NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN RUSSELL MCNEAL, II	:	
Appellant	:	No. 1498 EDA 2024

Appeal from the Order Entered March 12, 2024
In the Court of Common Pleas of Chester County Criminal Division at No(s): CP-15-CR-0000291-2022

BEFORE: STABILE, J., McLAUGHLIN, J., and BENDER, P.J.E.

MEMORANDUM BY BENDER, P.J.E.: **FILED APRIL 29, 2025**

Appellant, John Russell McNeal, II, appeals from the aggregate judgment of sentence of 24 to 48 years' incarceration, imposed after he was convicted, following a non-jury trial, of two counts of attempted first-degree murder and various other offenses. On appeal, Appellant seeks to challenge the weight and sufficiency of the evidence, and the legality of his sentence. Additionally, Appellant's counsel, Scott J. Werner, Jr., Esq., seeks to withdraw his representation of Appellant pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). After careful review, we affirm Appellant's judgment of sentence and grant counsel's petition to withdraw.

We glean the following facts from the record. At trial, Christina Melendez testified that on January 2, 2022, she and Appellant, her boyfriend, got into an argument while they were driving with her two children in the car.

N.T. Trial, 11/3/23, at 141. The couple arrived at Ms. Melendez's apartment complex and, as she was getting her children out of the car, Appellant "let off a shot in the air" from a gun he was holding. ***Id.*** at 149. Ms. Melendez took her children to her friend Kiara's nearby apartment in the same complex, and then went to her apartment, where she was alone with Appellant. ***Id.*** at 157, 159. Inside Ms. Melendez's apartment, Appellant put his two hands around Ms. Melendez's throat with "a firm grab" and said, "I could smoke you right now." ***Id.*** at 161-62. Ms. Melendez interpreted Appellant's statement as a threat to shoot her. ***Id.*** at 162.

Appellant then released Ms. Melendez and told her he was "going to pack his belongings and leave and never come back…." ***Id.*** at 165. When Appellant went upstairs to pack his things, Ms. Melendez returned to Kiara's apartment to retrieve her children. ***Id.*** at 166. At Kiara's home, Ms. Melendez stood looking out the front screen door to see if Appellant "was actually leaving…." ***Id.*** at 168. She saw Appellant come outside and shoot "at [her] car a few times." ***Id.*** at 175. He then shot at Ms. Melendez as she was looking out the screen door of Kiara's apartment. ***Id.*** at 176. One bullet struck Ms. Melendez in the thigh, and another bullet struck her three-year-old son, going "through his back and out of his armpit on the right side." ***Id.*** at 133, 177, 187, 192. Ms. Melendez shut the "main door" of the home, and ran to "the back of the room with everyone that was in the living room[,]" including several children. ***Id.*** at 177, 178. Ms. Melendez called 911 and was ultimately taken to the hospital. ***Id.*** at 187, 192.

Based on the testimony of Ms. Melendez and other witnesses, as well as surveillance video, photographs from the crime scene, ballistics evidence, and medical and phone records admitted by the Commonwealth, the court convicted Appellant of two counts of attempted first-degree murder (18 Pa.C.S. § 2502(a) and 18 Pa.C.S. § 901(a)); five counts of aggravated assault (18 Pa.C.S. §§ 2702(a)(1), 2702(a)(4), and 2702(a)(8)); three counts of simple assault (18 Pa.C.S. §§ 2701(a)(1), 2701(a)(1), 2701(a)(3)); carrying a firearm without a license (18 Pa.C.S. § 6106(a)(1)); terroristic threats (18 Pa.C.S. § 2706(a)(1)); criminal mischief (18 Pa.C.S. § 3304(a)(5)); seven counts of discharging a firearm into an occupied structure (18 Pa.C.S. § 2701.1(a)); and ten counts of recklessly endangering another person (18 Pa.C.S. § 2705).

On March 12, 2024, the court sentenced Appellant to an aggregate term of 24 to 48 years' incarceration. He filed a timely post-sentence motion, which was denied on April 24, 2024. Appellant then filed a timely, *pro se* notice of appeal.[1] In response to the court's order to file a Pa.R.A.P. 1925(b) concise

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[1] In ***Commonwealth v. Williams***, 151 A.3d 621, 624 (Pa. Super. 2016), we held "that this Court is required to docket a *pro se* notice of appeal despite [the a]ppellant['s] being represented by counsel…." Here, Appellant's *pro se* notice of appeal was postmarked as having been mailed on May 23, 2024. Thus, pursuant to the prisoner mailbox rule, his *pro se* appeal was timely filed. ***See*** Pa.R.Crim.P. 720(A)(2)(a) ("If the defendant files a timely post-sentence motion, the notice of appeal shall be filed…within 30 days of the entry of the order deciding the motion."); Pa.R.A.P. 121(f) ("A *pro se* filing submitted by a person incarcerated in a correctional facility is deemed filed as of the date of the prison postmark or the date the filing was delivered to the prison authorities for purposes of mailing as documented by a properly executed prisoner cash slip or other reasonably verifiable evidence.").

statement of errors complained of on appeal, Attorney Werner filed a Rule 1925(c)(4) statement of his intent to file an ***Anders*** brief and petition to withdraw. On September 27, 2024, the court issued an opinion noting that counsel had found no, non-frivolous issues he could raise on appeal.

