IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	**No.: CP-48-CR-02847-2010** **CP-48-CR-00281-2011** **CP-48-CR-00282-2011**
v.	
ANTHONY HERNANDEZ-ACOSTA,	
Defendant.	

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1925(a) STATEMENT

AND NOW, this 16th day of December, 2011, the Court issues the following statement:

Following a jury trial, conviction, and sentencing, on October 7, 2011, Defendant Anthony Hernandez-Acosta ("Hernandez-Acosta") filed and served upon this Court a timely Notice of Appeal to the Superior Court of Pennsylvania. On October 28, 2011, pursuant to our request under Pa. R.A.P. 1925(b), we received Hernandez-Acosta's Concise Statement of Errors Complained of on Appeal.

For the reasons that follow, we respectfully suggest that Hernandez-Acosta's appeal lacks merit.

I. Factual and Procedural Posture

We presided over a jury trial from July 11, 2011 through July 14, 2011 regarding charges filed against Hernandez-Acosta in six (6) separate Informations that were joined for trial:

1. CP-48-CR-0000281-2011

a. Five Counts of Burglary, 18 Pa. C.S. § 3502(a);
b. Criminal Conspiracy to Commit Burglary, 18 Pa. C.S. § 903(a)(1); 18 Pa. C.S. § 3502(a);
c. Five Counts of Criminal Trespass, 18 Pa. C.S. § 3503(a)(ii);
d. Four Counts of Theft by Unlawful Taking, 18 Pa. C.S. § 3921(a);
e. Two Counts of Theft by Receiving Stolen Property, 18 Pa. C.S. § 3925(a); and
f. Criminal Mischief, 18 Pa. C.S. § 3304(a)(5).

2. CP-48-CR-0000282-2011

a. Burglary, 18 Pa. C.S. § 3502(a);
b. Criminal Conspiracy to Commit Burglary, 18 Pa. C.S. § 903(a)(1); 18 Pa. C.S. § 3502(a);
c. Theft by Unlawful Taking, 18 Pa. C.S. § 3921(a); and
d. Theft by Receiving Stolen Property, 18 Pa. C.S. § 3925(a).

3. CP-48-CR-0002847-2010

a. Burglary, 18 Pa. C.S. § 3502(a);
b. Criminal Conspiracy to Commit Burglary, 18 Pa. C.S. § 903(a)(1); 18 Pa. C.S. § 3502(a);
c. Criminal Trespass, 18 Pa. C.S. § 3503(a)(ii); and
d. Criminal Attempt to Commit Theft, 18 Pa. C.S. § 901(a); 18 Pa. C.S. § 3921(a).

4. CP-48-CR-0000283-2011

a. Burglary, 18 Pa. C.S. § 3502(a);
b. Criminal Conspiracy to Commit Burglary, 18 Pa. C.S. § 903(a)(1); 18 Pa. C.S. § 3502(a);
c. Criminal Trespass, 18 Pa. C.S. § 3503(a)(ii); and
d. Criminal Mischief, 18 Pa. C.S. § 3304(a)(1).

5. CP-48-CR-0000294-2011

a. Two Counts of Burglary, 18 Pa. C.S. § 3502(a) ;
b. Two Counts of Criminal Trespass, 18 Pa. C.S. § 3503(a)(ii); and
c. Two Counts of Theft by Unlawful Taking, 18 Pa. C.S. § 3921(a).

6. CP-48-CR-0000295-2011

a. Burglary, 18 Pa. C.S. § 3502(a);
b. Criminal Trespass, 18 Pa. C.S. § 3503(a)(ii); and
c. Theft by Unlawful Taking, 18 Pa. C.S. § 3921(a).

The Commonwealth alleged that Hernandez-Acosta, together with accomplice and co-conspirator, Sebastian Alonso ("Alonso"), burglarized numerous residences throughout Northampton County. Following trial, the jury acquitted Hernandez-Acosta of all of the charges in cases CP-48-CR-0000283-2011, CP-48-CR-0000294-2011, and CP-48-CR-0000295-2011. In case CP-48-CR-0002847-2010, the jury convicted Hernandez-Acosta of criminal trespass[1] and acquitted him of the remaining charges. In case CP-48-CR-0000281-2011, the jury convicted Hernandez-Acosta of one count of

[1] 18 Pa. C.S. § 3503(a)(ii).

theft by receiving stolen property[2] and acquitted him of the remaining charges. Finally, in case CP-48-CR-0000282-2011, the jury convicted Hernandez-Acosta of one count of theft by receiving stolen property[3] and acquitted him of the remaining charges.

CP-48-CR-0000281-2011

On April 23, 2010, Sandra Pursell ("Pursell"), a resident of 2417 Bushkill Drive, Forks Township, Pennsylvania, left her residence at approximately 6:00 a.m. and returned at approximately 6:30 p.m. Transcript of Proceedings at 83-84, *Commonwealth v. Hernandez-Acosta*, CP-48-CR-2847-2010, CP-48-CR-281-2011, CP-48-CR-282-2011, CP-48-CR-283-2011, CP-48-CR-294-2011, CP-48-CR-295-2011 (C.P.Northampton, Jul. 12, 2011) [hereinafter "N.T., July 12, 2011"]. When she returned home, Pursell found her side door pried open and the bedrooms in disarray. *Id*. at 84. The police determined that this door was the point of entry. N.T., Transcript of Proceedings at 91-92, *Commonwealth v. Hernandez-Acosta*, CP-48-CR-2847-2010, CP-48-CR-281-2011, CP-48-CR-282-2011, CP-48-CR-283-2011, CP-48-CR-294-2011, CP-48-CR-295-2011 (C.P.Northampton, Jul. 13, 2011) [hereinafter "N.T., July 13, 2011"]. The items taken from Pursell's home on April 23, 2011 included jewelry, cash, a television valued at $1,400, a leather coat valued at $200, and her husband's watch and class ring. N.T., July 12, 2011 at 84-86. When Hernandez-Acosta and Alonso

[2] 18 Pa. C.S. § 3925(a).
[3] 18 Pa. C.S. § 3925(a).

were arrested on May 3, 2011, the police recovered from Hernandez-Acosta's vehicle several pieces of jewelry stolen from Pursell's home, including her husband's watch and class ring. *Id.* at 87; N.T., July 13, 2011 at 109-10. Alonso testified that he and Hernandez-Acosta burglarized and stole items from Pursell's residence, specifically a large, flat screen television. N.T., July 12, 2011 at 108; N.T., July 13, 2011 at 57.

CP-48-CR-0000282-2011

On April 23, 2010, Nanette Neadle ("Neadle"), a resident of 1070 West Lafayette Street, Easton, Pennsylvania, left her residence at approximately 6:30 a.m. and returned at approximately 5:00 p.m. N.T., July 12, 2011 at 108. When she returned home, Neadle found her front door pried open and wood shards on the living room floor. *Id.* at 60; N.T., July 13, 2011 at 25. The items taken from Neadle's home on April 23, 2010 included a flat screen television valued at $800 to $900, three laptop computers valued at approximately $2,500, and jewelry. N.T., July 12, 2011 at 60-62. The value of all of the items taken was $7,565.36. *Id.* at 63. When Hernandez-Acosta and Alonso were arrested on May 3, 2011, the police recovered from Hernandez-Acosta's vehicle some of the items taken from Neadle's home, including a diamond engagement ring, a sterling silver pendant, a sterling silver bracelet, a pearl charm and a cell phone charger. *Id.* at 63-64; N.T., July 13, 2011 at 109-10.

