: Kathryn Morris

Defense request further investigation.Time ruled excludable. NCD: 6/30/11 room 1105

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
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Ronald Thomas

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	07/12/2011		Temin, Carolyn Engel

Order to Place Case on Trial List

ADA: J. Conroy
ATTY: M. Wallace
STENO: J. Kurz
CLERK: G. Williams

List for 5-Day Jury Trial on 9/18/2012 R 1108. No Motions. Time ruled excludable. Both counsels attached. Relist 2/27/2012 for possible non-trial disposition.

5	07/12/2011		Court of Common Pleas - Philadelphia County

Hearing Notice

6	07/12/2011		Temin, Carolyn Engel

Counsel Attached for Trial

Atty Michael E. Wallace attached for 5 day jury trial on 9/18/12 Room 1108
ADA Jude Conroy

1	09/19/2011		Nenner, David Scott

Entry of Appearance

1	02/27/2012		Temin, Carolyn Engel

Counsel Attached for Trial

Court orders David Nenner attached to a 5 day Jury Trial on 9/18/2012 in room 1108 with Judge Carolyn E. Temin

2	02/27/2012		Temin, Carolyn Engel

Trial Date to Remain

New counsel David Nenner enters his appearance in this matter. Trial date of 9/18/2012 R 1108 to remain. Court orders new counsel attached.

ADA: J. Conroy
ATTY: D. Nenner
STENO: D. Zweizig
COURT CLERK: G. Williams

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
2	09/05/2012		Temin, Carolyn Engel

Order Granting Motion for Continuance

Joint request to lift trial date of 9/18/2012 in courtroom 1108. Commonwealth has recently discovered extensive evidence of witness intimidation. Case cannot be tried on presently scheduled date of 9/18/2012. Commonwealth requires additional time to fully investigate new information.

Defense requires additional time after that to investigate information discovered by the Commonwealth. Court must retire 12/31/2012 due to reaching the age of 78. Relist case today in courtroom 1105 for Scheduling Conference.

ADA: J. Conroy
ATTY: D. Nenner
STENO: J. Kurz
COURT CLERK: G. Williams

6	09/05/2012		Court of Common Pleas - Philadelphia County

Hearing Notice

11	09/05/2012		Court of Common Pleas - Philadelphia County

Hearing Notice

12	09/05/2012		Commonwealth of Pennsylvania

Motion for Continuance

ADA: Jude Conroy Def. Atty: David Nenner Steno: Michael Ammann Court Clerk: Kathryn Morris

Defense request. This case is returned from Judge Temin to be re-spun. NCD: 9/13/2012 room 1105

1	09/13/2012		Commonwealth of Pennsylvania

Motion for Continuance

ADA: Jude Conroy Def. Atty: David Nenner Steno: Michael Ammann Court Clerk: Kathryn Morris

Listed for trial with Judge McDermott on April 29, 2013 court room 908. Trial readiness conference is listed on September 18, 2012 court room 908. Both counsel are attached for trial.

4	09/13/2012		Court of Common Pleas - Philadelphia County

Hearing Notice

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
7	09/13/2012		Lerner, Benjamin
Counsel Attached for Trial			
11	09/13/2012		Court of Common Pleas - Philadelphia County
Hearing Notice			
14	09/13/2012		Lerner, Benjamin
Counsel Attached for Trial			
The Court orders David Nenner and ADA Jude Conroy attached for a 3 day Jury Trial on 4/29/2013 in Courtroom 908			
3	09/20/2012		Court of Common Pleas - Philadelphia County
Hearing Notice			
4	09/20/2012		Commonwealth of Pennsylvania
Motion for Continuance			
ADA: Jude Conroy Def. Atty: David Nenner Steno: Judy Bonner Court Clerk: Kathryn Morris			
Trial scheduled for February 25, 2013 with Judge Byrd in court room 607. Trial readiness conference date September 27, 2012 room 607. Earliest possible date. Counsel are attached.			
5	09/20/2012		Lerner, Benjamin
Counsel Attached for Trial			
7	09/20/2012		Lerner, Benjamin
Counsel Attached for Trial			
The Court orders ADA Jude Conroy and David Nenner attached for a 3 day Jury Trial on 2/25/2013 in Courtroom 607			
3	09/27/2012		Court of Common Pleas - Philadelphia County
Hearing Notice			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
5	09/27/2012		Byrd, Sandy L.V.
Trial Date to Remain Listed 11/30/12 for outstanding 404b concerns and 1/25/13 for final trial readiness conference courtroom 607. ADA: Conroy Atty: Nenner Steno: Venneri Clerk: Sharpe			
1	11/30/2012		Byrd, Sandy L.V.
Trial Date to Remain Commonwealth motion to be filed by 12/21/2012. Next court date 1/25/13 courtroom 607 for ruling on motion and 2/25/2013 for jury trial. ADA: Conroy, Atty: Nenner, Steno: Jackson, Clerk: Sharpe			
4	11/30/2012		Court of Common Pleas - Philadelphia County
Hearing Notice			
D1/1	12/21/2012		Thomas, Ronald
Motion in Limine			
D2/1	01/11/2013		Nenner, David Scott
Omnibus Pre-Trial Motion			
D3/2	01/11/2013		Nenner, David Scott
Response to CW's Motion in Limine			
3	01/25/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
3	02/08/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
6	02/08/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

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Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

Court Case

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Ronald Thomas

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
7	02/08/2013		Byrd, Sandy L.V.
Trial Date to Remain Listed 2/15/13 for inclusion of discovery and 2/22/13 for ruling on commonwealth motion. ADA: Conroy; Atty: Nenner; Steno: Mansfield; Clerk: Sharpe			
3	02/15/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
6	02/15/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
7	02/15/2013		Byrd, Sandy L.V.
Trial Date to Remain Listed 2/25/13 for trial, court will rule on motion 2/22/13 courtroom 607. ADA: Conroy; Atty: Nenner; Steno: Flannagan; Clerk: Sharpe			
4	02/22/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
6	02/22/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
8	02/22/2013		Byrd, Sandy L.V.
Order Granting Motion for Continuance Court on trial. Motion in progress, next court date 2/26/13 courtroom 607. ADA: Conroy; Atty: Nenner; Steno: Flannagan; Clerk: Sharpe			
3	02/26/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
5	02/26/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
3	02/27/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
5	02/27/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
3	02/28/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
2	03/01/2013		Byrd, Sandy L.V.
Jury Selection			
ADA: J.Conroy; Atty: D. Nenner; Steno: K. Flannagan; Clerk: E. Sharpe			
5	03/01/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
1	03/02/2013		Byrd, Sandy L.V.
Jury Selection Continued			
Eleven (11) jurors selected ncd 3/4/13 courtroom 607 to complete selection.			
3	03/04/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
3	03/05/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
3	03/06/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

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CRIMINAL DOCKET

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
3 Hearing Notice	03/07/2013		Court of Common Pleas - Philadelphia County
4 Testimony Resumes	03/07/2013		Byrd, Sandy L.V.
3 Hearing Notice	03/08/2013		Court of Common Pleas - Philadelphia County
4 Testimony Resumes	03/08/2013		Byrd, Sandy L.V.
3 Hearing Notice	03/11/2013		Court of Common Pleas - Philadelphia County
4 Testimony Resumes	03/11/2013		Byrd, Sandy L.V.
5 Prosecution Rests	03/11/2013		Byrd, Sandy L.V.
3 Hearing Notice	03/12/2013		Court of Common Pleas - Philadelphia County
4 Defense Rests	03/12/2013		Byrd, Sandy L.V.
5 Closing Arguments	03/12/2013		Byrd, Sandy L.V.
6 Jury Charged	03/12/2013		Byrd, Sandy L.V.
7 Jury Retires for Deliberation	03/12/2013		Byrd, Sandy L.V.

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	03/13/2013		Byrd, Sandy L.V.
Jury Deliberation Resumes			
4	03/13/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
3	03/14/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
1	03/15/2013		Byrd, Sandy L.V.
Jury Deliberation Resumes			
4	03/15/2013		Court of Common Pleas - Philadelphia County
Hearing Notice			
1	03/18/2013		Byrd, Sandy L.V.
Jury Deliberation Resumes			
2	03/18/2013		Byrd, Sandy L.V.
Jury Returns with Verdict			
3	03/18/2013		Byrd, Sandy L.V.
Guilty ADA: Conroy; Atty: Nenner; Steno: Finn; Clerk: Sharpe			
D4/4	03/18/2013		Byrd, Sandy L.V.
Order - Sentence/Penalty Imposed Sentenced To Life In Prison With Out The Possibility Of Parole.			
5	03/18/2013		Court of Common Pleas - Philadelphia County
Penalty Assessed			
D5/6	03/18/2013		Thomas, Ronald
Notice of Appeal to the Superior Court JOS J. Byrd file located			

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
Service To		Service By	
Issue Date	Service Type	Status Date	Service Status

Byrd, Sandy L.V.
04/15/2013 First Class
Philadelphia County District Attorney's Office
04/15/2013 First Class

D5A/1 04/15/2013 Thomas, Ronald
Motion for Transcripts
3/1/13 - 3/18/13

D6/D6A/1 04/25/2013 Byrd, Sandy L.V.
Order Issued Pursant to Pa.R.A.P. 1925(b)
Nenner, David Scott
04/25/2013 First Class
Philadelphia County District Attorney's Office
04/25/2013 First Class
Thomas, Ronald
04/25/2013 First Class

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1 04/26/2013 Cotter, John P.
Entry of Appearance

D7/D7A/1 04/30/2013 Byrd, Sandy L.V.
Order Issued Pursant to Pa.R.A.P. 1925(b)
Cotter, John P.
04/30/2013 First Class
Philadelphia County District Attorney's Office
04/30/2013 First Class
Thomas, Ronald
04/30/2013 First Class

D8/1 05/14/2013 Stein, Gerald A.
Motion for Extension of Time

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
Service To		Service By	
Issue Date	Service Type	Status Date	Service Status

D9/D9A/2 05/14/2013 Byrd, Sandy L.V.
Order Issued Pursant to Pa.R.A.P. 1925(b)
Philadelphia County District Attorney's Office
05/14/2013 First Class
Thomas, Ronald
05/14/2013 First Class

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3 05/16/2013 Court of Common Pleas - Philadelphia County
Hearing Notice

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4 05/16/2013 Byrd, Sandy L.V.
Status Listing
Status Of Appeal.

Atty: Stein; ADA: Mccauley; Steno: Hall; Clerk: Sharpe

D10/5 05/16/2013 Stein, Gerald A.
Motion to Vacate Previous Order to File 1925(b) Statment

D11/6 05/16/2013 Byrd, Sandy L.V.
Order Denying Motion for Extension of Time
Defense request for extension of time to file statement of matters complained on appeal is denied.

ADA: McCauley; Atty: Stein/Moyer; Steno: Hall; Clerk: Sharpe

D12/1 05/24/2013 Stein, Gerald A.
Preliminary Statement of Matters

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2 05/31/2013 Court of Common Pleas - Philadelphia County
Preliminary Docket Entries Prepared

D13/1 06/12/2013 Byrd, Sandy L.V.
Order Issued Pursant to Pa.R.A.P. 1925(b)

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
Service To		Service By	
Issue Date	Service Type	Status Date	Service Status

Philadelphia County District Attorney's Office
06/12/2013 First Class
Stein, Gerald A.
06/12/2013 First Class
Thomas, Ronald
06/12/2013 First Class

D14/1 06/26/2013 Stein, Gerald A.
Revised Statement of Matters

D15/1 07/17/2013 Byrd, Sandy L.V.
Order Issued Pursant to Pa.R.A.P. 1925(b)
Philadelphia County District Attorney's Office
07/17/2013 First Class
Stein, Gerald A.
07/17/2013 First Class
Thomas, Ronald
07/17/2013 First Class

D16/1 07/29/2013 Stein, Gerald A.
Statement of Matters Complained on Appeal
Statement of Errors Complained on Appeal filed on behalf of Defendant.

