NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. SHONDA SPRUILL Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3193 EDA 2008

Appeal from the Judgment of Sentence October 7, 2008
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012637-2007;
CP-51-CR-0012638-2007; CP-51-CR-0012639-2007

BEFORE: GANTMAN, P.J., PANELLA, J., and STABILE, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED JULY 28, 2014**

Appellant, Shonda Spruill, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following her bench trial conviction for aggravated assault, conspiracy to commit aggravated assault, simple assault, possession of an instrument of crime, recklessly endangering another person, and terroristic threats.[1] This case is on remand from the Pennsylvania Supreme Court by order dated November 22, 2013, to determine, *inter alia*, if Appellant's abandonment issue was properly preserved for appeal. We affirm Appellant's convictions but vacate the judgment of sentence, and remand for resentencing.

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[1] 18 Pa.C.S.A. §§ 2702(a)(4); 903(a)(1); 2701(a)(1); 907(a); 2705; 2706(a)(1), respectively.

The Pennsylvania Supreme Court opinion sets forth the relevant facts and procedural history of this appeal as follows:

> On October 1, 2007, [Appellant] attended a funeral service in Philadelphia. Also attending the funeral were Derrell Hawkins and her daughters, Shamira Deans ("Shamira") and Shadora Deans ("Shadora"). Shamira was approximately five months pregnant. The father of Shamira's unborn child was also the father of a child of [Appellant]. After the funeral service ended, [Appellant] and ten other women accosted Derrell, Shamira and Shadora. [Appellant] began screaming at Shamira that [Appellant] was going to kill Shamira's baby. The group of assailants attacked Derrell, Shamira and Shadora, macing the victims as well as punching and kicking them. Shamira was repeatedly kicked in the stomach during the assault. The assault lasted for approximately ten minutes until the pastor and other church staff were able to intercede and remove the victims.
>
> [Appellant] was charged with the aggravated assault of Derrell, Shamira, and Shadora as well as related crimes. Count 1 in each of the bills of information lodged against [Appellant] set forth the aggravated assault charge, as follows:
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> > COUNT 1: Aggravated Assault—(F1)
> >
> > Offense Date: 10/1/2007—18 [Pa.C.S.] § 2702 §§ A
> >
> > Attempted to cause serious bodily injury to another, or caused such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; and/or attempted to cause, or intentionally, knowingly, or recklessly did cause bodily/serious bodily injury with a deadly weapon.
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> Information filed 11/06/2007.
>
> Although the aggravated assault charges were denominated as "F1"s—*i.e.*, first-degree felonies—the descriptions in the bills of information encompassed the

> elements of both F1 aggravated assault and second-degree felony ("F2") aggravated assault. F1 aggravated assault is established when an actor "attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa.C.S. § 2702(a)(1). The less serious offense of F2 aggravated assault is established when an actor "attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon." 18 Pa.C.S § 2702(a)(4).
>
> [Appellant] was tried nonjury before the Honorable Linda A. Carpenter. On May 19, 2008, the trial court found [Appellant] guilty of F2 aggravated assault, conspiracy to commit aggravated assault, simple assault, possession of an instrument of crime, recklessly endangering another person, and terroristic threats with respect to the attack on Derrell. With respect to Shamira and Shadora, the trial court found [Appellant] not guilty of aggravated assault, but guilty of simple assault and related crimes. [Appellant] did not raise an objection to the aggravated assault verdict premised upon the grading of the conviction as an F2.
>
> Over four months later, on October 7, 2008, [Appellant] was sentenced to an aggregate term of 6 to 23 months' house arrest to be followed by five years' probation for the crimes against Derrell. With respect to the remaining convictions for the assaults upon Shamira and Shadora, the trial court imposed concurrent sentences of 6 to 23 months' house arrest to be followed by two years' probation. Again, [Appellant] did not object to the aggravated assault conviction premised upon its grading as an F2.

Commonwealth v. Spruill, __ Pa. __, __, 80 A.3d 453, 454-56 (2013).