Alonso testified that on May 3, 2010, he was travelling with Hernandez-Acosta in Hernandez-Acosta's gold P.T. Cruiser for the purpose of "get[ting] paid," *i.e.*, to commit a burglary. N.T., July 12, 2011 at 112-13; N.T., July 13, 2011 at 42, 107. Hernandez-Acosta was driving and Alonso was in the front passenger's seat. N.T., July 12, 2011 at 112-13. Hernandez-Acosta drove the vehicle onto the driveway of 3709 North Delaware Drive, Forks Township, Pennsylvania. *Id.* at 117. Hernandez-Acosta exited the vehicle and rang the doorbell to the residence to determine whether anyone was home. *Id.* at 113. This was consistent with their burglary procedures.[4] *Id.* When no one answered the door, Hernandez-Acosta walked to the other side of the house, out of Alonso's view. *Id.*

A few moments later, Detective Philomena Sandt of the Forks Township Police Department arrived at the residence. *Id.* at 116, 118; N.T., July 13, 2011 at 98. Detective Sandt observed Alonso standing outside of a gold PT Cruiser. N.T., July 13, 2011 at 98. Alonso saw Detective Sandt and unsuccessfully attempted to alert Hernandez-Acosta that he should leave the residence. N.T., July 12, 2011 at 116-18. Alonso then entered the driver's side of the vehicle, and attempted to drive away. *Id.* at 117. However,

[4] Detective Christopher Miller testified that Alonso told him that when Alonso and Hernandez-Acosta intended to burglarize a house, it was standard procedure to first knock on the door. N.T., July 13, 2011 at 32. If no one was home, they would break into the house. *Id.* If someone was home, they would say their car is overheating and ask to use a water hose. *Id.*

Detective Sandt blocked Alonso's path and arrested him. *Id.* at 117. Hernandez-Acosta was arrested forty minutes later, approximately a mile away from the residence. N.T., July 13, 2011 at 42-43, 101, 108.

The Forks Township Police seized and then searched Hernandez-Acosta's P.T. Cruiser. *Id*. at 109. After searching the vehicle, the police recovered a variety of items, including jewelry, clothing, shoes, CDs, PlayStation games and documents, and a tool belt containing multiple tools. *Id.* at 109. In addition, the police recovered a screwdriver from a drawer under the passenger's seat of the P.T. Cruiser. *Id.* at 65, 121, 153. As noted above, Neadle, the resident of 1070 West Lafayette Street, and Pursell, the resident of 2417 Bushkill Drive, identified some of their missing property from the items seized from the P.T. Cruiser. *Id.* at 110.

Dale Yobe ("Yobe"), a resident of 3709 North Delaware Drive, Forks Township, Pennsylvania left his residence on May 3, 2010 at approximately 1:30 p.m. and returned between approximately 3:30 p.m. and 4:00 p.m. N.T., July 12, 2011 at 67, 68, 70. Yobe did not give permission to anyone to enter his home. *Id.* at 70. When he returned home, Yobe observed that windows and a door were pushed in and damaged, and a window appeared to be the point of entry. *Id.* at 68, 69; N.T., July 13, 2011 at 100. Furthermore, this window's curtain was outside the residence. *Id*. Based upon the curtain's position, Detective Sandt concluded that someone inside the residence fled outside through this window. N.T., July 13, 2011 at 100-

01. Yobe noted that several laptop computers were moved from the second floor to the first floor. N.T., July 12, 2011 at 68. The cost to replace the damaged windows and door was $6,025. *Id.* at 69.

After his arrest, Alonso told police that he and Hernandez-Acosta committed several burglaries over the past month. *Id.* at 89-90. In conducting those burglaries, they would drive the gold P.T. Cruiser to a house. N.T., July 13, 2011 at 55. He explained that Hernandez-Acosta would always enter the house by either prying open a door or window with a screwdriver. *Id.* at 58. In addition, Detective Joseph Effting of the Forks Township Police Department testified that at the majority of the burglarized homes, including 3709 North Delaware Drive and 2417 Bushkill Drive, there were striation marks in the framework of the point of entry, either the door or windows. *Id.* at 58-59, 92. Also, all of the points of entry were at the rear of the residences, out of view of any neighbors. *Id.* at 61.

Hernandez-Acosta's Testimony

Hernandez-Acosta testified that between 2005 and 2006, he became a confidential informant for the Woodbridge, New Jersey, Police Department and other New Jersey law enforcement agencies. N.T., July 13, 2011 at 172, 200, 210. As a confidential informant, Hernandez-Acosta agreed to collect information pertaining to the activities of Alonso, a leader of the Latin Kings gang in New Jersey. *Id.* at 210. The New Jersey law enforcement

authorities instructed Hernandez-Acosta not to commit any crimes while acting as an informant. *Id*.

On May 3, 2010, Alonso contacted Hernandez-Acosta to assist him in finding tractor trailers to steal in New Jersey. *Id.* at 179. However, Hernandez-Acosta and Alonso then entered Pennsylvania. *Id.* at 180. Once in Pennsylvania, Alonso told Hernandez-Acosta to enter the driveway of 3709 North Delaware Drive so that they may "get paid," *i.e.*, commit a burglary. *Id.* at 181, 188. When they arrived, Alonso exited the car and knocked on the door of the residence. *Id.* at 189. Alonso then instructed Hernandez-Acosta to walk around to the rear of the house. *Id.* Hernandez-Acosta stated that he then noticed an open window but instead of entering the house and committing a burglary, he left the area. *Id.* at 182, 189. He used the house to block Alonso from seeing him leave. *Id.* at 189-90. Hernandez-Acosta then contacted Agent Keith Stopko from the New Jersey Attorney General's office, informing him that Alonso wanted him to commit a burglary. *Id.* at 182. Shortly thereafter, Forks Township Police arrested Hernandez-Acosta. *Id.* at 107-08, 182-83.

Hernandez-Acosta testified that he never entered, broke into or stole anything from 3709 North Delaware Drive, or any of the other residences at issue. *Id.* at 187. Hernandez-Acosta also testified that Alonso asked him to drive to a pawn shop in Newark, New Jersey in order to pawn the stolen items. *Id.* at 208. Hernandez-Acosta stated that the stolen property found

in his vehicle on May 3, 2010 were the items that Alonso was unable to sell at that pawn shop. *Id.* at 209.

II. Discussion

Hernandez-Acosta filed the instant appeal, asserting that we erred as a matter of law or abused our discretion in that:

> 1. The verdict is against the sufficiency of the evidence; specifically
>
> a. the evidence produced at trial fails to support a finding, beyond a reasonable doubt, that the defendant either entered or broke into the building for which he was convicted;
>
> b. the evidence produced at trial fails to support a finding, beyond a reasonable doubt, that the defendant is guilty of theft by receiving stolen property in that he did not intentionally receive, retain, or dispose of movable property of another. He was merely present making observations of the criminal activity of the codefendant [sic] Sebastian Alonso in order to report activity to law enforcement;
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> c. the evidence produced at trial fails to support a finding, beyond a reasonable doubt, the value of the property found in the car with [sic] the defendant was arrested and the acquittals on the burglary charges for the homes which that property is related shows that the evidence was insufficient to support a conviction for the theft by receiving stolen property charges.
>
> 2. The verdicts were against the weight of the evidence.
>
> 3. The court erred in not merging or running concurrently the sentences for the three charges for which imposed [sic] sentences.

Statement of Matters Complained of on Appeal at ¶¶ 1-3, *Commonwealth v. Hernandez-Acosta*, CP-48-CR-02487-2010, CP-48-CR-00281-2011, CP-48-

CR-00282-2011 (C.P.Northampton, Oct. 28, 2011). Although Hernandez-Acosta alleges that we erred as a matter of law or abused our discretion regarding these issues, he never presented any of these issues to us for decision. In fact, Hernandez-Acosta did not file any post-verdict motions, post-sentence motions, or oral motions during or after the trial claiming any such errors or raising any such arguments.