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1 08/25/2013 Court of Common Pleas - Philadelphia County
Entry of Civil Judgment

D18/1 09/19/2013 Court of Common Pleas - Philadelphia County
Transcript of Proceedings Filed
Motion 2/8/134, Hrng. 2/15/13, 3-1-13, 3-4-13, 3-5-13, 3-6-13, 3-7-13, 3-8-13, 3-11-13, 3-13-13, 3-14-13, 3-18-13 (JT VOL. 1)

D17/1 12/20/2013 Byrd, Sandy L.V.
Opinion

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

DOCKET

Docket Number: CP-51-CR-0013001-2010

CRIMINAL DOCKET

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ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
2	12/20/2013		Court of Common Pleas - Philadelphia County
Appeal Docket Entries and Served			
3	12/20/2013		Court of Common Pleas - Philadelphia County
Certificate and Transmittal of Record to Appellate Court			
1	03/07/2014		Court of Common Pleas - Philadelphia County
Transcript from Lower Court Notes of 11/30/12 sent to Superior Court			
2	03/07/2014		Court of Common Pleas - Philadelphia County
Certificate adn Transmittal of Notes of 11/0/12			

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

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CRIMINAL DOCKET

Court Case

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CASE FINANCIAL INFORMATION

Last Payment Date: Total of Last Payment:

Thomas, Ronald Defendant	Assessment	Payments	Adjustments	Non Monetary Payments	Total
Costs/Fees					
ATJ	$3.00	$0.00	$0.00	$0.00	$3.00
Booking Center Fee (Philadelphia)	$175.00	$0.00	$0.00	$0.00	$175.00
CJES	$2.25	$0.00	$0.00	$0.00	$2.25
CQS Fee Felony (Philadelphia)	$100.00	$0.00	$0.00	$0.00	$100.00
Commonwealth Cost - HB627 (Act 167 of 1992)	$18.40	$0.00	$0.00	$0.00	$18.40
Costs of Prosecution - CJEA	$50.00	$0.00	$0.00	$0.00	$50.00
County Court Cost (Act 204 of 1976)	$26.80	$0.00	$0.00	$0.00	$26.80
Crime Lab User Fee - State Police	$50,000.00	$0.00	$0.00	$0.00	$50,000.00
Crime Victims Compensation (Act 96 of 1984)	$35.00	$0.00	$0.00	$0.00	$35.00
DNA Detection Fund (Act 185-2004)	$250.00	$0.00	$0.00	$0.00	$250.00
Domestic Violence Compensation (Act 44 of 1988)	$10.00	$0.00	$0.00	$0.00	$10.00
Firearm Education and Training Fund	$5.00	$0.00	$0.00	$0.00	$5.00
JCPS	$10.25	$0.00	$0.00	$0.00	$10.25
Judicial Computer Project	$8.00	$0.00	$0.00	$0.00	$8.00
State Court Costs (Act 204 of 1976)	$12.30	$0.00	$0.00	$0.00	$12.30
Victim Witness Service (Act 111 of 1998)	$25.00	$0.00	$0.00	$0.00	$25.00
Appeal to Superior Court (Philadelphia)	$40.00	$0.00	$0.00	$0.00	$40.00
Civil Judgment/Lien (Philadelphia)	$83.94	$0.00	$0.00	$0.00	$83.94
Costs/Fees Totals:	$50,854.94	$0.00	$0.00	$0.00	$50,854.94
Grand Totals:	$50,854.94	$0.00	$0.00	$0.00	$50,854.94

** - Indicates assessment is subrogated

APPENDIX B

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Attorney for Appellant

COMMONWEALTH	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY TRIAL DIVISION CRIMINAL SECTION
v.	:	
RONALD THOMAS	:	CP#: CP-51-CR-0013001-2010 Pa. Super. Ct.#: 1121 EDA 2013

PA. R. APP. P. 1925(B) STATEMENT OF MATTERS TO BE RAISED ON APPEAL

In accordance with the July 17, 2013 Order of this Honorable Court, Appellant, RONALD THOMAS, submits the following list of issues to be raised on appeal pursuant to Pa. R. App. P. 1925(b).[1]

1. In violation of Appellant's equal protection and due process rights under the Thirteenth and Fourteenth Amendments of the U.S. Constitution as well as Article I, §§ 1, 9 of the Pennsylvania Constitution, the Trial Court permitted the Commonwealth to present Appellant's rap lyrics and rap-related visual images as inculpatory evidence. Given the often fictional nature of rap "narratives," this evidence was irrelevant and constituted inadmissible "other acts" evidence. Pa. R. Evid. 401; Pa. R. Evid. 403; and Pa. R. Evid. 404(b). Moreover, the Commonwealth failed to properly authenticate the dates on which the rap song "Take It How You Wanna" was composed, recorded, and/or released. Pa. R. Evid. 901. Additionally, given that Appellant is an African-American who resided in an economically challenged urban area, evidence concerning his involvement in rap music violated his equal protection and due process rights.

2. In violation of Appellant's confrontation rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the Trial Court erred in allowing the Commonwealth to present as evidence the decedent's purported hearsay statement to his brother, Hasan Ashmore; in this hearsay statement, the decedent

[1]On March 18, 2013, Appellant was convicted of First Degree Murder (18 Pa.C.S.A. § 2502(a)) and PIC (18 Pa.C.S.A. § 907(a).

allegedly "confided" that he had stolen drugs from Appellant. The hearsay failed to satisfy any hearsay exception. Pa. R. Evid. 802 *et seq.*

3. In violation of Appellant's due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, Appellant's convictions were against the weight of the evidence where the Commonwealth eyewitnesses (1) provided multiple inconsistent statements; (2) at the time of the homicide were under the influence of intoxicating substances which impaired their ability to accurately observe and recall events; (3) at the time of their out-of-court accusations against Appellant, had pending criminal cases for which they desired favorable treatment; and/or (4) had convictions for crimen falsi offenses.

4. In violation of Appellant's due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the evidence was insufficient to support Appellant's First Degree Murder conviction. The Commonwealth failed to prove beyond a reasonable doubt that Appellant committed the murder. No forensic evidence (e.g. fingerprints or firearm purchase records) linked Appellant to the firearm used in the fatal shooting. Furthermore, no witness testified at trial that Appellant was the shooter; instead, Appellant's guilt was premised solely on witnesses' inconsistent and recanted out-of-court statements.

5. In violation of Appellant's due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the Commonwealth repeatedly presented extensive evidence of witness intimidation where (1) the Commonwealth's evidence failed to demonstrate that the "intimidation" was related to Appellant's prosecution and (2) Appellant had no involvement in the intimidation. This inadmissible evidence included: (1) an incident in which Rashann Jackson purportedly threatened Stephanie Alexander in a laundromat; (2) a beating of Raphael Spearman in a cell room; (3) Raphael Spearman's "retraction" letter; (4) shots fired at Alexander's home and at Kaheem Brown; (5) the "posting" in a public place of Brown's statement.

6. In violation of Appellant's due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the Trial Court erred in denying Appellant's mistrial motion. (N.T., 03/15/13, at 16-17). Unable to reach a verdict, the jury began to speculate about information that was not part of the evidence presented at trial. (N.T., 03/15/13, at 16-17).

WHEREFORE, Appellant respectfully submits the above Statement of Matters Complained of on Appeal in accordance with the requirements of Pa. R. App. P. 1925(b).

Respectfully submitted,

Gerald A. Stein, Esq.

Ruth A. Moyer, Esq.

July 30, 2013

VERIFICATION

It is verified that the statements made in the foregoing are true and correct and understands that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Gerald A. Stein, Esq.

Ruth A. Moyer, Esq.

July 30, 2013

CERTIFICATION OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served by first-class mail as follows:

Hugh Burns, Esquire
Chief, Appeals Unit
Office of the Philadelphia District Attorney
3 South Penn Square
Philadelphia, PA 19107

Gerald A. Stein, Esq.

Ruth A. Moyer, Esq.

July 30, 2013

APPENDIX C

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0013001-2010
v.	:	
	:	1121 EDA 2013
RONALD THOMAS	:	

OPINION

Byrd, J. **December 20, 2013**

Ronald Thomas was tried before a jury commencing on March 4, 2013. On March 18, 2012 the jury convicted defendant of murder in the first degree and possession of an instrument of crime. On that same day, defendant was sentenced to life imprisonment in a state correctional facility without the possibility of parole. Defendant filed a notice of appeal on April 16, 2013, and on April 24, 2013, defendant was ordered to file a Statement of Matters Complained of on Appeal. Said Statement was filed on July 29, 2013.

STATEMENT OF FACTS

Defendant Ronald "Hollowman" Thomas, a member of a local group commonly referred to as Team A, was an alleged drug dealer and aspiring rapper. (N.T., 3/7/13, p. 54). Team A members included defendant, decedent Anwar Ashmore, Raphael Spearman, Daren "Dee" Haynesworth, Dennis "Den Den" Williams, Tyree "Wink" Tucker, Jeffrey "Haiti" Jones and several others. (N.T., 3/7/13, pp. 54-56). Team A members routinely congregated at the intersection of Stanley and Huntingdon Streets in Philadelphia, and they conducted their affairs and promoted their music in that general neighborhood.

Between late 2008 and early 2009, Kaheem Brown, a friend to defendant and a possible Team A member, was shot several times, reportedly by members of a rival group. Also, in early 2009, decedent Anwar Ashmore, friend to defendant, confided in his older brother, Hasan Ashmore, that he had participated in a theft from defendant. (N.T., 03/11/13, pp. 14-16). Showing his brother a plastic bag containing what looked like flour, decedent stated that the bag contained cocaine stolen from defendant's "stash house." (N.T., 03/11/13, p. 16). Decedent went on to state that after taking the drugs, he and his friends divided the stolen cocaine amongst themselves. (N.T., 03/11/13, p. 16). The identity of the thieves remained unknown for several months thereafter. In September 2009, feeling betrayed because he believed that a friend was responsible for the theft, defendant recorded a song called "Take It How You Wanna," which outlined his intention to kill the person responsible.

At some point, defendant learned the identity of those responsible for the theft. On April 22, 2010 at around 9:00p.m., Team A members, including Raphael Spearman, Jeffrey Jones and Daren Haynesworth congregated as they would normally at the intersection of Stanley and Huntingdon Streets. As the group of men stood around, they spoke about topics including potential retaliation against a rival group for Brown's shooting. During this conversation among friends, defendant drew his weapon and shot Anwar Ashmore in the chest twice, from point-blank range, killing him. (N.T., 03/08/13 p. 108). Everyone present at that time fled the scene of the shooting, leaving decedent mortally wounded in the street.

Police Officers William Forbes and Anthony Ricci were the first officers to arrive on the scene, approximately one minute after the radio call of the shooting was dispatched.

(N.T., 03/05/13, p. 106). Upon finding the victim lying in the street gasping for air, Officers Forbes and Ricci transported Mr. Ashmore to Temple University Hospital where he was pronounced dead shortly thereafter. (N.T., 03/11/13, p. 109). Crime Scene Unit Officers Maresca and Goraldo, working together, conducted a walk-through of the secured crime scene, where a projectile and two (2) .45 caliber fired cartridge casings were recovered. (N.T., 3/7/13, pp. 9,16). Detectives interviewed several witnesses at the outset of the investigation, including Jeffrey "Haiti" Jones and Troy Devlin on April 24, 2010. (N.T., 03/06/13, p. 224). Based on information gathered during the investigation of decedent's death, defendant was identified as a suspect and arrested on April 28, 2010, six (6) days after the shooting. (N.T., 03/11/13, p. 52).

Kaheem Brown was arrested after exchanging gunfire on the public streets in an unrelated matter and was brought into the Homicide Unit to be questioned about Mr. Ashmore's death. (N.T., 3/7/13, p. 65). Brown told police that on April 22, 2010, after having recently returned to the neighborhood from a local fashion show, he found a seat on a bench at Stanley and Huntingdon, across the street from where defendant, decedent, Spearman and others were having a conversation. (N.T., 3/7/13, p. 109). From his vantage point, Brown watched defendant remove a gun from his waistband, aim and shoot Mr. Ashmore. (N.T., 3/7/13, p. 109). After the shooting, Brown fled to his home on Myrtlewood Street. (N.T., 3/7/13, p. 109).

Raphael Spearman was arrested on May 22, 2010, in possession of the weapon used to kill Anwar Ashmore. (N.T., 03/11/13, p. 55). On August 4, 2010, Spearman was brought in to speak with Homicide Unit detectives. (N.T., 03/05/13, p. 39). Spearman told detectives that he and his friends, including decedent and defendant, were hanging out at

Stanley and Huntingdon Streets on the evening of April 22, 2010. (N.T., 03/06/13, p. 210). He further stated that he saw defendant pull out a gun and shoot decedent. (N.T., 03/06/13, p. 210). The men then fled the scene, with defendant and Spearman running away together. (N.T., 03/06/13, p. 210). Defendant then handed Spearman a bag containing the murder weapon with instructions to put it away. (N.T., 03/06/13, p. 211). Spearman stated that he'd kept the gun in the basement of his home until being arrested with it in May 2010. (N.T., 03/06/13, p. 211).

After Brown implicated defendant in this shooting, he and his family were placed in danger from Team A members who attacked him, his home and his family, purportedly on behalf of defendant, although no evidence of defendant's complicity in these actions was proven. Brown's statement to police was posted in his neighborhood Chinese restaurant at 29th and Huntingdon; the same neighborhood where Team A members frequented and where Mr. Ashmore was killed. Brown's statement was hand-delivered to his mother, Stephanie Alexander, at her home after being retrieved from the store window. (N.T., 3/8/13, p. 258). Although unable to connect it to defendant, Brown's statement to police was later discovered during the execution of a search at the address of 2623 North Stanley Street. (N.T., 03/08/13, p. 327). Inside a bag containing the retail sales box for Haynesworth's cellular phone was an envelope allegedly from defendant, now in prison, addressed to Haynesworth at 3244 West Huntingdon Street, Philadelphia, PA 19131 containing Brown's statement and a .9mm handgun. (N.T., 03/08/13, p. 331).

In addition to broadcasting his statement for the neighbors to see, Brown and his family were direct targets of gunfire. On October 26, 2012, around 3:00 p.m., Brown reported to his mother that as he stood at or near the corner of 31st Street and Huntingdon

Avenue, Haynesworth, along with "Merse," another Team A member, fired a number of shots at him. (N.T., 03/07/13, pp. 183-84). Ms. Alexander contacted Detective Peters, the detective to whom Brown gave a statement, and explained that her son had been shot at in the street by Team A members Haynesworth and "Merse." (N.T., 03/08/13 p. 233).

Brown frequently spent his free time at the intersection of 29th and Huntingdon Streets, just one block away from a laundromat at 30th and Huntingdon Streets. (N.T., 3/7/13, p. 57). On November 19, 2010, in that laundromat, where Stephanie Alexander routinely did the family's laundry, she was approached by Haynesworth and Tyree Tucker, both Team A members. (N.T., 3/7/13, p. 190). While in the company of another son, daughter and granddaughter, Ms. Alexander observed Rashann James and Tucker have a brief conversation outside of the laundromat before Rashann James entered. (N.T., 3/8/13, p. 237). James walked over to Ms. Alexander and commanded her not to move, before pulling a semiautomatic handgun from his waistband and placing it against her right temple. (N.T., 3/8/13, p. 246-49). As Ms. Alexander's son and the laundromat attendant hid in terror, she fell to the floor, covering her face, and James pulled the trigger several times. (N.T., 3/8/13, p. 249). Fortunately for Ms. Alexander, the gun did not discharge and James ran from the laundromat, allowing her to retreat to her home to contact police. (N.T., 3/8/13, p. 249). The threats continued, and Ms. Alexander again called the police to report shots fired at and into her home. On November 27, 2010, at approximately 10:03p.m., police officers arrived at Ms. Alexander's home and observed several holes in the front of her home and windows, and four (4) fired cartridge casings, and two (2) bullets outside. (N.T., 3/8/13, pp. 273, 310).