Appellant timely filed a notice of appeal on November 12, 2008. On November 24, 2008, the court ordered Appellant to file a concise statement of errors complained of on appeal, per Pa.R.A.P. 1925(b), which Appellant

timely filed on December 15, 2008. Initially on appeal to this Court, Appellant raised several claims including that her conviction for F2 aggravated assault was improper because the Commonwealth did not specifically prosecute that charge during trial. In response, the Commonwealth argued Appellant had waived the issue by failing to object before the trial court. On December 31, 2009, this Court found the issue was not waived because "a claim that the trial court improperly imposed a sentence on an offense lower than the offense charged in the criminal information goes to the legality of the sentence, and thus cannot be waived." ***See Commonwealth v. Spruill***, No. 3193 EDA 2008, unpublished memorandum at 3 (Pa.Super. filed December 31, 2009). Ultimately, this Court vacated Appellant's conviction and sentence, concluding the issue concerned the legality of the sentence and the Commonwealth had abandoned the F2 charge at trial. In its disposition, this Court did not address the other issues Appellant raised. The Commonwealth sought further review in the Pennsylvania Supreme Court. In an opinion filed on November 22, 2013, the Pennsylvania Supreme Court vacated this Court's judgment, holding Appellant's "abandonment" claim did not implicate the legality of the sentence for purposes of preservation and remanded the case to this Court to determine whether Appellant had properly raised and preserved this issue for appellate review. Appellant's case is now before this Court on remand to decide if Appellant's "abandonment" issue was properly

preserved at the trial level. As well, the Supreme Court recommended we review Appellant's sufficiency claim and a possible sentencing issue based on merger.

Appellant raises the following issues for our review:

> WHERE THE COMMONWEALTH SPECIFICALLY PROSECUTED [APPELLANT] FOR FELONY-ONE AGGRAVATED ASSAULT (AND CONSPIRACY TO COMMIT THE SAME), AND SPECIFICALLY DECLINED TO PROSECUTE [APPELLANT] FOR FELONY-TWO AGGRAVATED ASSAULT (OR CONSPIRACY TO COMMIT THE SAME), WAS NOT THE ISSUE PRESERVED FOR APPEAL WHEN THE [TRIAL] COURT ACKNOWLEDGED THAT THE COMMONWEALTH WAS PROCEEDING ONLY ON FELONY-ONE AGGRAVATED ASSAULT, AND DID NOT THE [TRIAL] COURT ERR WHEN IT THEN *SUA SPONTE* FOUND [APPELLANT] GUILTY OF FELONY-TWO AGGRAVATED ASSAULT AND CONSPIRACY TO COMMIT FELONY-TWO AGGRAVATED ASSAULT SINCE FELONY-TWO AGGRAVATED ASSAULT IS NOT A LESSER INCLUDED OFFENSE OF FELONY-ONE AGGRAVATED ASSAULT?
>
> BECAUSE IT WAS NOT PROVEN THAT THE "MACE" USED BY [APPELLANT] IN THE INSTANT MATTER WAS A DEADLY WEAPON, WAS NOT THE EVIDENCE INSUFFICIENT TO CONVICT [APPELLANT] OF CONSPIRACY TO COMMIT FELONY-TWO AGGRAVATED ASSAULT IN THAT THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT [APPELLANT] CAUSED OR ATTEMPTED TO CAUSE BODILY INJURY TO A COMPLAINANT WITH A DEADLY WEAPON OR CONSPIRED TO CAUSE BODILY INJURY TO A COMPLAINANT WITH A DEADLY WEAPON?

(Appellant's Brief at 4).[2]

In her first issue, Appellant argues the record shows the

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[2] We have reordered Appellant's issues for purposes of disposition.

Commonwealth specifically abandoned the second-degree felony aggravated assault ("F2 aggravated assault") charge during trial. Appellant contends the trial court opinion further demonstrates this point because it justified the F2 aggravated assault conviction as a lesser-included offense of F1 aggravated assault. Appellant maintains the trial court would not have justified the conviction in this manner if it truly believed the Commonwealth had retained the F2 aggravated assault charge. Further, Appellant asserts F2 aggravated assault is not a lesser-included offense of F1 aggravated assault because their respective elements differ. When the court convicted Appellant of the F2 aggravated assault, it viewed the verdict as a compromise. Given the Commonwealth's abandonment of the F2 aggravated assault and the trial court's compromised verdict, Appellant did not have to object to the illegal conviction to preserve it for appeal. Moreover, any objection would have been futile and risked harmful consequences to Appellant.

Appellant also argues the trial court had no subject matter jurisdiction to convict Appellant of an offense that the Commonwealth had withdrawn. Appellant contends the withdrawal issue is preserved for appeal because it implicates subject matter jurisdiction. Appellant concludes the withdrawal issue was not waived, and this Court should vacate the judgment of sentence as to F2 aggravated assault and conspiracy and discharge these convictions. We disagree.