1. Hernandez-Acosta's Challenge to the Sufficiency of the Evidence

Hernandez-Acosta alleges that we erred as a matter of law or abused our discretion because the evidence adduced at trial was insufficient to establish his guilt beyond a reasonable doubt. Statement of Matters Complained of on Appeal at ¶ 1. When reviewing sufficiency of the evidence, the standard applied by the Pennsylvania Superior Court is:

> whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence. Furthermore, when reviewing a sufficiency claim, our

> Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
>
> However, the 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 an accused's guilt beyond a reasonable doubt. The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail even under the limited scrutiny of appellate review.

Commonwealth v. Coleman, 19 A.3d 1111, 1118-1119 (Pa. Super. 2011) (quoting *Commonwealth v. Bostick*, 958 A.2d 543, 560 (Pa. Super. 2008)). Thus, the Superior Court will examine the evidence of record and determine, based upon the testimony and evidence offered at trial, whether the Commonwealth introduced sufficient evidence to prove beyond a reasonable doubt that Hernandez-Acosta committed the crimes of criminal trespass and receiving stolen property. *See id.*

A. Criminal Trespass

Hernandez-Acosta alleges that, with respect to the charge of criminal trespass, we erred as a matter of law or abused our discretion because the evidence adduced at trial was insufficient to establish his guilt beyond a reasonable doubt. Statement of Matters Complained of on Appeal at ¶ 1. Specifically, he maintains that "the evidence produced at trial fails to support a finding, beyond a reasonable doubt, that the defendant either entered or broke into the building for which he was convicted." *Id.*

A person is guilty of criminal trespass if, "knowing that he is not licensed or privileged to do so, he: (ii) breaks into any building or occupied structure or separately secured or occupied portion thereof." 18 Pa. C.S. § 3503(a)(1). "Breaks into" means "[t]o gain entry by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access." 18 Pa. C.S. § 3503(a)(3).

Alonso testified that he and Hernandez-Acosta committed several burglaries. N.T., July 12, 2011 at 90. Detective Effting testified that Alonso informed him that when committing these burglaries, they would drive the P.T. Cruiser to the targeted house. N.T., July 13, 2011 at 55. Alonso explained to Detective Effting that Hernandez-Acosta would always enter the house by either prying open a door or window with a screwdriver. *Id.* at 58.

Alonso testified that on May 3, 2010, he was travelling with Hernandez-Acosta in Hernandez-Acosta's gold P.T. Cruiser for the purpose of "get[ting] paid," *i.e.*, to commit a burglary. N.T., July 12, 2011 at 112-13; N.T., July 13, 2011 at 42, 107. Hernandez-Acosta drove the vehicle onto the driveway of 3709 North Delaware Drive. N.T., July 12, 2011 at 117. Hernandez-Acosta exited the vehicle and rang the doorbell to the residence to determine whether anyone was home. *Id.* at 98, 113. This was consistent with their burglary procedures.[5] *Id.* When no one answered the

[5] Detective Christopher Miller testified that Alonso told him that when Alonso and Hernandez-Acosta intended to burglarize a house, it was standard procedure to first knock on the door. N.T., July 13, 2011 at 32. If no one was home, they would break into the

door, Hernandez-Acosta walked to the other side of the house. *Id.* A few moments later, Detective Sandt arrived at the residence and observed Alonso standing outside of the PT Cruiser. *Id.* at 116, 118; N.T., July 13, 2011 at 98. Alonso saw Detective Sandt and unsuccessfully attempted to alert Hernandez-Acosta that he should leave the residence. N.T., July 12, 2011 at 116-18. Alonso then entered the driver's side of the vehicle, and attempted to drive away. *Id.* at 117. However, Detective Sandt was able to block Alonso's path and arrest him. *Id.* Hernandez-Acosta was arrested forty minutes later, approximately a mile away from the residence. N.T., July 13, 2011 at 42-43, 101, 108.

Yobe, a resident of 3709 North Delaware Drive, Forks Township, Pennsylvania left his residence on May 3, 2010 at approximately 1:30 p.m. and returned between approximately 3:30 p.m. and 4:00 p.m. N.T., July 12, 2011 at 67-68, 70. Yobe did not give permission to anyone to enter his home on May 3, 2010. *Id.* at 70. When he returned home, Yobe observed that windows and a door were pushed in and damaged, and a window appeared to be the point of entry. *Id.* at 68, 69; N.T., July 13, 2011 at 100. Furthermore, this window's curtain was outside the residence. N.T., July 13, 2011 at 100. Based upon the curtain's position, Detective Sandt concluded that someone inside the residence fled outside through this window. *Id.* at 100-01. In addition, Detective Effting testified that there were striation

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house. *Id.* If someone was home, they would say their car is overheating and ask to use a water hose. *Id.*

marks at the point of entry at 3709 North Delaware Drive. *Id.* at 59, 91-92. Yobe also noted that several laptop computers were moved from the second floor to the first floor. N.T., July 12, 2011 at 68. The cost to replace the damaged windows and door was $6,025. *Id.* at 69.

Viewing all the evidence admitted at trial in the light most favorable to the Commonwealth, the Commonwealth has met its burden of proving every element of the crime of criminal trespass beyond a reasonable doubt, *i.e.*, knowing he was not licensed or privileged to do so, Hernandez-Acosta broke into 3709 North Delaware Drive. *See Coleman*, 19 A.3d at 1118-1119; 18 Pa. C.S. § 3503.

Hernandez-Acosta may argue on appeal that the evidence of his presence at, and flight from, the scene of the crime is insufficient to establish guilt beyond a reasonable doubt for criminal trespass. "Mere presence at the scene of a crime, it has been held, is insufficient to sustain a verdict of guilt." *Commonwealth v. Fox*, 498 A.2d 917, 918 (Pa. Super. 1985) (citations omitted). Moreover, "[t]he additional element of concealment or flight, which is as consistent with fear as it is with guilt, does not convert mere presence into proof of guilt." *Id.* (citations omitted). "Thus, presence at the scene of the crime and flight or concealment, *without more*, do not establish guilt beyond a reasonable doubt." *Id.* (citing *Commonwealth v. Goodman*, 350 A.2d 810, 811 (Pa. 1976)) (emphasis in original). "However, when considered *together with other circumstantial*

evidence, these facts may establish a sufficient basis for conviction." *Id.*; *Commonwealth v. Coyle*, 203 A.2d 782, 789 (Pa. 1964); *Commonwealth v. Wilson*, 439 A.2d 770, 771 (Pa. Super. 1982); *Commonwealth v. Cerzullo*, 104 A.2d 179, 182 (Pa. Super. 1954).

In *Commonwealth v. Otto*, a police officer observed two men, one of whom was the defendant, near a broken window of a drugstore. *Commonwealth v. Otto*, 495 A.2d 554, 555 (Pa. Super. 1985). When the officer observed the two men begin to walk away, he stopped them and asked about the broken window. *Id*. The officer saw blood on the broken window and blood on the defendant's hands. *Id.* at 556. The defendant was charged with attempted burglary and criminal trespass. *Id.* In evaluating the sufficiency of the evidence for the charge of criminal trespass, the Superior Court emphasized that mere presence at a crime scene does not establish that person's guilt, and that "[s]omething more is needed." *Id.* at 557 ("There must be additional facts which point to that individual's active participation in the crime."). Thus, the Superior Court upheld the defendant's conviction for criminal trespass, finding that "something more" to be the blood on the defendant's hands. *See id.*

Here, Alonso testified that he and Hernandez-Acosta committed several burglaries. N.T., July 12, 2011 at 90. When committing these burglaries, they would drive the P.T. Cruiser to the targeted house. N.T., July 13, 2011 at 55. Alonso explained to Detective Effting that Hernandez-

Acosta would always enter the house by either prying open a door or window with a screwdriver. *Id.* at 58. On May 3, 2010, Hernandez-Acosta exited the vehicle and rang the doorbell to 3709 North Delaware Drive, to determine whether anyone was home. N.T., July 12, 2011 at 113. When no one answered the door, Hernandez-Acosta walked to the side of the house where the windows and doors were pushed in and damaged. *Id.* In addition, there were striation marks at the point of entry, *i.e.,* the window. N.T., July 13, 2011 at 59. The police recovered a screwdriver from the P.T. Cruiser. *Id.* at 65, 121, 153. Furthermore, this window's curtain was outside the residence. *Id*. at 100. Based upon the curtain's position, Detective Sandt concluded that someone inside the residence fled outside through this window. *Id.* at 100-01. Yobe noted that several laptop computers were moved from the second floor to the first floor. N.T., July 12, 2011 at 68.