Spearman was also subjected to acts of violence, arguably on behalf of defendant, including an assault at the courthouse and a coerced confession to having committed the murder of Mr. Ashmore. On October, 19, 2010, Spearman appeared to testify at defendant's preliminary hearing and disavowed his signed statement which implicated defendant. (N.T., 03/06/13 p. 67). However, having been arrested with the murder weapon, Spearman incurred a separate charge for its possession, and returned to the Criminal Justice Center for his own preliminary hearing on November 9, 2010. (N.T., 03/11/13, p. 78). After that preliminary hearing, Spearman was assaulted in the basement of the Criminal justice Center, purportedly by men acting on defendant's behalf. (N.T., 03/11/13, p. 78). On a recorded phone call just a few days after being assaulted in the basement of the Criminal Justice Center, Spearman called his brother and stated that H or Hollowman, both nicknames for defendant, had "put people on [his] top." (N.T., 03/11/13, p. 79).

Within two (2) weeks of being assaulted in the courthouse, on or around November 25, 2010, and while still incarcerated, Spearman allegedly authored an affidavit which contained a confession to the murder of decedent. (N.T., 03/06/13, pp. 92-93). In this affidavit, Spearman purported to exculpate defendant, and "take full responsibility" for decedent's death. (N.T., 03/05/13 p. 363). Later, Spearman stated to an investigator that the confession was occasioned by a letter he received in his cell which contained instructions to confess to the shooting "or something was going to happen to him." (N.T., 03/05/13 p. 363). However, at trial, Spearman stated that the confession was written of his own free will, and was not occasioned by any force or threats. (N.T., 03/06/13, p. 95). He also denounced the confession and identified a third person, Dennis "Den Den" Williams, as the shooter during his testimony. (N.T., 3/6/13, pp. 7-12).

Following the various acts of violence outlined above, each witness told several different stories at varying times throughout the investigation of this case, and ultimately at trial. However, defendant was brought to trial in March 2013, where each eyewitness appeared before a jury, subject to cross examination, and the jury subsequently returned guilty verdicts on the charges of murder in the first degree and possession of an instrument of crime.

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

Defendant raised the following issues in his Statement of Matters Complained of on Appeal, in accordance with Pennsylvania Rule of Appellate Procedure 1925(b)[1]:

1. In violation of Appellant's equal protection and due process rights under the Thirteenth and Fourteenth Amendments of the U.S. Constitution as well as Article I, §§ 1,9 of the Pennsylvania Constitution, the Trial Court permitted the Commonwealth to present Appellant's rap lyrics and rap-related visual images as inculpatory evidence. Given the often fictional nature of rap "narratives," this evidence was irrelevant and constituted inadmissible "other acts" evidence. Pa. R. Evid. 401; Pa. R. Evid. 403; and Pa. R. Evid. 404(b). Moreover, the Commonwealth fail to properly authenticate the dates on which the rap song "Take It How You Wanna" was composed, recorded, and/or released. Pa. R. Evid. 901. Additionally, given that Appellant is an African-American who resided in an economically challenged urban area, evidence concerning his involvement in rap music violated his equal protection and due process rights.

2. In violation of Appellant's confrontation rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the Trial Court erred in allowing the Commonwealth to present as evidence the decedent's purported hearsay statement to his brother, Hasan Ashmore; in this

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

hearsay statement, the decedent allegedly "confided" that he has stolen drugs from Appellant. The hearsay statement failed to satisfy any hearsay exception. Pa. R. Evid. 802 *et seq.*

3. In violation of Appellant's due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, Appellant's convictions were against the weight of the Commonwealth eyewitnesses (1) provided multiple inconsistent statements; (2) at the time of the homicide were under the influence of intoxicating substances which impaired their ability to accurately observe and recall events; (3) at the time of the out-of-court accusations against Appellant, had pending criminal cases for which they desired favorable treatment; and/or (4) had convictions for crimen falsi offenses.

4. In violation of Appellant's due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the evidence was insufficient to support Appellant's First Degree Murder conviction. The Commonwealth failed to prove beyond a reasonable doubt that Appellant committed the murder. No forensic evidence (e.g. fingerprints or firearm purchase records) linked Appellant to the firearm used in the fatal shooting. Furthermore, no witnesses testified at trial that Appellant was the shooter; instead Appellant's guilt was premised solely on witness's inconsistent and recanted out-of-court statements.

5. In violation of Appellant's due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the Commonwealth repeatedly presented extensive evidence of witness intimidation where (1) the Commonwealth's evidence failed to demonstrate that the "intimidation" was related to Appellant's prosecution and (2) Appellant had no involvement in the intimidation. This inadmissible evidence included: (1) an incident in which Rashann Jackson purportedly threatened Stephanie Alexander in a laundromat; (2) a beating of Raphael Spearman in a cell room; (3) Raphael Spearman's "retraction" letter; (4) shots fired at Alexander's home and at Kaheem Brown; (5) the "posting" in a public place of Brown's statement.

6. In violation of Appellant's due process rights under the Sixth and Fourteenth Amendments of the U.S. Constitution as well as Article I, § 9 of the Pennsylvania Constitution, the Trial Court erred in denying Appellant's mistrial motion. (N.T. 03/15/13, at 16-17). Unable to reach a verdict, the jury began to speculate about information that was not part of the evidence presented at trial. (N.T. 03/15/13, at 16-17).

DISCUSSION

Defendant's initial allegation of error is that it was improper for this court to admit evidence regarding his involvement with rap music. Defendant contends that his Equal Protection and Due Process rights were violated when this court allowed the jury to hear evidence regarding his involvement in rap music and view rap-related images which depicted defendant. These rap-related images included still photographs from music videos and artwork for defendant's album, which depicted defendant and his friends, many of whom are intimately involved in this case. Defendant has failed to articulate how his race and the admission of evidence regarding his choice of musical expression combined to separate him from others so as to violate the Equal Protection Clause of United States and Pennsylvania Constitutions. Defendant conceded his voluntary involvement in rap music, and his own music video was introduced as evidence at his trial. Further, counsel failed to raise any objections of constitutional significance at any point during the pendency of this trial, despite extensive argument from both sides, and careful consideration of each proffered piece of evidence. (N.T., 02/22/13). Defendant's failure to raise or develop these claims at trial before this court is fatal to his claim on appeal. It is well-settled that where a party fails to raise an issue, even one of constitutional dimension, the issue is waived and cannot be raised on appeal. *See* Pa. R.A.P. 302(a); Commonwealth v. Hawkins, 441 A.2d 1308, 1312 n. 6 (1982) ("[B]ecause issues, even those of a constitutional dimension, cannot

be raised for the first time on appeal, his contentions have been waived."). Accordingly, this allegation is without merit.

Defendant also contends that the rap lyrics to his song entitled "Take It How You Wanna," constituted "other acts" evidence and were used as inculpatory evidence, in contravention to the Pennsylvania Rules of Evidence. The Pennsylvania Rules of Evidence prohibit the use of character evidence to prove a defendant's conformity therewith. Specifically, they provide that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Pa. R. E. 404(b). However, the rules provide that "this evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Pa. R.E. 404(b)(2). Specifically, "evidence of prior criminal activity is relevant and admissible when offered to prove motive or malice." Commonwealth v. LaCava, 666 A.2d 221, 229 (Pa. 1995). To warrant admission at trial, the probative value of such evidence must outweigh its potential for prejudice. Pa. R.E. 404(b)(2). When weighing the potential for prejudice of evidence of other crimes, wrongs, or acts, the trial court may consider whether and how much such potential for prejudice can be reduced by cautionary instructions. LaCava 666 A.2d at 229. As such, when evidence is admitted for this purpose, the party against whom it is offered is entitled to a limiting instruction if necessary. Commonwealth v. Hutchinson, 811 A.2d 556, 562 (Pa. 2002).

In this case, the rap lyrics were proffered as evidence of defendant's motive for killing decedent. Contrary to defendant's assertions, the rap lyrics at issue were not admitted to show defendant's bad character or propensity to commit violence. As the

evidence at trial demonstrated, defendant was involved in the sale of drugs, and a large quantity of drugs was stolen from his "stash house." Following the theft of his drugs, defendant recorded a song wherein he stated that the stolen drugs were worth a significant amount of money, money which substantially impacted his quality of life, and that said act of betrayal would be his reason for killing the person responsible. This demonstration of defendant's motive, growing out of his involvement in drug dealing, and the statement of intent contained in his rap lyrics, constituted the type of evidence that our courts have unequivocally deemed admissible in similar situations. *See* Commonwealth v. Hall, 565 A.2d 144, 149 (Pa. 1989) (prosecution could question defendant and others about defendant's past drug dealings to establish defendant's revenge motive for killings of drug dealers who recently cheated defendant in large drug deal); Commonwealth v. Reid, 642 A.2d 453, 461 (Pa. 1994) (evidence of defendant's connection with Junior Black Mafia was admissible to prove motive in prosecution for first-degree murder because inference from such evidence was that defendant was a Junior Black Mafia enforcer who killed victim for stealing drugs). Accordingly, this evidence was properly admitted to demonstrate defendant's motive for killing the decedent.

In contending that the rap-related evidence was improperly admitted, defendant further argues that the date and time of the song's recording and release were not properly authenticated. When a party offers evidence contending that the evidence is connected with a person, the "evidence which a party seeks to offer at trial must be authenticated by other evidence establishing a connection between the offered evidence and the parties or events which are the subject of the litigation." *See* Commonwealth v. Pollock, 606 A.2d 500, 506(Pa. Super. 1992). To properly authenticate an item of evidence, "the proponent must

produce evidence sufficient to support a finding that the item is what the proponent claims it is." Pa. R. Evid. 901. This may be accomplished by and through testimony of a witness with knowledge. Id. The ultimate determination of authenticity is for the jury. A proponent of a document need only present a prima facie case of *some* evidence of genuineness in order to put the issue of authenticity before the fact-finders. Commonwealth v. Brooks, 508 A.2d 316, 320 (Pa. Super. 1986).

The authenticity of the album and the songs contained therein were not at issue in this case. There was no discrepancy regarding defendant's voice, album art, or predisposition to record rap music and pursue a rap career, as all witnesses attested to knowledge of defendant's pursuit of a rap career. When there is a question as to the authenticity of an exhibit, the trier of fact has the duty to resolve the issue. Pa. R. Evid. 901. This evidence was introduced to demonstrate the knowledge, intent, and state of mind of defendant; not to demonstrate the truth of its recording or that defendant was in fact the one who so recorded. (N.T., 02/22/13 p. 137). Further, and more importantly, it was represented to this court that the album Ear Bleed, and the song "Take It How You Wanna" were recorded and/or released on September 6, 2009. (N.T., 02/22/13 p. 143). As there was no dispute regarding the fact that the recording was made and that its contents were *defendant's vocal recordings, and witnesses such as Spearman and Brown testified to their* familiarity with the recording, this audio recording was properly authenticated. Thus, based on the foregoing discussion, all rap-related evidence was properly submitted for the jury's consideration, and this allegation of error is wholly without merit.

Defendant's second allegation of error is that this court improperly admitted a statement from the decedent in this case, wherein he admitted to being responsible for

stealing drugs from defendant. Contending that decedent's statement to his brother was hearsay, defendant argues that this statement should not have been presented to the jury. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein. Commonwealth v. Puksar, 740 A.2d 219, 225 (Pa. 1999). The rule against admitting hearsay evidence stems from its assumed unreliability, as the declarant cannot be challenged regarding the accuracy of the statement. Commonwealth v. Rush, 605 A.2d 792, 795 (1992). There are, however, several recognized exceptions to the hearsay rule, including the exception for statements which illustrate the declarant's state of mind. Our Supreme Court has explained the rationale underlying the state of mind exception to the hearsay rule as follows:

> Intention, viewed as a state of mind, is a fact, and the commonest way for such a fact to evince itself is through spoken or written declarations. It is therefore because of the impossibility, in many cases, of proving intention apart from personal declarations, that they are admitted. The true basis of their admission, then, is necessity, because of which an exception to the hearsay rule is recognized....

Commonwealth v. Begley, 780 A.2d 605, 623 (Pa. 2001) (citation omitted). Where the declarant's out-of-court statements demonstrate his state of mind, are made in a natural manner, and are material and relevant, they are admissible pursuant to the exception. Id. Further, the determination of whether such statements are admissible is within the sound discretion of the trial court and will be reversed only upon an abuse of that discretion. Id. at 623-24.

In the instant case, this court found that the testimony at issue met the well-established state of mind exception to the hearsay rule. The decedent's confession regarding his complicity in a crime—stealing drugs from defendant—is admissible as a

statement of his then-existing state of mind. (N.T., 02/22/13 p. 139). Explaining that he feared for his life because of his involvement in the theft of defendant's drugs, decedent's fear was ultimately realized when defendant shot and killed him shortly thereafter. In this case, the declarant's death rendered him unavailable, and the evidence included eyewitness testimony which affirmatively proved that defendant shot and killed decedent. Accordingly, as this statement was properly admitted pursuant to the state of mind exception to the hearsay ban, this allegation of error is without merit.

Defendant's next contention is that the verdict was against the weight of the evidence. "A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict." Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000). A claim alleging the verdict was against the weight of the evidence is addressed to the discretion of the trial court. Commonwealth v. Houser, 18 A.3d 1128, 1135 (Pa. 2011). The exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is abused only "where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, bias or ill will." Widmer, 744 A.2d at 752. A new trial should not be granted because of a mere conflict in the evidence presented by the Commonwealth and defense, or because the trial judge on the same facts would have arrived at a different conclusion. Commonwealth v. Brown, 648 A.2d 1177, 1189 (Pa. 1994). A new trial should be awarded only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. Id. Thus, an appellate court may only reverse the jury's verdict if it is so contrary to the evidence as to shock one's sense of justice. Begley, 780 A.2d at 619.