To preserve a claim of error for appellate review, a party must make a specific objection to the alleged error before the trial court in a timely fashion and at the appropriate state of the proceedings; failure to raise such objection results in waiver of the underlying issue on appeal. ***Commonwealth v. Charleston***, 16 A.3d 505 (Pa.Super. 2011), *appeal denied*, 612 Pa. 696, 30 A.3d 486 (2011). ***See also Commonwealth v. Shamsud-Din***, 995 A.2d 1224 (Pa.Super. 2010) (holding appellant failed to preserve for appellate review claim that trial court erred by convicting her of third-degree misdemeanor assault where appellant did not timely object to trial court's consideration of that offense or to conviction immediately following court's guilty verdict). "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

Subject matter jurisdiction attaches in a criminal case when the court is competent to hear the case and formal notice of the crimes charged is given to the defendant in compliance with the Sixth Amendment of the United States Constitution and Article, 1 Section 9, of the Pennsylvania Constitution. ***Commonwealth v. Jeffrey Jones***, 593 Pa. 295, 304, 929 A.2d 205, 210 (2007). First, "each court of common pleas within this Commonwealth possesses the same subject matter jurisdiction to resolve cases arising under the Pennsylvania Crimes Code…" ***Commonwealth v. Bethea***, 574 Pa. 100, 114, 828 A.2d 1066, 1075 (2003), *cert. denied*, 540 U.S. 1118, 124 S.Ct. 1065, 157 L.Ed.2d 911 (2004). Second, formal notice

is given when "the Commonwealth confront[s] the defendant with a formal and specific accusation of the crimes charged." ***Commonwealth v. Little***, 455 Pa. 163, 168, 314 A.2d 270, 273 (1974). "[S]o long as the defendant received formal notice, even the lack of a proper criminal indictment would not deprive the trial court of subject matter jurisdiction…" ***Jones, supra*** at 304, 929 A.2d at 210. Generally, "[a]n objection to lack of subject matter jurisdiction can never be waived; it may be raised at any stage in the proceedings by the parties or by a court on its own motion." ***Little, supra*** at 167, 314 A.2d at 272.

"In any court case pending before an issuing authority, the attorney for the Commonwealth, or his or her designee, may withdraw one or more of the charges. The withdrawal shall be in writing." Pa.R.Crim.P. 551.

Instantly, Appellant attended a funeral service that the victims also attended. After the service ended, Appellant along with ten other women accosted the victims. During the altercation, Appellant screamed she would kill one of the victims and her unborn child. Appellant proceeded to spray the victims with mace before punching and kicking them repeatedly. The pregnant victim was kicked in the stomach numerous times during the ten-minute attack. The Commonwealth charged Appellant with aggravated assault, conspiracy to commit aggravated assault and related crimes. Count 1 in each of the bills of information was designated as an "F1" charge; nevertheless, the descriptions in the bills of information encompassed the

elements of both F1 aggravated assault and F2 aggravated assault. Appellant was tried nonjury and found guilty of F2 aggravated assault, conspiracy to commit aggravated assault, and related charges. Appellant did not object to the F2 aggravated assault conviction.

Initially, Appellant's case involved criminal charges arising under the Pennsylvania Crimes Code. Given that each court of common pleas possesses subject matter jurisdiction to resolve cases arising under the Pennsylvania Crimes Code, the trial court was competent to hear the case pending against Appellant. ***See Bethea, supra***. Additionally, the criminal information filed against Appellant provided her with formal notice of the charges pending because it encompassed the elements of both F1 and F2 aggravated assault. ***See Little, supra***. The lack of a separate listing for the F2 aggravated assault charge did not deprive the trial court of subject matter jurisdiction. ***See Jones, supra***. Therefore, no jurisdictional issue exists in this case.

Additionally, the Commonwealth at no time filed a petition to withdraw the F2 aggravated assault charge in the trial court. The prosecutor did state on the record that the aggravated assault charge was graded as an F1, but these comments alone are insufficient to serve as an affirmative withdrawal of the F2 aggravated assault charge where the withdrawal of pending charges must be done in writing. ***See*** Pa.R.Crim.P. 551. Further, by virtue of the F2 aggravated assault conviction, the trial court demonstrated the F2

charges had not been withdrawn. Therefore, Appellant's claim that the Commonwealth withdrew the pending F2 aggravated assault charge merits no relief.