Like the facts in *Otto*, not only was there evidence of Hernandez-Acosta's presence and flight, but there was "[s]omething more[,]" *i.e.*, additional facts pointing to Hernandez-Acosta's active participation in the crime. *See Otto*, 495 A.2d at 557. Therefore, there is sufficient evidence to uphold Hernandez-Acosta's conviction of criminal trespass of 3709 North Delaware Drive.

As noted above, Hernandez-Acosta testified that between 2005 and 2006, he became a confidential informant for the Woodbridge, New Jersey,

Police Department and other New Jersey law enforcement agencies. N.T., July 13, 2011 at 172, 200, 210. As a confidential informant, Hernandez-Acosta agreed to collect information pertaining to the activities of Alonso, a leader of the Latin Kings gang in New Jersey. *Id.* at 210. The New Jersey law enforcement authorities instructed Hernandez-Acosta not to commit any crimes while acting as an informant. *Id.* at 181. Hernandez-Acosta testified that he never entered, broke into or stole anything from 3709 North Delaware Drive, or any of the other residences at issue. *Id.* at 187. Hernandez-Acosta also testified that Alonso asked him to drive to a pawn shop in Newark, New Jersey in order to pawn the stolen items. *Id.* at 208. Hernandez-Acosta stated that the stolen property found in his vehicle on May 3, 2010 were the items that Alonso was unable to sell at that pawn shop. *Id.* at 209.

The jury convicted Hernandez-Acosta based partly on the testimony of an accomplice, *i.e.,* Alonso. At Hernandez-Acosta's request, with respect to Alonso's testimony, we instructed the jury that such accomplice testimony comes from a corrupt and polluted source and should be evaluated according the following standards:

> When a Commonwealth witness is an accomplice, his testimony has to be judged by special precautionary rules. Experience shows that an accomplice, when caught, may often try to place the blame falsely on someone else. He may testify falsely in the hope of obtaining favorable treatment or for some corrupt or -- or for some corrupt or wicked motive. On the other hand, an accomplice may be perfectly -- may be a perfectly truthful

> witness. The special rules that I will give you are meant to help you distinguish between truthful and false accomplice testimony.
>
> You must decide whether Sebastian Alonso was an accomplice in the crimes charged. If, after considering all the evidence, you find that he was an accomplice then you must apply the special rules to his testimony. Otherwise, ignore these rules.
>
> Use this test to determine whether Sebastian Alonso was an accomplice. Again, an accomplice is a person who knowingly and voluntarily cooperates with or aids in the commission of a crime. If you believe Sebastian Alonso was an accomplice these are the special rules that you must apply to his testimony.
>
> First, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source. Second, you should examine the testimony of an accomplice closely and accept it only with care and caution. Third, you should consider whether the testimony of an accomplice is supported in whole or in part by other evidence in the case. Accomplice testimony is more dependable if it's supported by independent evidence.
>
> However, even if there is no independent supporting evidence you may still find the defendant guilty solely on the basis of an accomplice's testimony, after using the special rules I just told you about, you are satisfied beyond a reasonable doubt that the accomplice testified truthfully and that the defendant is guilty.
>
> If you decide that a witness deliberately falsified about a material point, that is about a matter that could affect the outcome of this trial, you may for that reason alone choose to disbelieve the rest of his or her testimony, but you are not required to do so. You should consider not only the deliberate falsehood but also all other factors bearing on the witness's credibility in deciding whether to believe other parts of his or her testimony.

Transcript of Proceedings at 58-60, *Commonwealth v. Hernandez-Acosta*, CP-48-CR-2847-2010, CP-48-CR-281-2011, CP-48-CR-282-2011, CP-48-CR-283-2011, CP-48-CR-294-2011, CP-48-CR-295-2011 (C.P.Northampton, Jul. 14, 2011) [hereinafter "N.T., July 14, 2011"]. Notwithstanding this charge, the jury chose to believe Alonso, and disbelieved Hernandez-Acosta. As

between Alonso and Hernandez-Acosta, the jury was free to believe or disbelieve the testimony of Alonso or Hernandez-Acosta. *See Commonwealth v. Thompson*, 934 A.2d 1281, 1285 (Pa. Super. 2007) ("it is for the fact-finder to make credibility determinations, and the finder of fact may believe all, part, or none of a witness's testimony."). The jury believed Alonso. Had the jury found Hernandez-Acosta more credible, they might have found him not guilty.

Accordingly, when viewing the evidence admitted at trial in a light most favorable to the Commonwealth, there is sufficient evidence to enable the fact finder to find, beyond a reasonable doubt, that Hernandez-Acosta committed the crime of criminal trespass on May 3, 2010 at 3709 North Delaware Drive. *See Coleman*, 19 A.3d at 1118-19; 18 Pa. C.S. § 3503(a)(1).

B. <u>Receiving Stolen Property</u>

Hernandez-Acosta alleges that, with respect to the charge of receiving stolen property in cases CP-48-CR-0000281-2011 (Pursell home at 2417 Bushkill Drive) and CP-48-CR-000282-2011 (Neadle home at 1070 West Lafayette Street), we erred as a matter of law or abused our discretion because the evidence adduced at trial was insufficient to establish his guilt beyond a reasonable doubt. Statement of Matters Complained of on Appeal at ¶ 1. Specifically, he maintains that:

> b. the evidence produced at trial fails to support a finding, beyond a reasonable doubt, that the defendant

is guilty of theft by receiving stolen property in that he did not intentionally receive, retain, or dispose of movable property of another. He was merely present making observations of the criminal activity of the codefendant [sic] Sebastian Alonso in order to report activity to law enforcement;

c. the evidence produced at trial fails to support a finding, beyond a reasonable doubt, the value of the property found in the car with [sic] the defendant was arrested and the acquittals on the burglary charges for the homes which that property is related shows that the evidence was insufficient to support a conviction for the theft by receiving stolen property charges.

Statement of Matters Complained of on Appeal at ¶ 1. To convict a defendant of the crime of receiving stolen property, the Commonwealth must establish beyond a reasonable doubt that: 1) the property at issue was stolen; 2) the defendant was in possession of the property; and 3) the defendant knew or had reason to believe that the property was stolen. *See* 18 Pa. C.S. § 3925(a).

There is sufficient evidence to demonstrate the elements of theft by receiving stolen property in both CP-48-CR-0000281-2011 (Pursell home at 2417 Bushkill Drive) and CP-48-CR-000282-2011 (Neadle home at 1070 West Lafayette Street).

1. Stolen Property

When Hernandez-Acosta and Alonso were arrested on May 3, 2010, the police recovered from Hernandez-Acosta's vehicle some of the items taken from Neadle's (case CP-48-CR-000282-2011) home, including a diamond engagement ring, a sterling silver pendant, a sterling silver

bracelet, a pearl charm and a cell phone charger. N.T., July 12, 2011 at 63-64; N.T., July 13, 2011 at 109-10. The police also recovered from Hernandez-Acosta's vehicle several pieces of jewelry stolen from Pursell's (case CP-48-CR-0000281-2011) home, including her husband's watch and class ring. N.T., July 12, 2011 at 87; N.T., July 13, 2011 at 109-10. Therefore, the property at issue was stolen property.