On November 11, 2024, Attorney Werner filed with this Court a petition to withdraw from representing Appellant. That same day, counsel also filed an ***Anders*** brief, stating that

> Appellant seeks to raise the credibility of the [a]ffiant and victim during the trial, the legality of the sentence imposed, the weight of the evidence[,] and the sufficiency of the evidence.

Anders Brief at 11. Attorney Werner concludes that these issues are frivolous, and that Appellant has no other, non-frivolous issues he could pursue herein. Accordingly,

> this Court must first pass upon counsel's petition to withdraw before reviewing the merits of the underlying issues presented by [the appellant]. ***Commonwealth v. Goodwin****,* 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*).
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> Prior to withdrawing as counsel on a direct appeal under ***Anders****,* counsel must file a brief that meets the requirements established by our Supreme Court in ***Santiago****.* The brief must:
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> > (1) provide a summary of the procedural history and facts, with citations to the record;
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> > (2) refer to anything in the record that counsel believes arguably supports the appeal;
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> > (3) set forth counsel's conclusion that the appeal is frivolous; and
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> > (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

> ***Santiago****,* 978 A.2d at 361. Counsel also must provide a copy of the ***Anders*** brief to his client. Attending the brief must be a letter that advises the client of his right to: "(1) retain new counsel to pursue the appeal; (2) proceed pro se on appeal; or (3) raise any points that the appellant deems worthy of the court's attention in addition to the points raised by counsel in the ***Anders*** brief." ***Commonwealth v. Nischan****,* 928 A.2d 349, 353 (Pa. Super. 2007), *appeal denied*, … 936 A.2d 40 ([Pa.] 2007).

Commonwealth v. Orellana, 86 A.3d 877, 879-80 (Pa. Super. 2014). After determining that counsel has satisfied these technical requirements of ***Anders*** and ***Santiago***, this Court must then "conduct a simple review of the record to ascertain if there appear[s] on its face to be arguably meritorious issues that counsel, intentionally or not, missed or misstated." ***Commonwealth v. Dempster***, 187 A.3d 266, 272 (Pa. Super. 2018) (*en banc*).

In this case, Attorney Werner's ***Anders*** brief complies with the above-stated requirements. Namely, he includes a summary of the relevant factual and procedural history, he refers to portions of the record that could arguably support Appellant's claims, and he sets forth his conclusion that Appellant's appeal is frivolous. He also explains his reasons for reaching that determination and supports his rationale with citations to the record and pertinent legal authority. Attorney Werner also states in his petition to withdraw that he has supplied Appellant with a copy of his ***Anders*** brief. Additionally, he attached a letter directed to Appellant to his petition to withdraw, in which he informed Appellant of the rights enumerated in ***Nischan***. On January 23, 2025, Appellant filed a *pro se* response to counsel's petition to withdraw, as well as a *pro se* brief. Accordingly, counsel has

complied with the technical requirements for withdrawal. We will now independently review the record, as well as Appellant's *pro se* response to counsel's petition to withdraw, to determine if Appellant's issues are frivolous, and to ascertain if there are any other, non-frivolous claims he could pursue on appeal.

First, Appellant seeks to challenge the sufficiency of the evidence to sustain his convictions. We observe that,

> "[w]hether the evidence was sufficient to sustain the charge presents a question of law." ***Commonwealth v. Toritto***, 67 A.3d 29 (Pa. Super. 2013) (*en banc*). Our standard of review is *de novo*, and our scope of review is plenary. ***Commonwealth v. Walls***, 144 A.3d 926 (Pa. Super. 2016). In conducting our inquiry, we examine[,]
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> > whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict-winner, [is] sufficient to establish all elements of the offense beyond a reasonable doubt. We may not weigh the evidence or substitute our judgment for that of the fact-finder. Additionally, the evidence at trial need not preclude every possibility of innocence, and the fact-finder is free to resolve any doubts regarding a defendant's guilt 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. When evaluating the credibility and weight of the evidence, the fact-finder is free to believe all, part or none of the evidence. For purposes of our review under these principles, we must review the entire record and consider all of the evidence introduced.
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> ***Commonwealth v. Trinidad***, 96 A.3d 1031, 1038 (Pa. Super. 2014) (quotation omitted).