Moreover, at the time of the verdict, Appellant failed to object to the F2 aggravated assault conviction before the trial court or allege the Commonwealth had withdrawn the F2 aggravated assault charge. Likewise, Appellant raised no objection at sentencing or in post-sentence motions. This failure to make a specific and timely objection to the conviction as graded constituted waiver of the issue on appeal. ***See Charleston, supra***. Therefore, we conclude Appellant waived this claim that the Commonwealth withdrew the F2 aggravated assault charge.

In her second issue, Appellant argues "mace" is commonly used as a temporary disabling and non-lethal weapon. To sustain her conviction for F2 aggravated assault, Appellant maintains the Commonwealth must prove Appellant used a deadly weapon during the perpetration of the aggravated assault. Appellant contends she used the "mace" in a non-lethal manner and caused the victims no serious or lasting effects. Further, Appellant emphasizes the lack of expert testimony on the potential physical effects of "mace" shows the evidence was insufficient to prove Appellant committed F2 aggravated assault or conspiracy to commit F2 aggravated assault. Appellant concludes the trial court erred in determining that "mace" is a deadly weapon for purposes of grading her conviction, and this Court should

vacate the judgment of sentence as to F2 aggravated assault and conspiracy and discharge these convictions. We disagree.

Appellant's second issue involves a challenge to the sufficiency of the evidence, which implicates the following legal principles:

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

Commonwealth v. Barnswell Jones, 874 A.2d 108, 120-21 (Pa.Super. 2005) (quoting ***Commonwealth v. Bullick***, 830 A.2d 998, 1000 (Pa.Super. 2003)).

The Crimes Code defines aggravated assault as follows:

> **§ 2702. Aggravated assault**
>
> **(a) Offense defined.—**A person is guilty of aggravated assault if he:

> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
>
> * * *
>
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.
>
> * * *

18 Pa.C.S.A. § 2702(a)(1), (4). The Crimes Code defines "deadly weapon" as "[a]ny firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury. 18 Pa.C.S.A. § 2301.

"Although deadly weapons are commonly items which one would traditionally think of as dangerous (*e.g.*, guns, knives, *etc.*), there are instances when items which normally are not considered to be weapons can take on a deadly status." ***Commonwealth v. Scullin***, 607 A.2d 750, 753 (Pa.Super. 1992), *appeal denied*, 533 Pa. 633, 621 A.2d 579 (1992). "Items not normally considered deadly weapons can take on such status based upon their use under the circumstances. ***Commonwealth v. Rhoades***, 8 A.3d 912, 917 (Pa.Super. 2010); *appeal denied*, 611 Pa. 651, 25 A.3d 328 (2011), *cert. denied*, __ U.S. __, 132 S.Ct. 1746, 182 L.Ed.2d 536 (2012). ***See also Commonwealth v. McCullum***, 529 Pa. 117, 137, 602 A.2d 313,

323 (1992) (holding "[a] deadly weapon need not be…an inherently lethal instrument or device"); ***Commonwealth v. Prenni***, 357 Pa. 572, 575, 55 A.2d 532, 533 (1947) (stating "[a]n ax, a baseball bat, an iron bar, a heavy cuspidor, and even a bedroom slipper have been held to constitute deadly weapons under varying circumstances"); ***Commonwealth v. Raybuck***, 915 A.2d 125 (Pa.Super. 2006) (holding mouse poison became deadly weapon when included in sandwich for husband to consume and fact that amount was insufficient to cause serious bodily injury is irrelevant to classification as deadly weapon); ***Commonwealth v. Roman***, 714 A.2d 440 (Pa.Super. 1998), *appeal denied*, 556 Pa. 707, 729 A.2d 1128 (1998) (finding egg is deadly weapon when thrown from roof of building at windshield of vehicle); ***Commonwealth v. Nichols***, 692 A.2d 181, 184 (Pa.Super. 1997) (finding "[a] baseball bat, when swung at the head, can be a very deadly weapon"); ***Commonwealth v. Chance***, 458 A.2d 1371, 1374 (Pa.Super. 1983) (finding where defendant's gun clicked several times during struggle with victim evidence was sufficient for aggravated assault with deadly weapon notwithstanding the fact that gun was unloaded).

Section 903(a)(1) of the Crimes Code provides:

> **§ 903 Criminal Conspiracy**
>
> **(a) Definition of conspiracy**.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

> (1) agrees with such person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime;
>
> * * *
>
> **(b) Scope of conspiratorial relationship.**—If a person guilty of conspiracy, as defined by subsection (a) of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, to commit such crime whether or not he knows their identity.

