NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
SAMUEL GUILLAUME	:	
Appellant	:	No. 161 MDA 2023

Appeal from the Judgment of Sentence Entered September 13, 2022
In the Court of Common Pleas of Dauphin County Criminal Division at
No(s): CP-22-CR-0000763-2019

BEFORE: DUBOW, J., KUNSELMAN, J., and NICHOLS, J.

MEMORANDUM BY NICHOLS, J.: **FILED: JANUARY 18, 2024**

Appellant Samuel Guillaume appeals from the judgment of sentence imposed following his convictions for corrupt organizations, conspiracy, forgery, identity theft, washing vehicle titles, and tampering with records or identification.[1] On appeal, Appellant challenges the sufficiency of the evidence and alleges trial court error regarding his right to counsel, evidentiary issues, and merger of sentences. After careful review, we affirm Appellant's convictions but vacate the judgment of sentence and remand for resentencing.

The underlying facts of this matter are well known to the parties. ***See*** Trial Ct. Op., 5/15/23, at 2-7. Briefly, Appellant was charged with multiple offenses based on allegations that he participated in a series of title-washing schemes between 2013 and 2015. During that time, Appellant and several

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[1] 18 Pa.C.S. §§ 911(b)(4), 903, 4101(a)(2), 4120(a), 4118, 4104(a), respectively.

other individuals utilized stolen identities to obtain financing and insurance policies for seven vehicles.

While this case was pending, Appellant retained the services of two private attorneys, Michael Worgul, Esq., and Jerry Russo, Esq., who Appellant subsequently fired. At a hearing before the trial court on May 2, 2022, Appellant indicated that he wished to proceed *pro se*. ***See*** N.T. Hr'g, 5/2/22, at 2. At that time, the trial court confirmed that Appellant understood that he had the right to be represented by counsel and that if he could not afford counsel, an attorney would be appointed at no cost. ***See id.*** at 5. Appellant was informed of the charges against him, the permissible range of sentencing, the fact that he would be bound by the standard procedural rules, and that there may be possible defenses or rights that would be lost permanently if Appellant failed to raise them at the proper time. ***See id.*** at 5, 8-14, 23-24. Ultimately, the trial court permitted Appellant to proceed *pro se* and appointed standby counsel. ***See id.*** at 6.

Following a jury trial, Appellant was convicted of the aforementioned charges. On September 13, 2022, the trial court imposed an aggregate sentence of thirty to sixty months' incarceration. Following sentencing, Appellant retained counsel, who filed post-sentence motions on Appellant's behalf. The trial court denied Appellant's post-sentence motions on January 13, 2023.

Appellant filed a timely notice of appeal and a court-ordered Pa.R.A.P 1925(b) statement. The trial court issued a Rule 1925(a) opinion addressing Appellant's claims.

Appellant raises the following issues, which we have re-ordered for our review:

1. Whether the trial court violated [Appellant's] right to counsel by finding that he waived or forfeited that right despite failing to adequately determine that [Appellant] understood the nature of the proceedings and the rights he would be giving up by proceeding *pro se* and where [Appellant] never engaged in extremely dilatory or disruptive behavior?

2. Whether the Commonwealth introduced sufficient evidence to prove corrupt organizations and conspiracy to commit corrupt organizations where the first charge requires an enterprise and [Appellant] himself was not an enterprise, and the second charge does not exist because the corrupt organizations statute itself encompasses a conspiracy?

3. Whether the trial court violated [Appellant's] right to confrontation by allowing a police officer to testify against [Appellant] by video where the only reason offered for doing so was that the officer had to take a family member to a surgery and the Commonwealth could have called the officer to testify on a different day?

4. Whether the trial court misinterpreted the rules of evidence and erroneously concluded that inconsistent statements offered to impeach two witnesses were hearsay when it precluded [Appellant] from calling his private investigator to testify that the main witnesses against him had told the investigator that they implicated [Appellant] only under duress and that the police had also attempted to intimidate the investigator during trial, thereby depriving [Appellant] of his entire defense and violating his Sixth Amendment rights?

5. Whether corrupt organizations – conspiracy and conspiracy to commit corrupt organizations – conspiracy merge at sentencing?

Appellant's Brief at 9-10.

Appellant's Right to Counsel

Appellant argues that he is entitled to "a new trial because he should not have been forced to proceed *pro se*." ***Id.*** at 31. In support, Appellant argues that the trial court's waiver-of-counsel colloquy was defective because the trial court never inquired as to Appellant's ability to understand the proceedings, nor did the trial court derive information as to Appellant's educational background. ***Id.*** at 36-37. Alternatively, Appellant claims that the trial court erred in concluding that he forfeited his right to counsel. ***Id.*** at 38. Specifically, Appellant contends that the trial court never warned Appellant that he was risking the forfeiture of his right to counsel, nor did the trial court mention the concept of forfeiture during the May 2, 2022 hearing. ***Id.***

The Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution guarantee the right to counsel. ***Commonwealth v. Lucarelli***, 971 A.2d 1173, 1178 (Pa. 2009). Whether that right was violated is a question of law, over which our standard of review is *de novo* and our scope of review is plenary. ***See id.***; ***see also Commonwealth v. J. Baldwin***, 58 A.3d 754, 762 (Pa. 2012).