Commonwealth v. Rojas-Rolon, 256 A.3d 432, 436 (Pa. Super. 2021), *appeal denied*, 285 A.3d 879 (Pa. 2022).

Here, Attorney Werner does not identify which specific element(s) of Appellant's various offenses that Appellant believes the Commonwealth failed to prove in this case. Instead, counsel generally explains that,

> [i]n the present matter, the Commonwealth presented clear evidence to convict … Appellant of each criminal offense. The victim, Christina Melendez (hereinafter referred to as the "Victim")[,] testified that … Appellant got out of his car and began shooting up her parked car with a firearm. The Victim further testified that … Appellant began to shoot at her and into her friend's house while she stood in the front doorway of the house. Medical and live testimony established that the Victim and a young child were shot by … Appellant. The Victim positively identified … Appellant as the only shooter.
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> Along with the testimony of the Victim, witnesses, and responding/investigating police officers, the Commonwealth admitted surveillance video, the 911 call, photographs from the scene, crime scene processing including eight shell casings [and] bullet holes in the occupied property, medical records and phone records.

Anders Brief at 14-15 (citations to the record omitted). Counsel concludes that this evidence was sufficient to sustain all of Appellant's convictions.

In Appellant's *pro se* brief, he "argues that the Commonwealth failed to establish 'criminal intent' beyond a reasonable doubt, [and] therefore failed to satisfy the essential element to sustain [his] convictions…." Appellant's *Pro Se* Brief at 2 (unnumbered). We disagree. Appellant's act of shooting a gun multiple times at Ms. Melendez as she stood in the doorway of a home that Appellant knew had other individuals inside, including children, was sufficient to prove that he acted with criminal intent.

Appellant also complains that the Commonwealth failed to present sufficient evidence to support his terroristic threats conviction, as that charge

"was based solely on the statement and subsequent testimony of … [Ms.] Melendez[,]" who stated that Appellant put his hands around her throat and told her, "I could smoke you right now." ***Id.*** at 6 (unnumbered). According to Appellant, photographs of Ms. Melendez "taken within an hour of the incident" did not show any marks on her neck, and a medic who testified at trial stated that Ms. Melendez had no other injuries other than the bullet wound to her leg. ***Id.*** Thus, Appellant claims that the evidence was insufficient to convict him of terroristic threats.

Again, we disagree. Appellant essentially challenges Ms. Melendez's credibility, asserting that her testimony should not have been believed because there was no physical evidence corroborating it. It is well-settled that attacks on credibility determinations are challenges to the weight, not sufficiency of the evidence. ***See Commonwealth v. Gaskins***, 692 A.2d 224, 227 (Pa. Super. 1997). Here, the trial court, as the fact-finder, was free to believe Ms. Melendez's testimony, despite the lack of corroborating physical proof. ***See Trinidad***, 96 A.3d at 1038 (**"**When evaluating the credibility and weight of the evidence, the fact-finder is free to believe all, part or none of the evidence."). Moreover, Ms. Melendez's testimony was sufficient to prove that Appellant "communicate[d], either directly or indirectly, a threat to … commit any crime of violence with intent to terrorize another[.]" 18 Pa.C.S. § 2706(a)(1). Appellant had just fired a gun outside Ms. Melendez's home when he put his hands around her neck and threatened to "smoke" her. Ms.

Melendez believed Appellant meant that he would shoot her. This was sufficient evidence to convict Appellant of terroristic threats.

Next, Appellant seeks to challenge the weight of the evidence to sustain his convictions. We agree with Attorney Werner that this issue would be frivolous to raise on appeal, as Appellant has failed to preserve a weight claim for our review. We do not discern anywhere in the record that Appellant orally raised a weight claim before the trial court, and he did not assert a challenge to the weight of the evidence in a written motion after trial, or in his post-sentence motion. Accordingly, Appellant's challenge to the weight of the evidence is waived. ***See*** Pa.R.Crim.P. 607 ("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.").

Finally, Appellant seeks to challenge the legality of his sentence. As Attorney Werner notes, "Appellant's sentences are standard[-]range sentences, and all sentences [a]re within the statutory maximums." ***Anders*** Brief at 19. Thus, Attorney Werner does not identify any way in which Appellant's sentences are illegal.