18 Pa.C.S.A. § 903(a)(1), (b). To sustain a conviction for criminal conspiracy, the Commonwealth must establish the defendant: 1) entered into an agreement to commit or aid in an unlawful act with another person or persons; 2) with a shared criminal intent; and 3) an overt act was done in furtherance of the conspiracy. ***Jones, supra*** at 121. Additionally:

> Circumstantial evidence may provide proof of the conspiracy. The conduct of the parties and the circumstances surrounding such conduct may create a "web of evidence" linking the accused to the alleged conspiracy beyond a reasonable doubt. An agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

Id. at 121-22.

> The essence of a criminal conspiracy is the common understanding that a particular criminal objective is to be accomplished. Mere association with the perpetrators, mere presence at the scene, **or** mere knowledge of the

> crime is insufficient. Rather, the Commonwealth must prove that the defendant shared the criminal intent, *i.e.,* that the [defendant] was an active participant in the criminal enterprise and that he had knowledge of the conspiratorial agreement. The defendant does not need to commit the overt act; a co-conspirator may commit the overt act.

Commonwealth v. Lambert, 795 A.2d 1010, 1016 (Pa.Super. 2002), *appeal denied*, 569 Pa. 701, 805 A.2d 521 (2002) (internal citations and quotation marks omitted) (emphasis added). Nevertheless, circumstances such as an association between alleged conspirators, knowledge of the commission of the crime, presence at the scene of the crime, and/or participation in the object of the conspiracy, are relevant to prove a conspiracy, when "viewed in conjunction with each other and in the context in which they occurred." ***Id.***

Instantly, Appellant used mace to incapacitate and isolate her victims during the attack. The mace temporarily blinded the victims. As a result, the victims were unable to defend themselves against their attackers. Further, the victims endured the attack for ten minutes without help, because the bystanders also feared being sprayed with mace. In light of Appellant's threats made on the pregnant victim's life, the use of mace to incapacitate the victims, the repeated kicking and punching of the victims, and the length of the attack, the trial court determined there was sufficient evidence to convict Appellant of F2 aggravated assault with mace as a deadly weapon. On appeal to this Court, Appellant challenged the

sufficiency of the evidence of her F2 aggravated assault conviction stating the trial court erred in classifying mace as a deadly weapon. This Court did not address the issue, however, because Appellant's conviction was vacated on sentence illegality grounds. The case is now before this Court on remand from the Pennsylvania Supreme Court. While the Commonwealth asserts Appellant's sufficiency claim is not entitled to review, the Supreme Court in its remand order called for us to consider Appellant's remaining claims, including the sufficiency of the evidence. ***See Spruill, supra***. Therefore, we will address the claim.

Initially, we observe that mace, when used for its intended purpose, might not necessarily be an inherently deadly object. Nonetheless, in this case, mace took on deadly weapon status because it was integral to Appellant's attempt to carry out her death threats aimed at the pregnant victim. ***See Scullin, supra***. Specifically, Appellant sprayed three victims with mace to incapacitate them, before punching and kicking them for ten minutes. Additionally, Appellant repeatedly kicked the pregnant victim in the stomach after making threats on her life. Appellant stopped the attack only when bystanders intervened. Given Appellant's actions, her stated intent, and her total disregard for the wellbeing of her victims, the trial court was justified in classifying mace as a deadly weapon for the purposes of F2 aggravated assault. ***Id.*** Therefore, Appellant's F2 aggravated assault sufficiency claim merits no relief.

Further, Appellant and ten other women attacked the victims during the incident. All of the women participated in the incident and repeatedly kicked and punched the victims during the ten-minute attack. Additionally, the other women were present when Appellant made threats on the pregnant victim's life. Under the circumstances of this case, there was sufficient evidence to conclude that Appellant and the other women agreed to commit a crime and, with shared intent, committed overt acts in furtherance of the conspiracy. ***See Barnswell Jones, supra***. Therefore, the trial court properly convicted Appellant of conspiracy to commit F2 aggravated assault and her sufficiency claim as to the conspiracy charge also merits no relief.