Pennsylvania courts have recognized that "[a] criminal defendant's right to counsel under the Sixth Amendment includes the concomitant right to waive counsel's assistance and proceed to represent oneself at criminal proceedings." ***Commonwealth v. Green***, 149 A.3d 43, 56 (Pa. Super. 2016)

(citing, *inter alia*, ***Faretta v. California***, 422 U.S. 806 (1975)). However, although a defendant's right to self-representation is guaranteed, it is not absolute. ***Commonwealth v. Brooks***, 104 A.3d 466, 474 (Pa. 2014).

It is well settled that a defendant can waive or forfeit his right to counsel. ***Lucarelli***, 971 A.2d at 1178-79. In distinguishing between waiver and forfeiture, our Supreme Court has stated that while waiver is "an intentional and voluntary relinquishment of a known right," forfeiture "does not require that the defendant intend to relinquish a right, but rather may be the result of the defendant's 'extremely serious misconduct' or 'extremely dilatory conduct.'" ***Id.*** at 1179 (citations omitted). Therefore, when a defendant forfeits his right to counsel through his own conduct, the waiver-of-counsel colloquy requirements set forth at Pa.R.Crim.P. 121 do not apply. ***See id.*** (explaining that "[t]o hold otherwise would permit a recalcitrant defendant to engage in the sort of obstructive behavior that mandates the adoption of the distinction between forfeiture and waiver in the first instance").

In ***Lucarelli***, our Supreme Court noted that the defendant had the financial ability to retain private counsel, fired several lawyers that he had hired, was given over eight months to prepare for trial, and then appeared at trial without an attorney or an explanation as to why counsel was not present. ***Id.*** at 1180. Therefore, the Court held that "where a defendant's course of conduct demonstrates his [] intention not to seek representation by private counsel, despite having the opportunity and financial wherewithal to do so, a

determination that the defendant be required to proceed *pro se* is mandated because that defendant has forfeited the right to counsel." ***Id.*** at 1179.

Following our Supreme Court's decision in ***Lucarelli***, this Court considered whether a defendant intentionally forfeited his right to counsel in ***Commonwealth v. Kelly***, 5 A.3d 370 (Pa. Super. 2010). In ***Kelly***, this Court concluded as follows:

> [The defendant] . . . had been unwilling to cooperate with all three counsel assigned to him; who argued all counsel were incompetent because they refused to argue what [the defendant] believed was the law; who, the day after his *pro se* motion to withdraw his first guilty plea was granted, filed *pro se* an omnibus pre-trial motion seeking suppression of evidence on a ground the trial court had already addressed (validity of search warrant); who wanted a counsel, but only one who would please him; who treated appointed counsel with disdain; whose trial had been already postponed because he could not agree with assigned counsel (counsel 2); who had been warned by the trial court that failure to cooperate with assigned counsel (counsel 3) would result in him representing himself *pro se* at trial; who sought to have other counsel appointed to him (who would have been counsel 4) and postpone the trial instead of trying to cooperate with counsel 3; and who clearly was not interested in listening closely [to] what [the trial court] was telling him, consumed as he was in making his point counsel were ineffective and he knew the law better than assigned counsel. We have no difficulty concluding the trial court did not err in finding [the defendant] intentionally forfeited his right to counsel.

Id. at 381-82 (footnote omitted).

Finally, in ***Commonwealth v. McLendon***, 293 A.3d 658 (Pa. Super. 2023), this Court found that the defendant forfeited his right to counsel. ***McLendon***, 293 A.3d at 670. Applying ***Lucarelli*** and ***Kelly***, the ***McLendon*** Court concluded as follows:

> [A]s in ***Lucarelli***, [the defendant's] refusal to cooperate with counsel and the trial court persisted throughout the trial court proceeding. And while [the defendant] had only one lawyer in this case, whereas the defendants in ***Lucarelli*** and ***Kelly*** had several, the end result was the same—unnecessarily drawn[-]out proceedings brought about by a defendant's refusal to cooperate with counsel. [The defendant's] dilatory conduct spanned eleven months in this case, whereas the ***Lucarelli*** Court found forfeiture based on the defendant's 8 ½ month course of conduct. We therefore conclude that the dismissal and/or withdrawal of multiple attorneys, while common in forfeiture of counsel cases, is not a necessary precursor to concluding that a defendant has forfeited the right to counsel. Our focus is upon a defendant's conduct and not on the number of counsel that may lead to a forfeiture decision. The duration and persistence of the defendant's dilatory conduct, and the delays occasioned thereby, can lead to forfeiture of counsel even though only one attorney was involved in the case. Here, as in ***Kelly***, [the defendant] engaged in a "cat and mouse game" throughout the trial court proceeding and now claims that the trial court, to bring the case to a conclusion, arbitrarily deprived [the defendant] of the right to counsel.