2. Possession of the Stolen Property

If a defendant is not in actual possession of the stolen property, the Commonwealth can prove possession by establishing that the defendant was in constructive possession of the property. *Commonwealth v. Brady,* 560 A.2d 802, 803 (Pa. Super. 1989). When the Commonwealth proceeds under a theory of constructive possession, it must establish that the defendant exercised conscious dominion or control over the property. *In the Interest of Scott,* 566 A.2d 266, 267 (Pa. Super. 1989). The Pennsylvania Supreme Court has defined constructive possession as follows:

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion." . . . We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control."

Commonwealth v. Mudrick, 507 A.2d 1212, 1213 (Pa. 1986) (citations omitted). Furthermore, when analyzing constructive possession, we must be mindful "that the doctrine of constructive possession defies bright line

application. Instead, we must examine the totality of the circumstances in order to assess whether constructive possession has been shown. Moreover, it is clear that circumstantial evidence alone can be used to show the requisite circumstances." *Commonwealth v. Grekis*, 601 A.2d 1275, 1281 (Pa. Super. 1992) (citations omitted).

In *Commonwealth v. Brady*, the defendant was seated in a vehicle while the driver, Fred Miller, entered a residence through a window, removed property, and placed that property in the vehicle's trunk. *Commonwealth v. Brady*, 560 A.2d 802, 803 (Pa. Super. 1989). The defendant was convicted of burglary, theft by receiving stolen property and conspiracy to commit theft by receiving stolen property. *Id.* With respect to the charge of theft by receiving stolen property, the Superior Court found that although the defendant knew the property had been stolen, the Commonwealth failed to prove that the defendant ever received or possessed the stolen property. *Id.* at 807. The Court stated:

> Although appellant was again present in Donald Miller's car when Fred Miller attempted to dispose of the stolen property, appellant's role, if any, was not explained. The evidence does not show what, if anything, occurred between the time of the burglary and Fred Miller's attempt to sell the stolen property to an undercover state trooper. Neither does it show that the stolen property was ever subject to appellant's control. The evidence did not show that appellant had helped to place the stolen property in the trunk of Miller's car or that he had helped to remove it. Indeed, the evidence does not show that appellant had ever touched the stolen property or that he had ever driven or otherwise controlled the car in which Fred Miller had placed the stolen property. The arrangements for Fred Miller to meet the undercover policeman had been made by Donald Miller.

> There was no evidence that appellant had aided therein or that he had participated in any way in the negotiations between Miller and the undercover policeman for the sale of the stolen property. During these negotiations, according to all the evidence, appellant remained seated in the rear of the car. Thus, according to the evidence, appellant was nothing more than a spectator who was present but did not participate. This was insufficient to support a conviction for theft by receiving stolen property.

Brady, 560 A.2d at 807.

In the instant case, the Commonwealth presented sufficient evidence to demonstrate beyond a reasonable doubt that Hernandez-Acosta constructively possessed the stolen property, *i.e.*, he exercised conscious dominion and control of the property. Hernandez-Acosta owned the car from which the stolen property was recovered by the police. N.T., July 12, 2011 at 149-50. Hernandez-Acosta drove this car on numerous occasions while it contained the stolen property. N.T, July 12, 2011 at 110-11; N.T., July 13, 2011 at 207-08. Moreover, Alonso testified that after he and Hernandez-Acosta committed multiple burglaries in March and April 2010, they would transport the stolen items to Newark, New Jersey and sell the stolen property. N.T., July 12, 2011 at 89-90, 110. In fact, Hernandez-Acosta was driving the car on May 3, 2010 shortly before the police searched the car and recovered the stolen items. N.T., July 13, 2011 at 181. With respect to the Pursell home at 2417 Bushkill Drive (case CP-48-CR-0000281-2011), Alonso testified that he and Hernandez-Acosta burglarized this home. N.T., July 12, 2011 at 108. With respect to the Neadle home at 1070 West

Lafayette Street (case CP-48-CR-0000282-2011), Detective Miller testified that Alonso stated that he remained in the vehicle in the driveway while Hernandez-Acosta burglarized the home. N.T., July 13, 2011 at 31-32.

This case differs significantly from the evidence presented in *Brady*. *See Brady*, 560 A.2d 802. In *Brady*, the Commonwealth merely demonstrated the defendant's presence in the vehicle. *See id.* at 806-07. As noted above, the Commonwealth presented sufficient evidence to demonstrate beyond a reasonable doubt that Hernandez-Acosta constructively possessed the stolen property, *i.e.*, he exercised conscious dominion and control of the property. Here, there was more than mere proximity to the stolen goods. *See Davis*, 280 A.2d at 121. *Cf. Brady*, 560 A.2d at 806-07.

3. Knowledge That Property Was Stolen

Hernandez-Acosta testified that he knew that the stolen property, which included property from both 2417 Bushkill Drive and 1070 Lafayette Street, was in his vehicle. N.T., July 13, 2011 at 207-08. He explained that, on May 3, 2010, Alonso asked Hernandez-Acosta to take him to a pawn shop in Newark, New Jersey in order to pawn some of the jewelry. *Id.* at 208. With respect to this issue, Hernandez-Acosta testified as follows:

> Q: So, again, if there are other items that were pawned then how is it that when the car was seized there's still jewelry and other items and proceeds from previous burglaries found in your car?

A: Those were items that he couldn't sell off. As we testified in the case the items found were costume jewelry.

N.T., July 13, 2011 at 209.

Q: Did you actually happen to see the jewelry and things of this nature in your car?

A: Prior to what? Do you mean when we went to the pawn shop? Actually, yes, I seen -- I knew he had jewelry. Did I see the jewelry? No. Then when he came back he said he got X amount of money. I can't remember the exact amount. And I said what's that. He said that's jewelry he couldn't sell. He was going to give to his girlfriend.

Q: All right. So the jewelry that he couldn't sell, you knew that to be in the vehicle, correct, with you?

A: Yes.

Q: At any point in time did you contact law enforcement and tell them there was stolen property in the car?

A: No, ma'am.

N.T., July 13, 2011 at 211. When Hernandez-Acosta and Alonso were arrested on May 3, 2010, the police recovered from Hernandez-Acosta's vehicle some of the items taken from Neadle's (case CP-48-CR-000282-2011) home, including a diamond engagement ring, a sterling silver pendant, a sterling silver bracelet, a pearl charm and a cell phone charger. N.T., July 12, 2011 at 63-64; N.T., July 13, 2011 at 110. The police also recovered from Hernandez-Acosta's vehicle several pieces of jewelry stolen from Pursell's (case CP-48-CR-0000281-2011) home, including her husband's watch and class ring. N.T., July 12, 2011 at 87; N.T., July 13,

2011 at 110. Furthermore, Hernandez-Acosta admitted that he knew this property was stolen. N.T., July 13, 2011 at 207-09, 211.

Therefore, the Commonwealth presented sufficient evidence to demonstrate beyond a reasonable doubt that Hernandez-Acosta knew or had reason to believe that the property at issue was stolen property. *See* 18 Pa. C.S. § 3925(a).

4. Value of Stolen Property

Hernandez-Acosta alleges that, with respect to the charge of receiving stolen property in cases CP-48-CR-0000281-2011 (Pursell home at 2417 Bushkill Drive) and CP-48-CR-000282-2011 (Neadle home at 1070 West Lafayette Street), we erred as a matter of law or abused our discretion because:

> b. the evidence produced at trial fails to support a finding, beyond a reasonable doubt, the value of the property found in the car with [sic] the defendant was arrested and the acquittals on the burglary charges for the homes which that property is related shows that the evidence was insufficient to support a conviction for the theft by receiving stolen property charges.