Finally, we see in the certified record that the trial court, in its sentencing order, directed Appellant to serve concurrent sentences for some crimes that should have merged for sentencing. "No crime 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." 42 Pa.C.S.A. § 9765. Merger is prohibited "unless two distinct facts are present: 1) the crimes arise from a single criminal act; and 2) all of the statutory elements of one of the offenses are included in the statutory elements of the other." ***Commonwealth v. Baldwin***, 604 Pa. 34, 39, 985 A.2d 830, 833 (2009). Under Section 9765, this Court held there are distinct elements in both simple assault and REAP,

which preclude merger for sentencing purposes. ***Commonwealth v. Calhoun***, 52 A.3d 281, 289 (2012), *appeal denied*, ___ Pa. ___, 67 A.3d 793 (2013). Nevertheless, the elements of simple assault are necessarily included in the crime of aggravated assault for the purposes of merger at sentencing. ***See*** 18 Pa.C.S.A. §§ 2701, 2702 (demonstrating all elements of simple assault are included in aggravated assault in single criminal act). "[M]erger is a nonwaivable challenge to the legality of the sentence." ***Commonwealth v. Pettersen***, 49 A.3d 903, 911 (Pa.Super. 2012), *appeal denied*, ___ Pa. ___, 63 A.3d 776 (2013).

If a court does not have a statutory authority to order a particular act, the order must be vacated. ***Commonwealth v. Randal***, 837 A.2d 1211 (Pa.Super. 2003) (*en banc*); ***Commonwealth v. Arest***, 734 A.2d 910 (Pa.Super. 1999) (*en banc*); ***Commonwealth v. Their***, 663 A.2d 225 (Pa.Super. 1995), *appeal denied*, 543 Pa. 703, 670 A.2d 643 (1996). In light of the Pennsylvania Supreme Court's decision in ***Baldwin***, a sentencing court has no statutory authority to sentence a defendant for two crimes arising from a single criminal act when all of the statutory elements of one of the offenses are included in the statutory elements of the other. ***See Baldwin, supra***.

Instantly, in Appellant's first appeal, she argued her convictions at CP-51-CR-0012639-2007 for aggravated assault and simple assault should have merged for sentencing, her convictions at CP-51-CR-0012638-2007 for

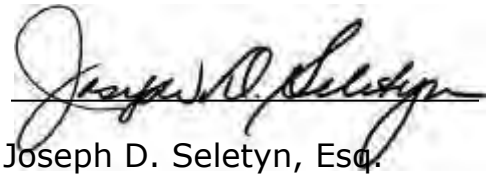
simple assault and recklessly endangering another person should have merged for sentencing, and her convictions at CP-51-CR-0012637-2007 for simple assault and recklessly endangering another person should have merged for sentencing. Given this Court's reversal of Appellant's conviction on other grounds, the case was to be remanded to the trial court for resentencing, without this Court reaching the merger issue. In light of the Supreme Court's reversal of that previous decision, however, this case is once more before us for review. While Appellant did not raise the merger issue in the present appeal, the Supreme Court's remand decision recommended that we review all of Appellant's unaddressed claims from her initial appeal. ***See Spruill, supra***. Therefore, given the fact that a merger issue is nonwaivable, we address the issue.

Pursuant to controlling law, the trial court was without statutory authority to sentence Appellant to separate albeit concurrent sentences for aggravated assault and simple assault at CP-51-CR-0012639-2007, so that sentence must be corrected. On the other hand, simple assault and REAP do not merge for sentencing purposes, so Appellant's sentences at the other docket numbers remain. Nevertheless, we must vacate the judgment of sentence because we have disturbed the court's overall sentencing scheme. Accordingly, we vacate and remand the matter for re-sentencing. ***See Commonwealth v. Bartrug***, 732 A.2d 1287 (Pa.Super. 1999), *appeal denied*, 561 Pa. 651, 747 A.2d 896 (1999) (citing ***Commonwealth v.***

Vanderlin, 580 A.2d 820, 831 (Pa.Super. 1990) (holding that if trial court errs in its sentence on one count in multi-count case, then all sentences for all counts will be vacated so court can restructure its entire sentencing scheme). ***See also Commonwealth v. Goldhammer***, 512 Pa. 587, 517 A.2d 1280 (1986), *cert. denied*, 480 U.S. 950, 107 S.Ct. 1613, 94 L.Ed.2d 798 (1987) (stating, "When a defendant challenges one of several interdependent sentences, [s]he, in effect, challenges the entire sentencing plan"; if appellate court alters overall sentencing scheme, then remand for re-sentencing is proper).

Judgment of sentence vacated; case remanded for re-sentencing. Jurisdiction is relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/28/2014