Despite defendant's contentions, the verdicts returned in this case were consistent with the evidence presented at trial. An appellate court reviews the exercise of the trial court's discretion, but does not determine whether the verdict was actually against the weight of the evidence. Houser, 18 A.3d at 1135. By challenging the weight of the evidence, defendant concedes that the evidence was sufficient to sustain the convictions. Citing recanted and inconsistent statements, alleged drug use, prior crimen falsi convictions, and witnesses' hope for favorable treatment, defendant attacks the credibility of the eyewitnesses who testified at his trial. Although defendant would suggest that, on appeal, the court reconsider the statements provided by the witnesses, the law is well-settled in that "[t]he determination of the credibility of a witness is within the exclusive province of the jury. Commonwealth v. Crawford, 718 A.2d 768, 772 (Pa. 1998). Further, our courts have explained:

> The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon references drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness. The phenomenon of lying, and situations in which prevarications might be expected to occur, have traditionally been regarded as within the ordinary facility of jurors to assess.

Id.

Citing the jury's reliance on the inconsistent and recanted statements of the witnesses, defendant essentially contends that the statements given by the witnesses implicating him as the shooter, given after their own arrests, but before defendant was brought to trial, were improperly considered as evidence of his guilt. However, "neither inconsistencies in the Commonwealth's evidence nor attempts by [witnesses] to avoid involvement in a criminal episode render [their] testimony patently unreliable."

Commonwealth v. Hudson, 414 A.2d 1381, 1385 (Pa. 1980). It is well-settled that prior inconsistent statements are admissible as substantive evidence, so long as they have the indicia of reliability as provided by the Rules of Evidence. In Commonwealth v. Lively, the Supreme Court held that a "prior inconsistent statement may be used as substantive evidence only when the statement is given under oath at a formal legal proceeding; or the statement had been reduced to a writing signed and adopted by the witness; or a statement that is a contemporaneous verbatim recording of the witness's statements." Commonwealth v. Lively, 610 A.2d 7, 11 (Pa. 1992). The prior statements at issue in this case fit within this rule, as they included verbatim written statements signed by the witnesses in the presence of Homicide Unit detectives. Although defendant attributes great significance to the fact that the witnesses recanted or repudiated their prior statements at trial and argued that "[r]ecanting testimony is exceedingly unreliable," as "[t]here is no less reliable form of proof, especially when it involves an admission of perjury," the determination of reliability is a credibility judgment, properly reserved for the jury. *See* Commonwealth v. Crawford, 718 A.2d 768, 772 (Pa. 1998); Commonwealth v. Mosteller, 284 A.2d 786, 788 (Pa. 1971).

Defendant's arguments challenge the credibility determinations made by the jury, judgments which are not subject to review on appeal. In this case, the two eyewitnesses who gave statements to police also took the witness stand at trial and attempted to explain away those prior statements, both on direct and cross examination. During their explanations, both witnesses gave contradictory and often nonsensical responses to both

Commonwealth and defense attorneys. Eyewitness Kaheem Brown made contradictory statements from the very outset of his testimony, including exchanges such as:

> Q. Mr. Brown, do you know the Defendant in this case, Ronald Thomas?
> A. No.
> Q. You don't know him?
> A. No.
> Q. Have you ever seen him before in your life?
> A. Yes.
> Q. On how many occasions?
> A. What do you mean: "On how many occasions?"
> Q. How many times have you seen him in your life?
> A. I seen him a lot.
> Q. Is he a friend of yours?
> A. Yes.
> Q. So, you know him?
> A. Yes.

(N.T. 03/07/13 pp. 52-53).

Although Brown was questioned at length regarding his prior statements, his answers repeatedly changed and often contradicted one another throughout the duration of both his direct and cross examination. *See e.g.* (N.T. 03/07/13 pp. 314-316). Brown repeatedly contradicted himself on the witness stand as he attempted to explain away his statements to police, both the statement implicating defendant, and subsequent statements regarding other incidents. *See e.g.* (N.T. 03/07/13 pp. 205-208). Notably, although Brown testified that his statement inculpating defendant was involuntary and that the detective forcibly signed his name, Detective Peters testified that Brown signed the statement of his own free will. Indeed, within the content of that statement is the acknowledgment by Brown that his signature was left-handed due to an injury to his dominant right hand. (N.T. 03/11/13 p. 69).

Similar to Brown, Spearman told several different stories throughout the course of this homicide investigation and during defendant's trial. After inculpating defendant in the murder at the outset, he subsequently confessed to the shooting, then blamed it on Dennis "Den Den" Williams, who was killed several months before defendant's trial began. (N.T., 3/6/13, pp. 7-12). Spearman disavowed his statement to police at defendant's preliminary hearing, then attempted to take full responsibility for the murder, then blamed the murder on a third party, all while asserting that each story was, in fact, the truth. (N.T. 03/06/13 pp. 7, 63-64, 67). Despite demonstrating a thorough knowledge of incidents which occurred on the street during his terms of incarceration, Spearman testified that he had no knowledge of Williams' death before he made the declaration that Williams was in fact the person responsible for killing decedent. (N.T., 03/06/13 pp. 138, 140).

The trier of fact was free to make judgments about the evidence and choose whether to believe all, some or none of the testimony presented. Commonwealth v. Reed, 990 A.2d 1158, 1161 (Pa. 2010). The fact that the witnesses gave prior inconsistent statements to police was a factor for the jury to consider in determining their credibility. While defendant sought to discredit the witnesses and their testimony at trial, the jury was free to believe the prior inconsistent statements given by those witnesses. As will be discussed further below, several acts of intimidation or retaliation were perpetrated against Spearman and Brown, arguably in attempts to discourage their cooperation in defendant's prosecution, all of which may have affected their testimony at trial, leaving the jury in the best position to assess their credibility. Accordingly, the jury was free to disbelieve some, all or none of their prior inconsistent statements offered as substantive evidence at trial.

As with defendant's challenge to the prior statements of the witnesses, he also contends that the witnesses' expectation of favorable treatment by the Commonwealth rendered the verdicts against the weight of the evidence. With witnesses who are facing criminal punishment for crimes at the time they take the witness stand, "even if no actual promises of leniency have been made, a witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution." Commonwealth v. Rickabaugh, 706 A.2d 826, 839-40 (Pa. Super. 1997). Therefore, "because the possibility exists that the witness hopes for or expects special consideration from the Commonwealth in exchange for his testimony, the jury should be informed in order to properly assess the witness's credibility." Id.

In this case, defense counsel questioned each of the witnesses at length regarding any offers that were presented to them and their expectation for favorable outcomes on their open or pending criminal matters in exchange for their testimony, and any other potential bias which may have otherwise motivated the witnesses to fabricate their testimony. *See e.g.*, (N.T., 03/06/13 pp. 45-47; 03/07/13 pp. 290-91). In fact, in one exchange, defense counsel directly asked Spearman how and why he lied in his statement, thereby highlighting his potential bias:

> Mr. Nenner: What you are saying there is that you felt that you had to put it on [defendant], and lie, because you were trying to save yourself and the others; right?
>
> Spearman: Yeah.

(N.T., 03/06/13, p. 81). The trier of fact makes the determination as to the weight to be attributed to each witness's testimony and the credibility of witnesses is not to be re-weighed on appeal. Commonwealth v. Sanders, 42 A.3d 325, 329 (Pa. Super. 2012). The

jury heard the witnesses testify and it was their duty to observe the demeanor of the witnesses and assess their credibility. In doing so, the jurors were charged with the task to determine the truth of the testimony provided from the witness stand. As illustrated by the return of guilty verdicts, the jury attributed more weight to the prior inconsistent statements of the witnesses, and chose to disbelieve the recantations offered by the witnesses at trial.

Defendant also states that drug use and prior crimen falsi convictions were grounds to disbelieve the witnesses' testimony. However, as with defendant's other challenges to the weight of the evidence, "intoxication is a question that goes to the witness's credibility and the reliability of the identification, not to an inherent limitation the witness might possess." Commonwealth v. Collins, 70 A.3d 1245, 1256 (Pa. Super. 2013). As with intoxication, "evidence of prior convictions [was] introduced for the purpose of impeaching the credibility of a witness [where] the conviction was for an offense involving dishonesty or false statements...." Commonwealth v. Randall, 528 A.2d 1326, 1329 (Pa. 1987).

However, despite defendant's diverse attacks on the weight of the evidence, each allegation questions the credibility of the witnesses, and "[i]t is within the province of the jury, as the finder of fact, to decide whether a witness's testimony lacks credibility." Commonwealth v. Fisher, 769 A.2d 1116, 1123 (Pa. 2001). A trial court should award a new trial on the ground that the verdict is against the weight of the evidence only when "the verdict is so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative so that right may be given another opportunity to prevail." Commonwealth v. Hodge, 658 A.2d 386, 389 (Pa. Super. 1995). Accordingly, as the verdicts

do not shock the conscious, defendant's convictions cannot be deemed against the weight of the evidence, and this allegation of error is wholly without merit.

Defendant's next contention is that the evidence was insufficient to sustain his conviction for first degree murder, citing a lack of forensic evidence and the witnesses' failure to identify defendant as the shooter at trial. On review of sufficiency claims, the court must "evaluate the record in the light most favorable to the [Commonwealth as] verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." Commonwealth v. Stays, 40 A.3d 160, 167 (Pa. Super. 2012). Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged was committed by the accused beyond a reasonable doubt. Id. The Commonwealth need not establish guilt to a mathematical certainty. Id. Finally, the Court may not substitute its judgment for that of the fact finder, "thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, [defendant's] convictions will be upheld." Id.

To obtain a conviction for first-degree murder, the Commonwealth must prove beyond a reasonable doubt that the defendant acted with a specific intent to kill, that a human being was unlawfully killed, that the defendant committed the killing, and that the killing was committed with deliberation. *See* 18 Pa. C.S. § 2502(a), (d). First degree murder is distinguished from all other degrees of criminal homicide by the willful, premeditated and deliberate intent to kill, which may be proven by circumstantial evidence. Commonwealth v. Paolello, 665 A.2d 439, 448 (Pa. 1995). The specific intent to kill may be proven by circumstantial evidence, and may be inferred from the defendant's

use of a deadly weapon on a vital part of the victim's body. Commonwealth v. Begley, 780 A.2d 605, 616 (Pa. 2001). It is well settled that, where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, a challenge to the sufficiency of the evidence must fail. Wright, 846 at 736.

Defendant also challenges the sufficiency of the evidence based on the witnesses' refusal to identify him as the shooter at his trial, despite having identified him as the shooter in prior statements to police. It is well-settled that the Commonwealth's burden may be sustained "by means of wholly circumstantial evidence; the entire trial record is evaluated and all evidence received against the defendant considered." Commonwealth v. Markman, 916 A.2d 586, 598 (Pa. 2007). Where, as here, the evidence consists primarily of witness observations, the ability of the witness to observe in the given circumstances becomes a matter of credibility, properly reserved for the trier of fact's determination. Commonwealth v. Baker, 614 A.2d 663, 669 (Pa. 1990). The trier of fact makes the determination of the weight to be attributed to each witness's testimony and the credibility of witnesses is not to be re-weighed on appeal. Commonwealth v. Sanders, 42 A.3d 325, 329 (Pa. Super. 2012). Although the witnesses refused to identify defendant at trial, as the foregoing discussion makes clear, the Commonwealth presented those witnesses' prior inconsistent statements as substantive evidence, wherein they unequivocally identified defendant as the shooter. The record provides evidence of premeditation and deliberation, illustrated by defendant's song "Take It How You Wanna," wherein defendant explained his motive for killing decedent—the theft of drugs earlier in the year. Both Brown and Spearman, present when defendant shot and killed decedent, identified him as the shooter

when speaking to Homicide Unit detectives. Both men told police that they witnessed defendant draw his weapon and fire it at decedent, standing no more than a few feet away, striking him in the chest multiple times. (N.T., 03/06/13, p. 210; 03/07/13, p. 109). The evidence from eyewitnesses Brown and Spearman, both of whom knew defendant personally and identified him from photographic arrays, was more than sufficient evidence to prove that defendant possessed a firearm which he in turn used to intentionally kill decedent. *See e.g.* (N.T., 03/06/13, p. 214).

Defendant also contends that the evidence is insufficient to sustain his convictions due to a lack of forensic evidence linking him to the murder scene and weapon. This argument is fatally flawed however, as the lack of forensic evidence does not preclude a murder conviction. *See* Commonwealth v. Chamberlain, 30 A.3d 381 (Pa. 2011) cert. denied, 132 S. Ct. 2377 (U.S. 2012) (murder conviction sustained although no forensic evidence linked Appellant to the murder, and police were unable to locate the murder weapon.). Although the murder weapon was not recovered directly from defendant in this case, it cannot be said that the Commonwealth failed to prove its case beyond a reasonable doubt. The testimony of eyewitnesses Brown and Spearman unequivocally identified defendant as the shooter. The law provides that testimony that an attacker possessed a handgun is all that is necessary, as recovery of the weapon itself is not dispositive of the sufficiency of the evidence. *See e.g.* Commonwealth v. Robinson, 817 A.2d 1153, 1162 (Pa. Super. 2003). There was sufficient evidence, by and through the statements and observations of eyewitnesses Brown and Spearman and defendant's own statements of motive and intent, to enable the jury to determine that defendant shot and killed decedent

with the requisite malice to support his first-degree murder conviction. Accordingly, this allegation of error is without merit and must fail.