Statement of Matters Complained of on Appeal at ¶ 1.

Theft by receiving stolen property is graded as a felony of the third degree if the amount of the stolen property exceeds two thousand dollars ($2,000). 18 Pa. C.S. § 3903(a.1). Theft by receiving stolen property is graded as a misdemeanor of the first degree if the amount of the stolen property exceeds two dollars ($200). 18 Pa. C.S. § 3903(b). With respect to

the valuation of such property, "value means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime." 18 Pa. C.S. § 3903. "Market value has been defined as the price which a purchaser, willing but not obligated to buy, would pay an owner, willing but not obligated to sell . . . ." *Commonwealth v. Hanes*, 522 A.2d 622, 625 (Pa. Super. 1987) (quoting *Commonwealth v. Warlow*, 346 A.2d 826, 828 (Pa. Super 1975)). In addition, "an owner, by reason of his status as owner, is deemed qualified to give *estimates* of the value of what he owns." *Id.* The Commonwealth has the burden to establish the value of the stolen property. *Id. See also Commonwealth v. Stauffer*, 361 A.2d 383, 384 (Pa. Super. 1976); *Warlow*, 346 A.2d at 827. Moreover, the Commonwealth does not have to establish an exact market value of the stolen property. *Hanes*, 522 A.2d at 626 (holding that the Commonwealth presented sufficient evidence to the jury supporting the finding that the market value of stolen red oak logs was as high as $2,500). Rather, the Commonwealth must present evidence from which one may reasonably conclude that the market value was a certain amount. *Id.*

Hernandez-Acosta was found guilty of theft by receiving stolen property as a misdemeanor of the first degree for the items stolen from the Pursell home at 2417 Bushkill Drive (case CP-48-CR-0000281-2011) and as

a felony of the third degree for the items stolen from the Neadle home at 1070 West Lafayette Street (case CP-48-CR-0000282-2011). For both counts, the Commonwealth presented sufficient evidence to demonstrate beyond a reasonable doubt that property at issue exceeded the value required by the statute.

In case CP-48-CR-0000281-2011, the Pursell home at 2417 Bushkill Drive, Pursell testified that the items taken from her home on April 23, 2011 included jewelry, cash, a television valued at $1,400, a leather coat valued at $200, and her husband's watch and class ring. N.T., July 12, 2011 at 84-86. The police recovered from Hernandez-Acosta's vehicle several pieces of jewelry stolen from Pursell's home, including her husband's watch and class ring. *Id.* at 87; N.T., July 13, 2011 at 109-10.

In case CP-48-CR-0000282-2011, the Neadle home at 1070 West Lafayette Street, Neadle testified that the items taken from her home included a flat screen television valued at $800 to $900, three laptop computers valued at approximately $2,500, and jewelry. N.T., July 12, 2011 at 60-62. The value of all of the items taken was $7,565.36. *Id.* at 63. The police recovered from Hernandez-Acosta's vehicle some of the items taken from Neadle's home, including a diamond engagement ring, a sterling silver pendant, a sterling silver bracelet, a pearl charm and a cell phone charger. *Id.* at 63-64; N.T., July 13, 2011 at 109-10

With respect to the Pursell home at 2417 Bushkill Drive (case CP-48-CR-0000281-2011), Alonso testified that he and Hernandez-Acosta burglarized this home. N.T., July 12, 2011 at 108. With respect to the Neadle home at 1070 West Lafayette Street (case CP-48-CR-0000282-2011), Detective Miller testified that Alonso stated that he remained in the vehicle in the driveway while Hernandez-Acosta burglarized the home. N.T., July 13, 2011 at 31-32. Alonso testified that after he and Hernandez-Acosta committed the burglaries in March and April 2010, they would transport the stolen items to Newark, New Jersey and sell the stolen property. N.T., July 12, 2011 at 89-90, 110. On numerous occasions, Hernandez-Acosta drove the car while it contained the stolen property. N.T, July 12, 2011 at 110-11; N.T., July 13, 2011 at 207-08. In fact, Hernandez-Acosta was driving the car on May 3, 2010 shortly before the police searched the car and recovered the stolen items. N.T., July 13, 2011 at 181.

Based upon these facts, the Commonwealth presented sufficient evidence to demonstrate beyond a reasonable doubt that the value of the property at issue in case CP-48-CR-0000282-2011, the Neadle home at 1070 West Lafayette Street, exceeded $2,000, and the value of the property at issue in case CP-48-CR-0000281-2011, the Pursell home at 2417 Bushkill Drive, exceeded $200. As such, the value in each case exceeded the amount required by statute for the grading of the charge for which Hernandez-Acosta was convicted.

Viewing all the evidence admitted at trial in the light most favorable to the Commonwealth, the Commonwealth has met its burden of proving every element of the crime of theft by receiving stolen property beyond a reasonable doubt in both CP-48-CR-0000281-2011 (Pursell home at 2417 Bushkill Drive) and CP-48-CR-000282-2011 (Neadle home at 1070 West Lafayette Street). *See Coleman*, 19 A.3d at 1118-1119; 18 Pa. C.S. § 3925(a).

2. Hernandez-Acosta's Challenge to the Weight of the Evidence

Hernandez-Acosta claims, for the first time on appeal, that the verdict was against the weight of the evidence. Statement of Matters Complained of on Appeal at ¶ 2. For the reasons set forth below, we maintain that Hernandez-Acosta has not properly preserved this issue for appellate review.

Pennsylvania Rule of Criminal Procedure 607 provides, in pertinent part:

> (A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:
>
> (1) orally, on the record, at any time before sentencing;
>
> (2) by written motion at any time before sentencing; or
>
> (3) in a post-sentence motion.

Pa. R. Crim. P. 607. Therefore, "a claim that the verdict is against the weight of the evidence must be raised in the first instance before the trial court." *Commonwealth v. Causey*, 833 A.2d 165, 173 (Pa. Super. 2003)

(citing Pa. R. Crim. P. 607). Hernandez-Acosta did not file any post-verdict or post-sentence motions. Moreover, Hernandez-Acosta did not present any oral motions that the verdicts were against the weight of the evidence. Accordingly, it is respectfully submitted that Hernandez-Acosta has failed to properly preserve this issue for appellate review. *See Causey,* 833 A.2d at 173 (Pa. R. Crim. P. 607 "has been applied to preclude appellate review of a weight of the evidence claim that has not first been presented in the form of a motion for a new trial."); *see also* Pa. R. Crim. P., cmt. ("The purpose of this rule is to make clear that a challenge to the weight of the evidence must be raised with the trial judge or it will be waived."). Because Hernandez-Acosta raises this issue for the first time on appeal, he has not properly preserved it for appellate review.

3. <u>Hernandez-Acosta's Challenge to the Sentence Imposed</u>

Hernandez-Acosta contends that "[t]he court erred in not merging or running concurrently the sentences for the three charges for which [sic] imposed sentences." Statement of Matters Complained of on Appeal at ¶ 3. Hernandez-Acosta was convicted of criminal trespass, and two counts of receiving stolen property. N.T., July 14, 2011 at 121-22, 126.