In Appellant's *pro se* brief, he claims his sentences for aggravated assault are illegal because Ms. Melendez and her son did not sustain "serious bodily injury[,]" and no other individuals were harmed. Appellant's *Pro Se* Brief at 7 (unnumbered). Appellant's argument is essentially an attack on the

sufficiency of the evidence to sustain his aggravated assault convictions, not a legality of sentencing issue. ***See Commonwealth v. Foster***, 17 A.3d 332, 342 (Pa. 2011) ("[L]egality of sentence issues occur generally either: (1) when a trial court's traditional authority to use discretion in the act of sentencing is somehow affected, and/or (2) when the sentence imposed is patently inconsistent with the sentencing parameters set forth by the General Assembly.") (internal citations omitted). Moreover, Appellant's aggravated assault convictions merged for sentencing purposes and, therefore, he did not receive any sentence for those crimes that we could deem "illegal." ***See*** N.T. Sentencing, 3/12/24, at 23 (the court's stating that Appellant's aggravated assault conviction merged for sentencing purposes).

In addition, Appellant's aggravated assault convictions were clearly supported by sufficient evidence. Appellant was convicted of aggravated assault under the following provisions:

> **(a) Offense defined.--**A person is guilty of aggravated assault if he:
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> > (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;
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> > ***
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> > (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon;
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> > ***
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> > (8) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to a child less than six years of age, by a person 18 years of age or older….

18 Pa.C.S. § 2702(a). The Crimes Code defines "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S. § 2301.

Appellant was convicted of two counts of aggravated assault under section 2702(a)(1) for each victim, *i.e.*, Ms. Melendez and her three-year-old son. He was also convicted of two counts under section 2702(a)(4) for each victim, and one count under section 2702(a)(8) for Ms. Melendez's son.

We need not determine if the wound sustained by Ms. Melendez constituted serious bodily injury because, even if it did ***not***, the evidence that Appellant repeatedly fired a gun directly at Ms. Melendez would be sufficient to prove that he ***attempted*** to cause serious bodily injury to her, so as to sustain his conviction under section 2702(a)(1). ***See Commonwealth v. Galindes***, 786 A.2d 1004, 1012 (Pa. Super. 2001) ("The Commonwealth, in sustaining an aggravated assault conviction, need only show the defendant attempted to cause serious bodily injury to another, not that serious bodily injury actually occurred."); ***id.*** (finding that "the act of firing a gun toward [the victim] constitutes an attempt to cause serious bodily injury") (citation omitted). Moreover, the fact that one of Appellant's bullets struck Ms. Melendez's three-year-old son in his torso is sufficient proof that Appellant caused serious bodily injury to the child to support his conviction under section 2702(a)(1) for that victim. ***See Commonwealth v. Drumheller***, 808 A.2d 893, 908 (Pa. 2002) (concluding the torso may be considered a vital part of

the body); ***Commonwealth v. Jones***, No. 559 EDA 2020, unpublished memorandum at *8-9 (Pa. Super. filed June 2, 2021) (finding that a victim's torso is a vital part of the body).[2] It was also sufficient to prove that Appellant caused bodily injury to a victim under three years old, thus sustaining his conviction under section 2702(a)(8). Finally, Appellant's actions in shooting both Ms. Melendez and her son were sufficient to prove that he used a deadly weapon in attempting to cause bodily injury to those victims to support his convictions under section 2702(a)(4).

Consequently, Appellant's purported challenge to the legality of his sentence, which is really an attack on the sufficiency of the evidence to sustain his aggravated assault convictions, is frivolous. We also agree with Attorney Werner that the other issues Appellant seeks to raise herein are frivolous, and our review of the record reveals no other, non-frivolous claims he could assert on appeal.[3] Accordingly, we affirm Appellant's judgment of sentence and grant counsel's petition to withdraw.

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[2] Unpublished decisions of the Superior Court filed after May 1, 2019, may be cited for their persuasive value. ***See*** Pa.R.A.P. 126(b).

[3] We note that Appellant raises several claims of ineffective assistance of counsel against his trial attorney, as well as Attorney Werner, who was appointed after Appellant filed the instant appeal. In ***Commonwealth v. Holmes***, 79 A.3d 562 (Pa. 2013), our Supreme Court reaffirmed its prior holding in ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), that, absent certain circumstances, claims of ineffective assistance of counsel should be deferred until collateral review under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. ***Holmes***, 79 A.3d at 576. The specific circumstances under which ineffectiveness claims may be addressed on direct
(Footnote Continued Next Page)

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 4/29/2025

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appeal are not present in the instant case. ***See id.*** at 577-78 (holding that the trial court may address claim(s) of ineffectiveness where they are "both meritorious and apparent from the record so that immediate consideration and relief is warranted," or where the appellant's request for review of "prolix" ineffectiveness claims is "accompanied by a knowing, voluntary, and express waiver of PCRA review").