Defendant's next allegation is that this court erroneously admitted evidence that defendant, by and through his associates, attempted to intimidate Brown and Spearman to prevent their cooperation in his prosecution. Indeed, defendant contends that those acts of violence against Brown and Spearman were unrelated to his prosecution. Defendant's argument is misplaced, as this evidence was not introduced as proof of defendant's affirmative acts or as evidence of consciousness of guilt. Most important to this issue, evidence that the witnesses were intimidated in one way or another was admitted for the limited purpose of showing the effect such acts had on the witnesses and their testimony at trial. As the acts of violence had the arguable purpose and effect of deterring the witnesses' cooperation and testimony at defendant's trial, they were properly admitted into evidence.

As discussed above, the Commonwealth may prove its case using entirely circumstantial evidence. Markman, 916 A.2d at 598. Such circumstantial evidence included defendant's own statements and inferences drawn from the timing and subject matter of defendant's recorded conversations. The law in this Commonwealth provides that where a statement is being offered to show its effect on a listener, it is not being offered for the truth of the matter and is non-hearsay. Commonwealth v. DeHart, 516 A.2d 656, 666 (Pa. 1986). However, in those instances where defendant actually made threats, such as to Spearman or on the recorded prison telephone line, such evidence was properly attributed to him.

After having given a statement which directly implicated defendant as the shooter, Kaheem Brown and his family were subjeced to numerous acts of intimidation. These

included the attempted murder of Brown's mother in a laundromat, a copy of Brown's statement being posted at the local Chinese restaurant, and Brown being shot at in the street. Also, Brown's home was shot-up by Team A members and others. Although defendant contends that no connection was made between him and the actions of his associates on the street, possession and distribution of Brown's statement was linked to defendant when it was discovered by police on March 25, 2012, in an envelope, sent to Haynesworth arguably from defendant at the county prison. (N.T., 03/08/13, pp. 331-33). In attempts to further deflect these acts of intimidation away from defendant, Brown testified that the attempted shooting in the laundromat was actually an act directed at his older brother, resulting from an independent dispute with others. (N.T., 03/07/13 p. 191, 195). However, both Ms. Alexander and the detective to whom she reported the incident stated that she was the target of the attempted shooting in the laundromat, thereby corroborating the contention that Brown's statement inculpating defendant was the motivating factor for the violence. (N.T., 03/08/13 p. 248). Detective Peters also testified to Brown's reluctance to testify in court, and how acts of intimidation permeated the investigation of this case. (N.T. 03/11/13 pp. 65-75).

Spearman, also an eyewitness whose statement directly implicated defendant as the shooter, was likewise subjected to intimidation which arguably affected his trial testimony. These acts included being beaten in the cell room the Criminal Justice Center on November 9, 2010 and being coerced into confessing to the crime of murder. Within a few days after the assault on November 9, 2010[2], Spearman allegedly authored an affidavit wherein he purported to take "full responsibility" for the murder of decedent, which was mailed to

2 As a result of the assault on November 9, 2010 in the Criminal Justice Center, Spearman was charged with assault, allegedly having attacked officers as they attempted to diffuse the situation.

defendant's attorney.[3] In this instance, defendant's own words created the inference that he influenced these acts. Specifically, on a December 22, 2010 phone call recorded from prison, defendant indirectly referenced the affidavit authored by Spearman, explaining that "someone" has "told the truth" and taken care of some paperwork, and once that paperwork reached his lawyer's office, he should be cleared by his next court date. (N.T., 03/11/13, pp. 80, 85-86)

Evidence concerning the violence perpetuated against eyewitnesses Spearman and Brown, and Brown's family was essential in determining their credibility and motive to fabricate. To rebut the Commonwealth's theory of intimidation, defense counsel posed questions and solicited responses from the witnesses which presented his theory that there were countless other potential shooters among Team A members and others, any of whom could have been responsible for the acts of intimidation perpetrated against Brown and his family. (N.T., 03/06/13 pp. 177-79). Likewise, defense counsel solicited alternate versions of the alleged incidences of intimidation, and presented the jury with the conflicting stories, leaving the jurors to determine the true facts. Contrary to defendant's assertions, this court instructed the jury on the proper manner to consider the evidence, and did not instruct the jury that the acts of intimidation in any way demonstrated defendant's consciousness of guilt. This court maintained control of both counsel and the witnesses, and properly instructed the jury of the limited purpose—the effect on the listener—for which they were to consider such evidence. *See e.g.,* (N.T., 03/07/13, p. 204). Accordingly, as these acts

3 At trial, defendant was represented by David Nenner. However, before Mr. Nenner was retained as defense counsel, defendant was represented by Roland Jarvis. Mr. Jarvis represented defendant at the time that Spearman authored and mailed the affidavit confessing to the slaying. (N.T., 03/11/13 p. 86).

were properly admitted to provide the full story and explain the effect they may have had on the witnesses' testimony, this allegation of error is without merit.

Defendant's final contention is that this court erroneously denied his motion for a mistrial. "The remedy of a mistrial is an extreme one that is required only when an incident is of such a nature that its unavoidable effect is to deprive the defendant of a fair and impartial trial by preventing the jury from weighing and rendering a true verdict." Commonwealth v. Spotz, 716 A.2d 580, 592 (Pa. 1998). Defendant contends that a mistrial was appropriate because the jury began to speculate about information not admitted at trial. A motion for a mistrial is within the sound discretion of the trial court. Commonwealth v. Stafford, 749 A.2d 489, 500 (Pa. Super. 2000). It is within the trial court's discretion to determine whether a defendant was prejudiced by the incident that is the basis of a motion for a mistrial. Commonwealth v. Tejeda, 834 A.2d 619, 623 (Pa. Super. 2003). A mistrial is not necessary if a court's cautionary instructions adequately cure any prejudice. Spotz, 716 A.2d at 592.

During deliberations, the jury posed questions based on the probable cause which supported a statement that was not provided to them as evidence. The following exchange gave rise to defendant's motion for mistrial:

> THE COURT: We now have a seventh question, which reads as follows: "Can we the jury make a reasonable assumption regarding the content of the unread statements of Tyrell Smith and Jeffrey Jones given that an arrest warrant was issued and no specific evidence was proffered as to what evidence was used to issue the warrant?"
>
> ...
>
> MR. NENNER: Again, I have to tell you it concerns me that they are considering what is in an arrest warrant or affidavit and calling it evidence. As your Honor knows, it's not evidence. I

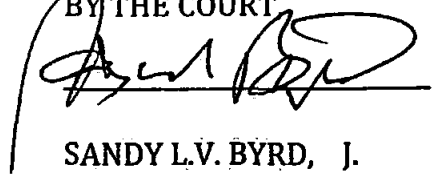
> think at this point, your Honor, I am compelled to ask for a mistrial, respectfully, because I think it's pretty clear from two notes ago that this jury said they were deadlocked and you Spencered them. We are at a point, sir, where they are asking things that don't exist. I think it has gotten to the point now, based on their misstatement of the law, based on they are talking about a witness that never gave a statement in this case, that they have gone too far afield. I am moving for a mistrial at this point.
>
> THE COURT: Your motion is denied. Let's be fair about this.
>
> ...
>
> THE COURT: Members of the jury, the law is as follows: As I previously instructed you,] ladies and gentlemen of the jury, in your determination of the facts you may only consider the evidence which has been introduced in this courtroom and, of course, the logical inferences which have derived from that evidence. Thus, you may not rely upon supposition or guess on any matters which are not in evidence.

(N.T., 03/15/13 pp. 15-22). Defendant cannot successfully argue that after the voluminous testimony presented, the jury disregarded the evidence and instead speculated to reach its guilty verdicts. The jurors' inquiry was related to statements referenced throughout the trial, but never placed into evidence, and did not inquire about anything specifically relevant to defendant's guilt or innocence. (N.T., 03/15/13 pp. 17-18). This court properly instructed the jury that their deliberations were limited to the evidence presented at trial. (N.T., 03/15/13 p. 22). In Pennsylvania, "[t]he law presumes that the jury will follow the instructions of the court." Commonwealth v. Spotz, 896 A.2d 1191, 1224 (Pa. 2006). "Mistrials should be granted only when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial." Commonwealth v. Johnson, 815 A.2d 563, 576 (Pa. 2002). Accordingly, as the jurors returned to deliberations, properly instructed on the evidence they were to consider, it cannot be said that this court committed error in refusing to grant defendant's motion for mistrial.

Additionally, after returning their verdicts, the jurors were individually polled to ensure that each juror agreed with the foreperson's pronouncement. As this court properly denied defendant's motion for a mistrial, this allegation is without merit.

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

BY THE COURT,



SANDY L.V. BYRD, J.

APPENDIX D

SONY

Commonwealth v. Ronald Thomas

1121 EDA 2013

APPENDIX D ("Take It How You Wanna")

Its not about what you know...
Somebody gotta die man, talking about forty thou
Sombody gotta die, yeah
Don't give a fuck who is it

Niggas is pretendas half a brick missing and its one of my niggas

Can't point fingers cause don't know who did it, but as soon as I find out,
swear the nigga finished, I swear the nigga finished

We talking about forty thou ... wow

I'm about to grab my forty cal ... wow

I'm about to act like I'm 19 shorty wild
(INAUDIBLE) fucking smile

The gun shit turn me on make one false move you gone
I'm gone like the wind
(INAUDIBLE)
I was brought up in sin
(INAUDIBLE)
Waiting for a break or my mom to hit the lottery
Course she never hit
So you got me obviously
(INAUDIBLE)
Take it how you wanna. Somebody gonna die on this cona (corner). For touching shit don't belong to ya

Take it how you wanna. Somebody gonna die on this cona. Somebody gonna be put in a coma. For touching shit that don't belong to ya

We talking about brick money.

We talking about a brick, money.

That was my lick money, and then you steal my shit from me.

So fuck my kids, fuck my rap career, car, and crib my studio, with a bitch and a ...

...I have no remorse.

You leave me no choice, I leave you no voice.

I thought we was boys, but you treat me like an outsider.

Forty thousand dried up... in powder
That's a lot of Lo and Prada
Couple of nice...
Couple of nice bitches.
Dolce Gabana
Louis Vuitton and Gucci bags
... you can't you dead.

Take it how you wanna.Somebody gonna die on this cona. Somebody gonna get put in a coma or get sent to they owna. For touching shit that don't belong to ya.

Take it how you wanna. Somebody gonna die on this cona. On this cona somebody gonna get put in a coma or sent to they owna
For touching shit that don't belong to ya.

Bitches getting ...

...Then I put my meat in they collard green...

Ok I guess that how it gotta be
Why?
The young boys follow me.

Alright!

The old heads admire me.

They do!

The music inspire me.

It do!

The ... acknowledge me
Cause I'm a mother fucking ...

Say no more

I don't want to rap no more man. I don't got to niggas.

You got me pissed the fuck off
You demon ass niggas.

When I find out; off with your fucking head

Fuck me huh?

Fuck my kids huh?

Fuck everything I'm trying to do with my rap shit and all that huh?