As an aid to sentencing, the Court ordered, received, and reviewed the PSI prepared by the Northampton County Department of Probation and Parole. Transcript of Proceedings at 13, *Commonwealth v. Hernandez-Acosta*, CP-48-CR-2847-2010, CP-48-CR-281-2011, CP-48-CR-282-2011,

CP-48-CR-283-2011, CP-48-CR-294-2011, CP-48-CR-295-2011 (C.P.Northampton, Sept. 9, 2011) [hereinafter "N.T., Sept. 9, 2011"]. At the sentencing hearing, Hernandez-Acosta, through his attorney, indicated that he had reviewed the PSI and found that it was factually accurate. *Id.* at 5. Hernandez-Acosta also reviewed the guideline calculations on the Sentencing Guideline Form and acknowledged that the calculations were correct. *Id.* at 5-7. The calculations indicated that Hernandez-Acosta had a prior record score of RFEL.[6] *Id.* at 5-6. In case CP-48-CR-0000281-2011, for the charge of theft by receiving stolen property, the Sentencing Guideline Form indicated an offense gravity score of three (3), a standard range sentence of twelve (12) months to eighteen (18) months as a minimum, a mitigated range sentence of nine (9) months as a minimum, an aggravated range sentence of twenty-one (21) months as a minimum, and a statutory maximum sentence of five (5) years in prison. *Id.* at 6. In case CP-48-CR-0000282-2011, for the charge of theft by receiving stolen property, the Sentencing Guideline Form sets forth an offense gravity score of five (5), a standard range sentence of twenty-four (24) months to thirty-six (36) months as a minimum, a mitigated range sentence of twenty-one (21) months as a minimum, an aggravated range sentence of thirty-nine (39) months as a minimum, and a statutory maximum sentence of seven (7)

[6] RFEL is the prior record score for "Offenders who have previous convictions or adjudications for Felony 1 and/or Felony 2 offenses which total 6 or more in the prior record . . . ." 204 Pa. Code § 303.4(a).

years in prison. *Id.* at 7. In case CP-48-CR-0002847-2010, for the charge of criminal trespass, the Sentencing Guideline Form sets forth an offense gravity score of four (4), a standard range sentence of twenty-one (21) months to thirty (30) months as a minimum, a mitigated range sentence of eighteen (18) months as a minimum, an aggravated range sentence of thirty-three (33) months as a minimum, and a statutory maximum sentence of ten (10) years in prison. *Id.* at 6.

In case CP-48-CR-0000281-2011, for the charge of theft by receiving stolen property, the Court sentenced Hernandez-Acosta to: (1) pay the cost of prosecution; (2) serve a term of imprisonment in a State Correctional Institution for a minimum period of eighteen (18) months to a maximum period of thirty-six (36) months; and (3) pay $447 in restitution to Pursell. *Id.* at 17. In case CP-48-CR-0000282-2011, for the charge of theft by receiving stolen property, the Court sentenced Hernandez-Acosta to: (1) pay the cost of prosecution; (2) serve a term of imprisonment in a State Correctional Institution for a minimum period of thirty (30) months to a maximum period of seventy-two (72) months; and (3) pay $7,138.12 in restitution to Neadle. *Id.* In case CP-48-CR-0002847-2010, for the charge of criminal trespass, the Court sentenced Hernandez-Acosta to: (1) pay the cost of prosecution; (2) serve a term of imprisonment in a State Correctional Institution for a minimum period of twenty-four (24) months to a maximum period of sixty (60) months; and (3) serve a consecutive term of five (5)

years of probation. *Id.* at 16-17. Each of the three sentences of imprisonment was a standard range sentence. The three sentence of imprisonment were imposed consecutively to each other. *Id.* at 17-18.

a. Hernandez-Acosta's Claim That His Sentences Should Have Been Concurrent, Not Consecutive, to Each Other

Hernandez-Acosta challenges his sentences as excessive because the court imposed consecutive sentences, instead of concurrent sentences. Statement of Matters Complained of on Appeal at ¶ 3. When imposing sentence, the court shall specify any maximum period up to the statutory limit and shall impose a minimum sentence of confinement, which shall not exceed one-half of the maximum sentence imposed. 42 Pa. C.S. §9756(a)-(b). Hernandez-Acosta's sentence for each offense was a standard range sentence and complied with these statutory requirements. As such, the Court imposed a legal sentence. Hernandez-Acosta's claim, therefore, challenges the discretionary aspects of the sentences.

Because Hernandez-Acosta's challenge to the discretionary aspects of the sentences was made for the first time on appeal, we maintain that he has not properly preserved this issue for appellate review. The Superior Court has held that:

> [i]ssues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. Absent such efforts, an objection to a discretionary aspect of a sentence is waived.

Commonwealth v. Shugars, 895 A.2d 1270, 1273-74 (Pa. Super. 2006).

Hernandez-Acosta did not file any post-verdict or post-sentence motions. Moreover, Hernandez-Acosta did not present any oral motions challenging his sentence. Accordingly, it is respectfully submitted that Hernandez-Acosta has failed to properly preserve this issue for appellate review. *See id.*

Assuming, *arguendo*, that Hernandez-Acosta properly preserved his right to appeal the discretionary aspects of his sentences, he has not demonstrated a substantial question regarding the appropriateness of his sentences and, therefore, the discretionary aspects of our sentences are not reviewable on appeal. The right to appeal discretionary aspects of sentencing is not absolute. *Commonwealth v. Mastromarino*, 2 A.3d 581, 585 (Pa. Super. 2010); *see also Commonwealth v. Ladamus,* 896 A.2d 592, 595 (Pa. Super. 2006) ("It is well-settled that appeals of discretionary aspects of a sentence are not reviewable as a matter of right."). "Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter." 42 Pa. C.S. § 9781(b). When appealing the discretionary aspects of a sentence, a defendant must demonstrate that a substantial question exists that the sentence imposed is not appropriate. *Commonwealth v. Lee,* 876 A.2d 408, 411 (Pa. Super. 2005); s*ee also* 42 Pa. C.S. § 9781(b).

When considering the discretionary aspects of a sentence, the determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. *Commonwealth v. Maneval,* 688 A.2d 1198, 1199-1200 (Pa. Super. 1997). Generally, if the sentence imposed falls within the sentencing guidelines, no substantial question exists. *Id.* However, the discretionary aspects of a sentence will be reviewed when a defendant raises a substantial question by articulating sufficiently "the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process . . . ." *Commonwealth v. Mouzon,* 812 A.2d 617, 627 (Pa. 2002).

Hernandez-Acosta challenges his sentence as excessive because the court imposed consecutive sentences, instead of concurrent sentences. Statement of Matters Complained of on Appeal at ¶ 3. The Superior Court has repeatedly reaffirmed that:

> in imposing sentence, a trial judge has the discretion to determine whether, given the facts of a particular case, a given sentence should be consecutive to, or concurrent with, other sentences being imposed. For this reason, this Court has previously held that such a challenge 'does not present a substantial question regarding the discretionary aspects of sentence.'

Commonwealth v. Rickabaugh, 706 A.2d 826, 847 (Pa. Super. 1998) (quoting *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. 1995)). Accordingly, Hernandez-Acosta's challenge to the consecutive sentences as

excessive does not present a substantial question that the sentence imposed is not appropriate. *See Lee,* 876 A.2d at 411; *see also* 42 Pa. C.S. § 9781(b). Therefore, the discretionary aspects of Hernandez-Acosta's sentence are not reviewable on appeal. *Lee,* 876 A.2d at 411.

Assuming, *arguendo*, that Hernandez-Acosta can demonstrate a substantial question exists that the sentence imposed is not appropriate, the discretionary aspects of our sentence must be reviewed. *Mouzon,* 812 A.2d at 627. The proper standard of review when considering the merits of a defendant's sentence claim is to decide whether the court's sentencing determination was an abuse of discretion. *Commonwealth v. Walls,* 926 A.2d 957, 961 (Pa. 2007). When making this determination, an appellate court remains cognizant that:

> [s]entencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa. Super. 2003) (citations and quotations omitted). Moreover, when reviewing a sentence determination, "the appellate courts must give great weight to the sentencing judge's discretion, as he or she is in the best position to measure various factors such as the nature of the crime, the defendant's character,

and the defendant's display of remorse, defiance or indifference." *Commonwealth v. Ellis,* 700 A.2d 948, 958 (Pa. Super. 1997), *appeal denied*, 727 A.2d 127 (Pa. 1998). The sentencing court is "in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." *Commonwealth v. Ward,* 568 A.2d 1242, 1243 (Pa. 1990).