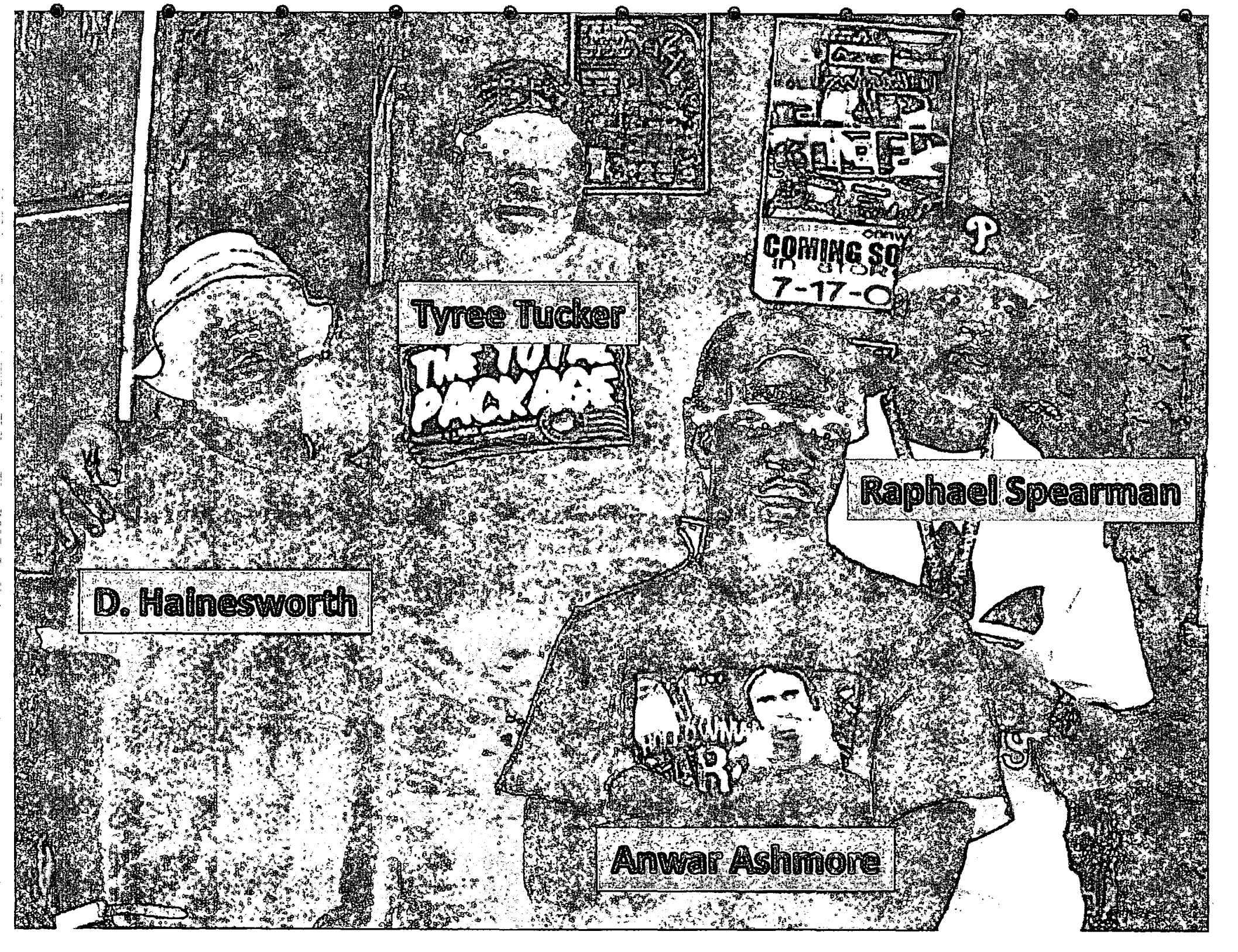
Fuck you nigga

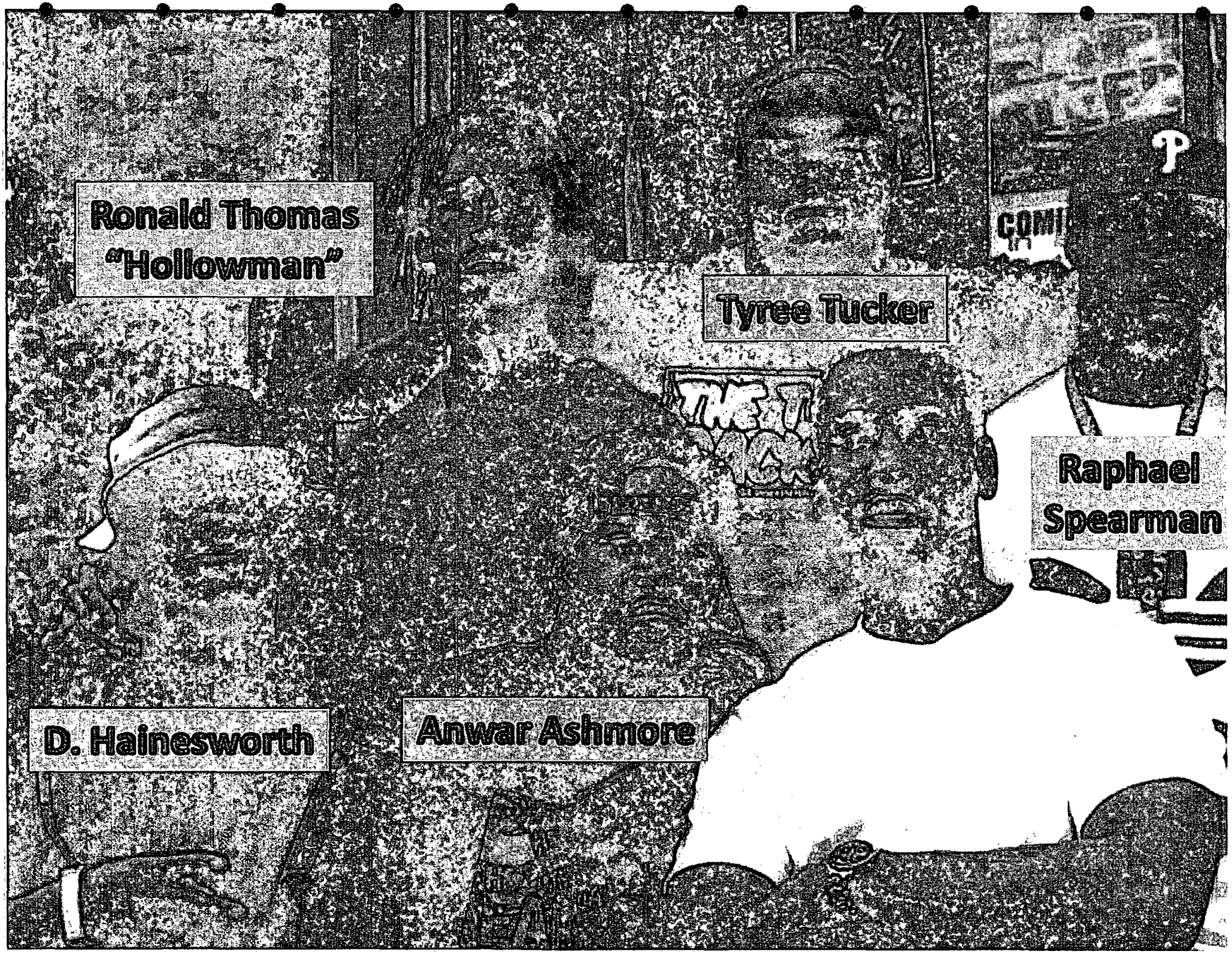
Take it how you wanna. Somebody gonna die on this cona. Somebody gonna get put in a coma or get sent to they owna for touching shit that don't belong to ya.

Take it how you wanna. Somebody gonna die on this cona. Somebody gonna get put in a coma or get sent to they owna for touching shit that don't belong to ya

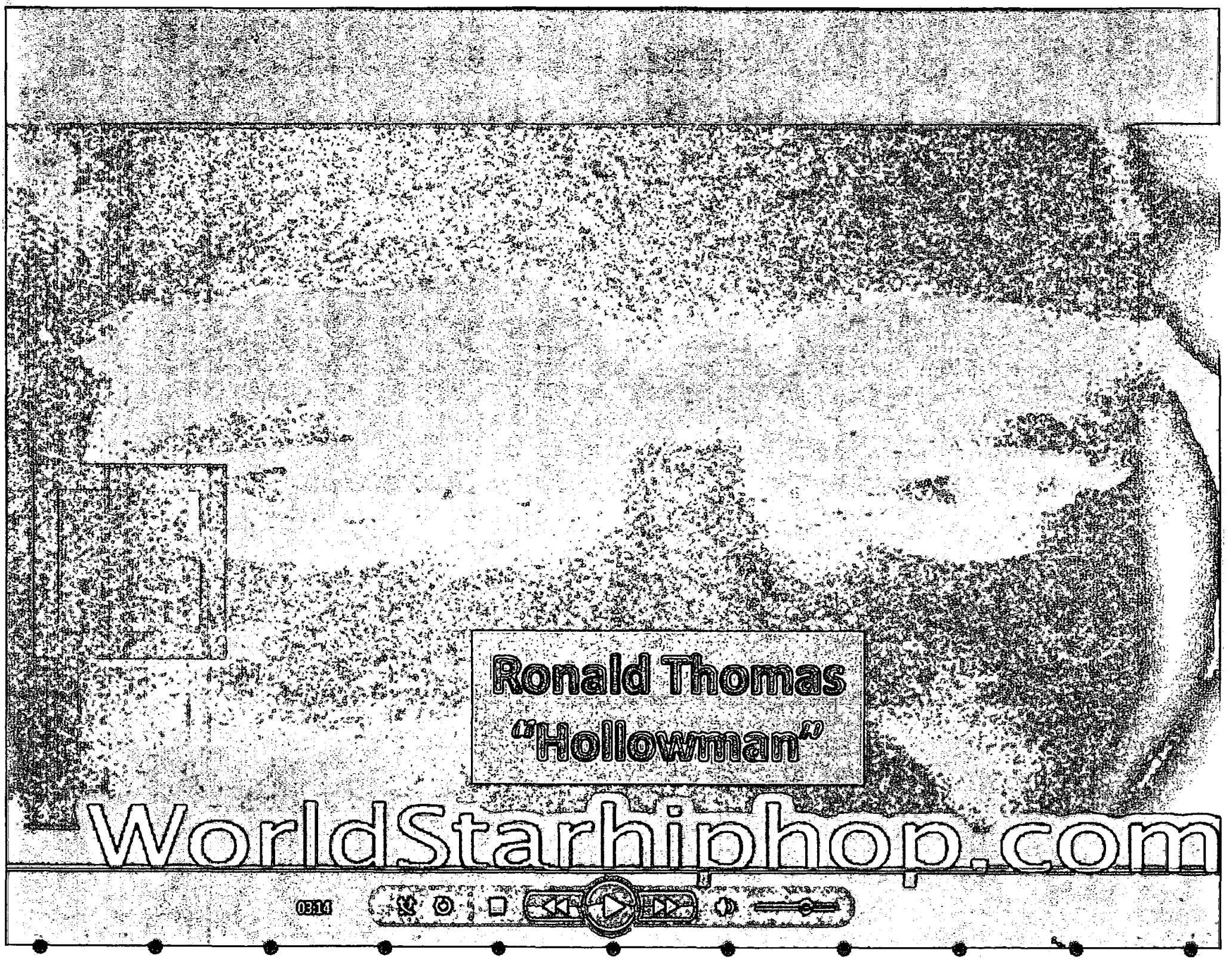
Its me niggas... A-TEAM

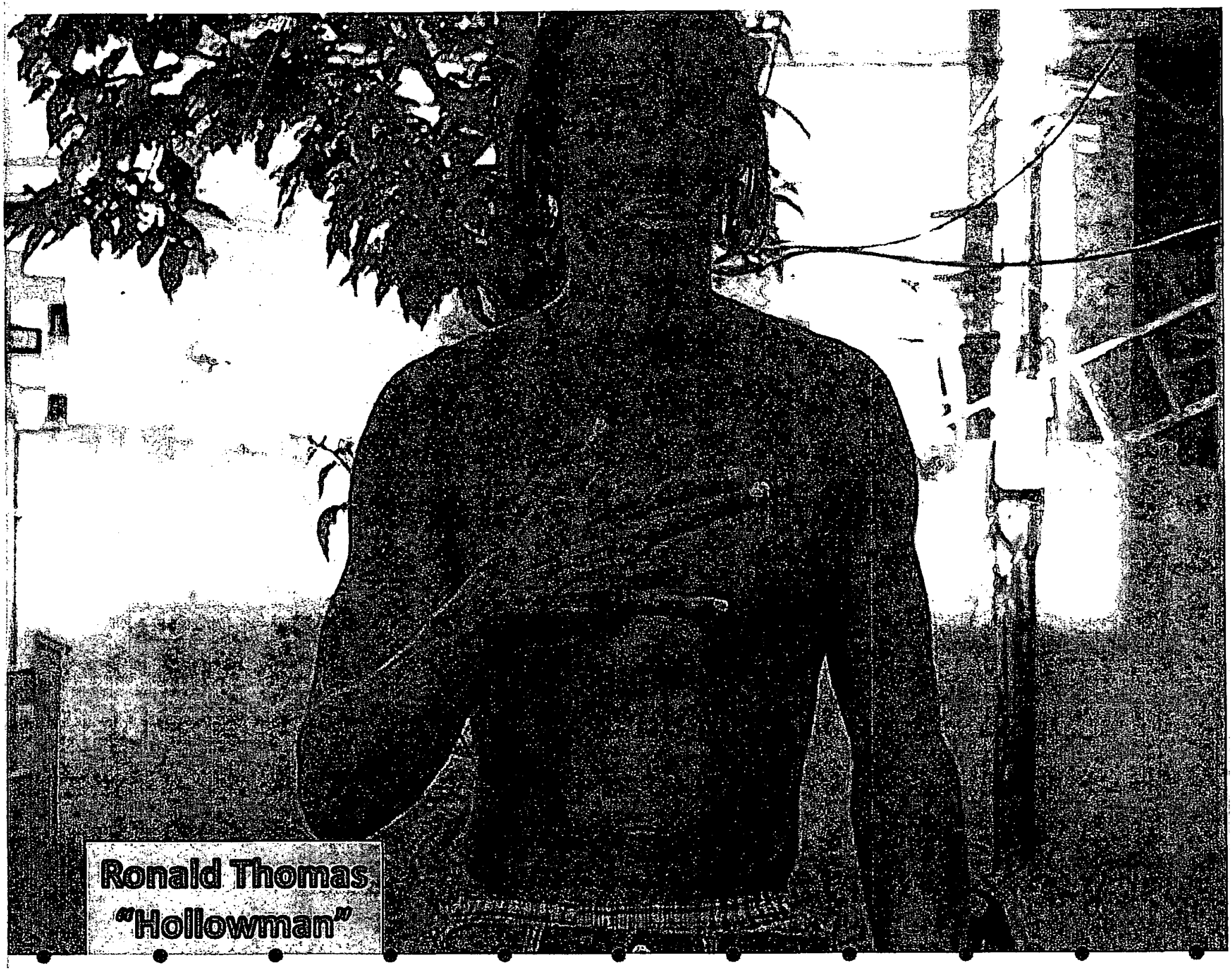
APPENDIX E


Tyree Tucker
THE NU
PACKAGE
COMING SO
7-17-0
Raphael Spearman
D. Hainesworth
Anwar Ashmore


Ronald Thomas
"Hollowman"
Tyree Tucker
Raphael
Spearman
D. Hainesworth
Anwar Ashmore

APPENDIX F


Ronald Thomas
"Hollowman"
WorldStarhiphop.com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Raphael Spearman
WorldStarhiphop.com
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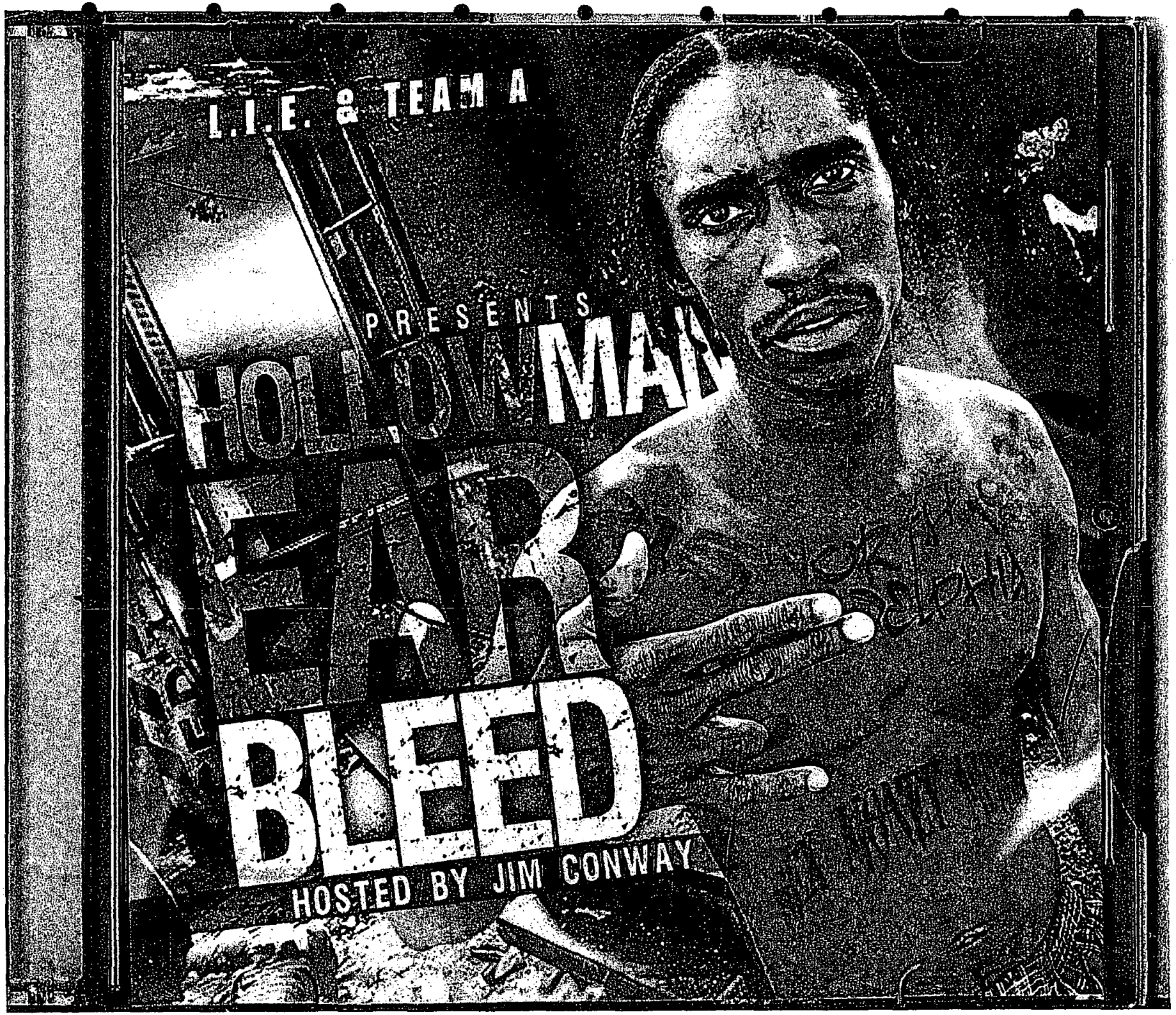
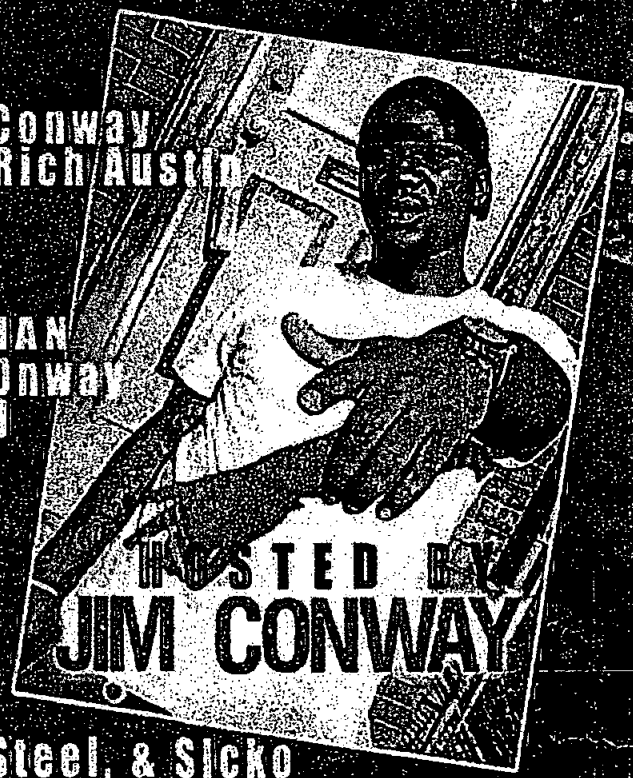
D. Hainesworth
02:11

APPENDIX G


I.I.E. & TEAM A
PRESENTS
HOLLOWMAN
BLEED
HOSTED BY JIM CONWAY

1.Intro Jim Conway Speaks
2.I GOt it Poppin
3."A"2""G" Prod.By Rich Austin
4.Posted In The Club Prod. By Jim Conway
5.Take It How You Wanna Prod. By Rich Austin
6.Bigger Picture -Freestyle
7.Ruby Red Prod. By Rich Austin
8.About a Dollar Freestyle
9.Bring IT ova Here Prod. By SUPAMAN
10.Ambition OF a HustlerProd.By COnway
11.Whats Gone Happen (Classic 04)
12.Blood In Blood Out- Freestyle
13.What if i, What if i - Freestyle
14.ANd What Prod. By COnway
15.I Buss My Tek Ft. Rickscope
16."A" Dance Prod. By Fire Starter
17.Why My Life (Classic 04)
18.I Got Us Prod. By Fire starter
19.Freestyle Ft. Magic , Bussman, Steel, & Sicko



FREE
P LO, MERC, PABLO
ROCKY, MOOK MEEN
AND ALL THE HOMIES

FOR BOOKING AND BEATS
CONTACT
215.954.2041
267.997.5334

SOX
MONEY
MURDER

TEAM "A" DVD COMING SOON

APPENDIX H

DAVID S. NENNER & ASSOCIATES
DAVID S. NENNER, ESQUIRE
IDENTIFICATION # 43804
1500 JFK BOULEVARD, SUITE 620
PHILADELPHIA, PA 19102
(215) 564-0644

Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
VS.	:	CRIMINAL DIVISION
	:	
RONALD THOMAS	:	CP-51-CR-0013001-2010

ORDER

AND NOW, this day of , 2013, upon consideration of the foregoing Omnibus Motion, it is hereby ORDERED AND DECREED that all Motions in Limine herein are GRANTED.

BY THE COURT:

_____
J.

DAVID S. NENNER & ASSOCIATES
DAVID S. NENNER, ESQUIRE
IDENTIFICATION # 43804
1500 JFK BOULEVARD, SUITE 620
PHILADELPHIA, PA 19102
(215) 564-0644

Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
VS.	:	CRIMINAL DIVISION
	:	
RONALD THOMAS	:	CP-51-CR-0013001-2010

MOTIONS IN LIMINE

TO THE HONORABLE SANDY L. BYRD, THE JUDGE OF THE SAID COURT:

Ronald Thomas (hereinafter "Thomas") by and through his undersigned counsel, David S. Nenner, respectfully requests that this Honorable Court grant the within pre-trial motions and, in support thereof, alleges as follows:

I. Motion to preclude the Commonwealth and its witnesses from referencing inadmissible hearsay statements contained within investigation interview records

1. On or about April 26, 2010, Thomas was arrested and charged with the criminal offenses of murder, carrying a firearm without a license, carrying a firearm on public streets or property in Philadelphia, and possession of an instrument of a crime. These charges stem from the death of Anwar Ashmore occurring on or about April 22, 2010.

2. Philadelphia homicide detectives, during the course of their investigation into the death of Anwar Ashmore conducted numerous interviews captioned "investigation interview records" which contain typed questions and purported answers. The discovery provided in connection with the above-captioned case reveals that Commonwealth citizen witnesses, Hasan

Ashmore (the deceased brother), Darren Haynesworth and Sadiah Mitchell provided substantive statements to homicide detectives which include information which should be deemed hearsay testimony inadmissible at trial pursuant to Pa. R.E. 802. (See yellow highlighted portions of witness statements attached hereto and incorporated herein as Exhibits "A", "B" and "C" respectively).

3. The highlighted portions of the relevant statements are not admissible under any applicable exceptions to the hearsay rule. (See Rule of Evidence 803 and its subparts). Nor has the Commonwealth suggested that any exceptions apply.

WHEREFORE, Ronald Thomas respectfully requests that this Honorable Court preclude the Commonwealth and/or its witnesses from referencing those portions of the investigation interview records containing inadmissible hearsay.

II. Motion in Limine to Preclude Commonwealth from referencing portion of witness statement provided by Raheem Brown.

4. Thomas incorporates all of the preceding paragraphs as though same were fully set forth herein at length.

5. On or about August 31, 2010, Homicide detectives allegedly took a statement from Raheem Brown.

6. Thomas asserts that the Commonwealth and its witnesses should be precluded from referencing the questions and answers appearing on the last page of the statement. (See Exhibit "D" yellow highlighted portions of witness statement).

7. Those specified portions of Brown's statement pertaining to Brown's subjective beliefs regarding his future in court testimony are not relevant unless and until Raheem Brown testifies inconsistently with his alleged statement to homicide. Furthermore, both the question and answer referencing "we do not get into that going to court" should be redacted precluding

any reference to "we" since it also constitutes inadmissible "hearsay" and an inappropriate "characterization" of third party opinion.

III. Motion in Preclude Commonwealth and its witnesses from referencing any alleged drug distribution organizations, "Team "A" and "Lot Boys" at trial.

8. Thomas incorporates all of the preceding paragraphs as though same were fully set forth herein at length.

9. On or about December 21, 2012, the Commonwealth filed a Motion in Limine to admit other acts evidence pursuant to Pa. Rule of Evidence 404(b).

10. The Commonwealth with its 404(b) Petition maintains that Thomas and/or his alleged associates belong to a drug organization characterized as Team "A". To date, the Commonwealth has not provided undersigned counsel with any competent evidence[1] to substantiate its claims.

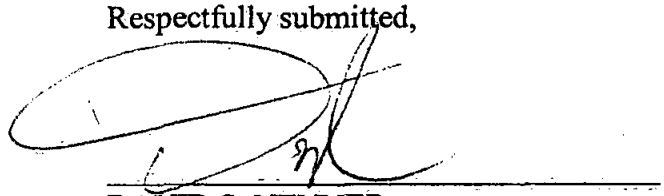
11. The Commonwealth within its 404(b) Petition suggests that Thomas killed Ashmore in retaliation for Ashmore stealing Thomas drugs and/or for failure to retaliate against an alleged competitor drug organization referred to as the "Lot Boys". Once again, the Commonwealth has not produced any competent evidence to establish the existence of a competitive drug organization or Thomas alleged belief that Ashmore stole his narcotics.

WHEREFORE, the Commonwealth should be precluded at trial from referencing any

[1] None of the provided witness statements or police reports reference any alleged drug organizations.

alleged "drug organizations", defendants alleged association with "drug organizations" and the unsubstantiated claim that the deceased stole defendant's narcotics.

Respectfully submitted,



DAVID S. NENNER
Attorney for Petitioner

VERIFICATION

I, DAVID S. NENNER, ESQUIRE, verify that the facts set forth in the foregoing Motion are true and correct to the best of my knowledge, information and belief. I understand that this statement is made subject to the penalties of 18 Pa.C.S. paragraph 4904 relating to unsworn falsification to authorities.

DAVID S. NENNER

SWORN TO AND SUBSCRIBED

before me this 10th day

of January , 2013.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
MICHELLE J. MILLER, Notary Public
City of Philadelphia, Phila. County
My Commission Expires October 16, 2013

PROOF OF SERVICE

I, DAVID S. NENNER, ESQUIRE, hereby certify that I am, this day, servicing the foregoing Motions in Limine upon the person and in the manner indicated below:

SERVICE VIA FIRST CLASS MAIL

Jude Conroy, Esquire
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107

DAVID S. NENNER

DATE: 11/01/13

DAVID S. NENNER & ASSOCIATES
DAVID S. NENNER, ESQUIRE
IDENTIFICATION # 43804
1500 JFK BOULEVARD, SUITE 620
PHILADELPHIA, PA 19102
(215) 564-0644

Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
VS.	:	CRIMINAL DIVISION
	:	
RONALD THOMAS	:	CP-51-CR-0013001-2010

DEFENDANT'S RESPONSE TO COMMONWEALTH'S MOTION IN LIMINE TO ADMIT OTHER ACTS EVIDENCE UNDER PA. RULE OF EVIDENCE 404

Ronald Thomas (hereinafter "Thomas") by and through his undersigned counsel, David S. Nenner, responds to the Commonwealth's Motion in Limine as follows:

A. Factual Background:

On or about April 22, 2010, at approximately 9:00 p.m., Anwar Ashmore (hereinafter "Ashmore") was shot and tragically killed in the area of Stanley and Huntingdon Streets in North Philadelphia. The decedent's cause of death was determined to be multiple gunshot wounds to the area of his chest.

Contrary to the Commonwealth's conclusory allegations contained within the factual background section of its Motion, the Commonwealth has not produced any statements and/or competent evidence to support several of its assertions contained therein. To date, defendant Thomas has not been provided with any evidence to either establish the existence of a drug distribution organization referenced by the Commonwealth as Team "A" or any alleged association between Thomas and the Commonwealth's alleged civilian witnesses with such an

organization. Although the Commonwealth's Motion indicates that detectives discovered the existence and associations pertaining to Team "A", the Commonwealth has yet to produce any evidence to establish these specific claims. (See defendant Thomas's Motion in Limine attached hereto and incorporated herein as Exhibit"A").

The Commonwealth has produced witness statements from Jeffrey Jones and Troy Devlin which represent that the alleged motive for the homicide arose from Ashmore's refusal to retaliate against individual(s) who shot Kaheem Brown. No where is it suggested that the shooting of Ashmore arose out of a dispute between two competing drug organizations. Similarly, there is no competent admissible evidence to establish either Ashmore's alleged theft of narcotics from Thomas or Thomas's alleged belief that Ashmore had stolen narcotics from him.