When imposing a sentence, a court is required to consider a myriad of factors when deciding what sentence to impose. Specifically:

> [i]n exercising its discretion [in sentencing], the trial court must consider the character of the defendant and the particular circumstances of the offense in light of the legislative guidelines for sentencing, and the court must impose a sentence that is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.

Commonwealth v. Burkholder, 719 A.2d 346, 350 (Pa. Super. 1998) (citations omitted), *appeal denied*, 747 A.2d 364 (Pa. 1999). In this case, as an aid to sentencing, the Court ordered, received, and reviewed the PSI prepared by the Northampton County Department of Probation and Parole. N.T., Sept. 9, 2011 at 13. With respect to presentence investigation reports, our Supreme Court has stated that:

> [w]here pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself . . . . [Sentencing judges] are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be

> disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion. It would be foolish, indeed, to take the position that if a court is in possession of the facts, it will fail to apply them to the case at hand.

Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. 1988).

The Court presided over Hernandez-Acosta's jury trial and sentencing hearings and had the opportunity to observe his demeanor during those proceedings. In sentencing Hernandez-Acosta, the Court reviewed and recounted the information in the PSI and then stated:

> Mr. Hernandez-Acosta, you've been found guilty by a jury of your peers. It appears from the Presentence Investigation that you do not have many factors in your favor. The Presentence Investigation lists a number of factors not in your favor. For example, your extensive prior criminal record dating back to 1991 including multiple convictions for felony burglary and robbery, including armed robbery, the fact that you served years in state prisons and have not been rehabilitated as of present, your lack of a positive family support system and your weak employment record and the fact that you've been unemployed for most of your life.
>
> I've considered your age and the information provided, the information in the Presentence Investigation, the evidence presented at trial, the sentencing guideline forms, your prior criminal record indicating that you are a career criminal, your previous incarcerations in state and local prisons, your lack of positive family relationships, the fact that you are not a good candidate for rehabilitation and your rehabilitative needs, your inconsistent employment record, the fact you have multiple convictions involving multiple victims, the impact of your crimes on the victims, the protection of the public, deterrence of similar future conduct, the fact a lesser sentence would depreciate the seriousness of the crime and the recommendation of the prosecutor.

> For all of these reasons and the reasons previously stated you will be sentenced in the standard range of the Pennsylvania Sentencing Guidelines.

N.T., Sept. 9, 2011 at 15-16. Hernandez-Acosta's sentence for each offense was a standard range sentence and complied with the statutory requirements. An appellate court is authorized to vacate a sentence imposed within the sentencing guidelines, if its review determines that "the case involves circumstances where the application of the guidelines would be clearly unreasonable." 42 Pa. C.S. § 9781(c)(2). The Court's statements during the sentencing hearing demonstrate that the Court was aware of the contents of the PSI; weighed and balanced the information presented there; applied the information contained in the report and the information presented by the Commonwealth and Hernandez-Acosta at the sentencing hearing; and considered the sentencing guidelines when fashioning Hernandez-Acosta's sentence. Accordingly, we maintain that our sentencing determination, including our decision to impose the three sentences consecutive to each other, was not an abuse of discretion and Hernandez-Acosta's challenges to the discretionary aspects of his sentence lack merit.

b. <u>Hernandez-Acosta's Claim That His Sentences Should Have Been Merged</u>

Hernandez-Acosta contends that "[t]he court erred in not merging . . . the sentences for the three charges for which [sic] imposed sentences." Statement of Matters Complained of on Appeal at ¶ 3. Questions regarding merger of sentences relate to the legality of the sentence. *Commonwealth*

v. Huckleberry, 631 A.2d 1329, 1332 (Pa. Super. 1993). Therefore, Hernandez-Acosta is asserting that the court imposed an illegal sentence. *See id.*

> Section 9765 of the Judicial Code provides:
>
> > No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa. C.S. § 9765. When a defendant is convicted of more than one crime based upon the same facts, in order to determine whether the sentences for such crimes will merge, the Pennsylvania Supreme Court has instructed us to analyze the issue as follows:

> To the extent that our merger jurisprudence is confusing, we now definitively state, for bench and bar, the standard for determining when convictions should merge for the purposes of sentencing. The preliminary consideration is whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge. In order for two convictions to merge: (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts. If the crimes are greater and lesser-included offenses and are based on the same facts, the court should merge the convictions for sentencing; if either prong is not met, however, merger is inappropriate.

Commonwealth v. Gatling, 807 A.2d 890, 899 (Pa. 2002). With

respect to the issue of whether the facts on which both offenses are charged constitute one solitary criminal act,

> [t]he threshold question is whether Appellant committed one solitary criminal act. The answer to this question does not turn on whether there was a 'break in the chain' of criminal activity. Rather, the answer turns on whether the actor commits multiple criminal acts beyond that which is necessary to establish the bare elements of the additional crime[.] If so, then the defendant has committed more than one criminal act. This focus is designed to prevent defendants from receiving a 'volume discount on crime' of the sort described in our Supreme Court's decision in *Anderson.*
>
> If multiple acts of criminal violence were regarded as part of one larger criminal transaction or encounter which is punishable only as one crime, then there would be no legally recognized difference between a criminal who robs someone at gunpoint and a criminal who robs the person and during the same transaction or encounter pistol whips him in order to effect the robbery. But in Pennsylvania, there is a legally recognized difference between these two crimes. The criminal in the latter case may be convicted of more than one crime and sentences for each conviction may be imposed where the crimes are not greater and lesser included offenses.

Commonwealth v. Ousley, 21 A.3d 1238, 1243 (Pa. Super. 2011) (quotations and citations omitted).

Under *Gatling* "we must first determine whether the facts on which both offenses are charged constitute one solitary criminal act." *Gatling*, 807 A.2d at 899. Each of the three sentences imposed on Hernandez-Acosta relates to a criminal charge that occurred at one of three separate locations. In case CP-48-CR-0000281-2011, Hernandez-Acosta was convicted of theft by receiving stolen property, relating to his actions on

April 23, 2010 at 2417 Bushkill Drive, Forks Township, Northampton County, Pennsylvania. In case CP-48-CR-0000282-2011, Hernandez-Acosta was convicted of theft by receiving stolen property, relating to his actions on April 23, 2010 at 1070 West Lafayette Street, Easton, Northampton County, Pennsylvania. In case CP-48-CR-0002847-2010, Hernandez-Acosta was convicted of criminal trespass, relating to his actions on May 3, 2010 at 3709 North Delaware Drive, Forks Township, Northampton County, Pennsylvania. Although the crimes of theft by receiving stolen property committed in cases CP-48-CR-0000281-2011 and CP-48-CR-000282-2011 occurred on the same date, each was committed at a different residence, in a different municipality, involved different victims and different items were taken. Moreover, the crime of criminal trespass in case CP-48-CR-0002847-2010 was committed ten (10) days later and at a residence different than the residences relating to the crimes of theft by receiving stolen property committed in cases CP-48-CR-0000281-2011 and CP-48-CR-000282-2011.

Therefore, for the three crimes at issue, Hernandez-Acosta clearly committed more than one criminal act and the crimes did not arise out of a single set of facts. Having determined that Hernandez-Acosta engaged in separate criminal acts giving rise to his convictions for criminal trespass and two counts of theft by receiving stolen property, we need not conduct a merger analysis. *See Gatling*, 807 A.2d at 899 ("If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the

event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge."). Accordingly, the sentences for these three crimes did not merge.

BY THE COURT:

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MICHAEL J. KOURY, JR., J.