B. There is no admissible competent evidence to link defendant, Thomas, to the Commonwealth's assertion that he engaged and participated in a methodical, pervasive and vicious pattern of witness intimidation.

As acknowledged within the Commonwealth's brief, any evidence of threats made by a third party against a witness to attempt to induce him or her not to testify are generally admissible so long as "it is shown that the defendant is linked in some material way to the making of those threats". (See Commonwealth's brief page 7), citing Commonwealth v. Carr, 259 A.2d 165, 167 (Pa. 1969), Commonwealth v. Martin, 515 A.2d 18, 20-21 (Pa. 1986). Obviously, any attempt to link the defendant to those third party witnesses alleged threats must be done so with competent admissible evidence.

The Commonwealth, in its 404(b) Motion attempts to set forth various alleged "acts" undertaken by third parties without establishing any actual admissible evidentiary connection

between Thomas and those third party individuals.

On or about October 5, 2010, Tyre Tucker and Darrin Hanesworth engaged in a social media attack against alleged Commonwealth witness, Raphael Spearman, on Facebook. Although the Commonwealth opines that Tyre Tucker and Darrin Hanesworth were "A" Team associates of defendant Thomas as indicated above, there is absolutely no evidentiary link substantiating Thomas's connection to either the "A" Team and/or Tyre Tucker and/or Darrin Hanesworth.[1] As of October 5, 2010, there is absolutely no proof of any collaboration or cooperation between Darrin Hanesworth and Tyre Tucker with defendant Thomas.

On or about October 19, 2010, Raphael Spearman testified at the preliminary hearing in connection with the death of Ashmore. At the preliminary hearing, Raphael Spearman did recant his alleged statement given on August 5, 2010, but the only evidence on record of any alleged intimidation of Spearman arose from law enforcement's alleged mistreatment of Spearman as testified to by Spearman at Thomas's preliminary hearing (See Commonwealth's Exhibit "D").

On November 9, 2010, several weeks after Spearman recanted the statement at Thomas's preliminary hearing, Philadelphia Sheriffs observed Spearman bleeding while confined in a cell room with unknown individuals at CJC. The Commonwealth has not produced any evidence to establish the events leading up to Spearman's injuries or more importantly, any connection between Thomas and those alleged injuries. The Commonwealth also indicates that on or about November 12, 2010.[2] Spearman indicated in a prison phone call with some unknown individual

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[1] On or about June 6, 2010, Darrin Hanesworth provided a statement to homicide wherein Hanesworth alleged that he had heard that defendant, Thomas, shot and killed decedent Ashmore. To suggest that Hainesworth was working either for and/or with Thomas is discredited by Hainesworth's statement.

[2] Undersigned counsel has not been provided with any prison tapes in connection with this case.

that he (Spearman) believed that "H put people on my top and they looking for Haiti" (Jeffrey Jones). Even assuming that Spearman's alleged reference to "H" identifies Thomas, there is absolutely no stated facts to substantiate Spearman's alleged suspicions. Moreover, there is no evidence to establish that Thomas is responsible for any confrontation between Spearman and other(s) in a cellroom occurring on a date approximately one month following Spearman's preliminary hearing testimony which, as acknowledged by the Commonwealth, was favorable to Thomas.

On or about December 22, 2010, in excess of two months after Thomas's preliminary hearing defendant Thomas, during a prison telephone call to some unknown individual, allegedly remarked "whats his face did what he was supposed to do, so that should come through, he is embarrassed by what he did in the first place . . ." Thomas's statement does not reference a specific person so that the jury would be required to guess and/or speculate as to the identity of the person referenced and to what particular circumstances about whichThomas was talking.

On or about October 26, 2010, Kaheem Brown, another Commonwealth witness in connection with Ashmore's homicide, is alleged by his mother, Stephanie Alexander, to have been shot at by friends of defendant, Thomas. (See Commonwealth's Exhibit "G"). There is no indication within the police activity sheet or anywhere else as to how Stephanie Alexander made this determination.[3] Kaheem Brown denied being the target of this shooting.

Interestingly, the alleged attack upon Kaheem Brown, by individuals who have not been

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[3] The Commonwealth has not provided undersigned counsel with any written statement submitted by Stephanie Alexander wherein she suggests that "Dee" and "Merse" were friends with Thomas. Any alleged verbal statements allegedly made by Stephanie Alexander would not constitute substantive evidence under the Pennsylvania Rules of Evidence and the case law referencing witnesses' adoption of written statements. See Commonwealth v. Lively, 610 A.2d (Pa. 1992); Commonwealth v. Carter, 661 A.2d 390 (Pa. Super. 1995), Commonwealth v. Martin, 515 A.2d 18, 20-21 (Pa. 1986) .

connected to Thomas by way of any competent admissible evidence, allegedly occurred before November 12, 2010, the date upon which the Commonwealth discovery letter was provided to Thomas's predecessor attorney. Thus, both the identity and the content of statements provided by Kaheem Brown and Jeffrey Jones were not available to defendant or his counsel at the time of the alleged shooting of Kaheem Brown.

On or about November 19, 2010, Rashan James walked into a laundromat at 30th and Huntingdon Streets and attempted to shoot Stephanie Alexander, Kaheem Brown's mother. Thereafter, on or about November 27, 2010, the home belonging to Stephanie Alexander and Kaheem Brown was shot up. Although the police statements in connection with these shootings contain Stephanie Alexander's opinion and conclusion that the shooting had something to do with "a homicide", there is no indication whatsoever that her opinion arose from any admissible facts. Thus, once again, the Commonwealth is attempting to introduce evidence pursuant to 404(b) when the majority of their proposed evidence arises from innuendo, conclusion, speculation and a complete lack of facts linking Thomas to alleged acts of third parties.

On some unknown date in 2011, Detective Brian Peters claims that Kaheem Brown told him that his formal statement given to homicide was posted in a local Chinese store by an unknown third party. However, the date of Kaheem Brown's alleged communication to Detective Peters is not disclosed within the Commonwealth's 404(b) Motion and, more importantly, there is no indication whatsoever as to whether Kaheem Brown's alleged communication to police was recorded by Detective Peters. Assuming that Kaheem Brown did not provide a recorded and/or signed statement, then the alleged content of Kaheem Brown's remarks regarding the posting of his statement should only be introduced at trial if testified to by Kaheem Brown.

In the Commonwealth's 404(b) Motion, it is alleged that on or about March 12, 2012, police, in response to a shooting occurring at 2623 N. Stanley Street, recovered a letter together with a redacted copy of Kaheem Brown's statement addressed to D. Haines from Hollow Thomas PPN 974012, 7001 State Road, Philadelphia, PA 19136 and a second letter addressed to Tyre Tucker inside the location of 2500 N. Myrtlewood Street. Although the Commonwealth references two letters, the only documents (see Exhibit "K" at Commonwealth's Motion) attached to their motion is an envelope and Kaheem Brown's redacted statement. The Commonwealth should not be relieved of its evidentiary burden to establish both authenticity and admissibility of the documentary evidence.

C. **Legal Analysis**

The Commonwealth seeks permission to introduce evidence of alleged threats and intimidation against its witnesses pursuant to Pennsylvania Rule of Evidence 404(b).

Initially, the Commonwealth argues that it possesses information sufficient to establish defendant's consciousness of guilt, motives and intentions. However, the Commonwealth does not possess any admissible evidence that connects defendant, Thomas, to alleged third party acts.

In Commonwealth v. Carr, 259 A.2d 165, 167 (Pa. 1969) and Commonwealth v. Martin, 515 A.2d 18, 20-21 (Pa. 1986), the Supreme Court of Pennsylvania determined that before any acts committed by third persons to influence or intimidate witnesses may be admissible for purposes of establishing the accused consciousness of guilt or bad motives, there must be admissible evidence to connect the defendant to those third party acts.

The Commonwealth, in support of its argument, relies on Commonwealth v. Lark, 543 A.2d 491 (Pa. 1988) and Commonwealth v. Markle, 361 A.2d 826 (Pa. Super 1976). In both cases, defendants and not third parties had made direct threats against Commonwealth witnesses.

These cases are inapposite to the instant situation because the Commonwealth's alleged evidence of threats and intimidation which consists primarily of witnesses' opinions and conjecture apply to actions of third parties with no established connection to defendant Thomas.

The Commonwealth has not proffered a scintilla of admissible evidence showing either the existence of a drug organization in which defendant Thomas and the third party actors were joint members or, even more importantly, that defendant Thomas has any connection whatsoever to the third party actors and their alleged behavior. Thus, there is no basis in which to admit 404(b) evidence directly against defendant for purposes of showing his state of mind since the Commonwealth cannot connect the proverbial dots linking defendant Thomas to misdeeds of others. See Carr, Ibid.

The Commonwealth also asserts that even if threats against Spearman and Brown cannot be connected to defendant, which is the case, the evidence of threats is still admissible to provide an explanation as to why Spearman recanted his statement at the preliminary hearing. While the Commonwealth is correct in its recitation that evidence of threats by third persons against a witness is admissible to explain the effect upon that witness, its contention that the third party threats against Spearman and Brown are admissible at the trial to explain Spearman's and potentially Brown's recantation of their respective statements depends entirely on Spearman and Brown's future testimony at trial. In other words, until and unless Spearman and/or Brown testify that any alleged prior recantation and/or inconsistencies resulted from fear of third party threats or intimidation, this third party evidence remains inadmissible. Once again, the Commonwealth cites cases which do not legally support their request for admission of third party threats to establish a witness's state of mind. In each of the cases referenced by the Commonwealth in its Motion, the Commonwealth witness articulated at trial that his prior

inconsistencies resulted from his subjective fear. (See page 8 of Commonwealth's Motion in Limine citing Commonwealth v. Smith, 492 A.2d 9, 13 (Pa. Super 1985); Commonwealth v. Bryant, 462 A.2d, 785, 788 (Pa. Super 1983); and Carr, supra.

None of these cases stand for the Commonwealth's suggestion that extraneous third party testimony may be presented at trial to establish the state of mind or fears of a Commonwealth witness who never articulates witness intimidation as a factor in that witness testifying under oath in a way that is inconsistent with a prior out-of-court statement allegedly made by that witness to law enforcement officers.

In summary, the Commonwealth cannot presume, through extraneous evidence that its witness(es) allegedly testified falsely because of intimidation or threats where that witness denies or fails to articulate the effect of any alleged threats or intimidation on their under oath testimony. As previously indicated, Spearman indicated at the preliminary hearing that his alleged statement to homicide detectives resulted solely from law enforcement intimidation and unless and until he states otherwise, the Commonwealth should be prohibited from eliciting any evidence of alleged third intimidation and/or threats.

For all of the aforementioned reasons, the Commonwealth's Motion in Limine to admit 404(b) evidence against Ronald Thomas must be denied.

Respectfully submitted

DAVID S.NENNER
Attorney for Defendant, Ronald Thomas

PROOF OF SERVICE

I, DAVID S. NENNER, ESQUIRE, hereby certify that I am, this day, servicing the foregoing Defendant's Response to Motions in Limine upon the person and in the manner indicated below:

SERVICE VIA FIRST CLASS MAIL

Jude Conroy, Esquire
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107

DAVID S. NENNER

DATE: 1/10/13

APPENDIX I

#1

10:30
3-13-13

1. The jury would like to examine the CD, jacket and the transcript lyric sheet.

2. ~~The jury would like to hear the last five statements made by the defense attorney.~~

3. The jury would like to examine the two envelopes and the statement retrieved from the abandoned house.

4. The jury would like to examine the transcript of the phone calls between Ronald Thomas and the two persons he spoke with - unknown male and Sara

5. ~~The jury would like to hear the transcript of Ray Ray testimony again.~~

Juror 5

#2

1. The jury would like to see the transcripts of the conversations recorded between Ronald Thomas and others (all transcripts).

2. The jury would also like to see the transcripts of Raphael Spearman's telephone calls while in jail. $C_3F\ O_2$

3. The jury would like to examine the statements made by Raphael Spearman and Kaheem Brown.

4. The jury wishes to examine the CD taken from the Earbleed jacket.

1. The jury would like to see only the transcripts of the conversations recorded between Ronald Thomas and others (~~all transcripts~~) at this time.

2. The jury would also like to see only the transcripts of Raphael Spearman's telephone calls while in jail at this time.

3. The jury would like to examine the statements made by Raphael Spearman and Kaheem Brown.

4. The jury wishes to physically examine the CD (disc) taken from the Earbleed jacket.

#5

#3

Your honor, at this time we can not come to a unanimous conclusion after several votes and deliberations have stalled.
Please re-instruct and clarify "reasonable doubt"

#5

1:55

#14

The jury requests that we adjourn for the day and reconvene tomorrow.

#5

4:34 pm

#5 / #6

Your honor, the jury remains deadlocked. At this point after extensive discussion, we can not come to a unanimous conclusion. It is clear that further disoussion will NOT result in a verdict.

[signature] #5

2012-03-15 11:00 am

1. The jury would like to know when the release date was for the song "Take it like you wanna"

2. The jury would like to hear the testimony of Kaheem Brown again (We understand this would be the court recorders written record)

3. The jury would also like to hear the testimony of Stephanie Alexander again.

2013-03-15
1:15 pm

Can we the jury make a reasonable assumption regarding the contents of the unread statements of Tyrell Smith and Jeffery Jones given that an arrest warrant was issued and no specific evidence was proffered as to what evidence was used to issue the warrant?

2013-03-15

3:03 pm

#8

Your honor, the jury moves to adjourn for the day.

2013-03-15

4:42 pm

#9

Your Honor, the jury has reached a verdict.

#5

2013-03-18 10:03 a.m.