Id. at 668-69 (citations and footnote omitted). Additionally, the ***McLendon*** Court noted that in an effort to delay sentencing, the defendant falsely reported to the trial court that he tested positive for COVID-19. ***Id.*** at 669.

Here, the trial court explained:

> Like the defendant in ***Lucarelli***, Appellant had no fewer than two private attorneys whom he hired and subsequently fired (at least once on the eve of trial), and he had [an] ample amount of time to prepare for trial. In fact, Appellant had far more time to prepare than did the defendant in ***Lucarelli***. Whereas the defendant in ***Lucarelli*** had 8 ½ months to prepare for trial, Appellant had **three years** to prepare for trial, as the [Commonwealth's] charging information was filed on June 3, 2019, and trial did not commence until June 13, 2022. Despite the financial wherewithal to hire private counsel, Appellant did not do so, and in fact, in a hearing just one month before trial, he explicitly stated to the [trial] court that he wished to proceed *pro se* despite being advised of his right to either private counsel or free counsel

> depending on his financial circumstances, and despite being given a . . . colloquy highlighting the potential consequences of his decision to proceed *pro se*. Despite clearly stating that he wanted to proceed *pro se* at the hearing before Judge Evans on May 2, 2022, Appellant appeared for trial just over a month later and as trial was about to commence, he requested another continuance for an opportunity to seek private counsel. Considering the foregoing . . . [the trial court] maintains that Appellant forfeited his right to counsel due to his dilatory conduct throughout the pendency of the entire criminal case, and as with the trial court in ***Lucarelli***, [the trial court] did not err by requiring Appellant to proceed to trial *pro se* in this matter with the assistance of competent standby counsel.

Trial Ct. Op. at 12-13 (emphasis added).

As noted above, when determining whether a defendant has forfeited his or her right to counsel, we must examine the defendant's conduct, and we must do so based on the record before us. ***See Commonwealth v. Preston***, 904 A.2d 1, 6-7 (Pa. Super. 2006) (*en banc*); ***Commonwealth v. Walker***, 878 A.2d 887, 888 (Pa. Super. 2005). Here, the record reflects that Appellant retained the services of two private attorneys before subsequently firing them both. Additionally, the record reflects that Appellant requested a myriad of continuances to delay the trial from moving forward. At the May 2, 2022 hearing, Appellant insisted that he desired to represent himself. ***See*** N.T. Hr'g, 5/2/22, at 5. The trial court advised Appellant that he could attempt to obtain private counsel prior to trial, but that the trial was going to commence as scheduled on June 13, 2022, regardless of whether Appellant was able to retain private counsel. ***See id.*** at 14-15. On June 13, 2022, Appellant appeared before the trial court and requested a continuance in order to obtain private counsel. ***See*** N.T. Trial, 6/13/22, at 8-9.

On this record, we conclude that Appellant engaged in dilatory conduct with the intent of delaying trial. ***See McLendon***, 293 A.3d at 668-69. Accordingly, the trial court did not err in concluding that Appellant forfeited his right to counsel. ***See id.*** For these reasons, Appellant is not entitled to relief.[2]

Sufficiency of the Evidence

Next, Appellant challenges the sufficiency of the evidence supporting his convictions for corrupt organizations and conspiracy. Appellant's Brief at 49. Specifically, Appellant contends that the Commonwealth failed to present sufficient evidence to sustain his conviction for corrupt organizations because there was "no evidence that an organization or enterprise was in any way involved in this case." ***Id.*** In support, Appellant asserts that "[t]he evidence showed only that [Appellant] himself engaged in washing the titles of seven motor vehicles. He did not do that in association with any business, and he did not work in concert with anyone else." ***Id.*** at 52. Further, Appellant claims that "according to the testimony, he paid the two cooperating witnesses to register car titles for him using fake documents" but that "[t]hey did not know the nature of the scheme or what the purpose was, and one of them testified

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[2] We note that in cases involving forfeiture of counsel, an analysis of the Pa.R.Crim.P. 121 waiver of counsel colloquy is not required. ***See McLendon***, 293 A.3d at 666. Nevertheless, for the reasons stated by the trial court, we find that Appellant's waiver of counsel was knowing, intelligent, and voluntary. ***See*** Trial Ct. Op. at 8-10 (citing ***Commonwealth v. Clyburn***, 42 A.3d 296, 299 (Pa. Super. 2012) (setting forth Rule 121 requirements for a knowing, intelligent, and voluntary waiver of counsel)).

that she did not even know that she was doing anything illegal." ***Id.*** Additionally, Appellant argues that the Commonwealth failed to present sufficient evidence to warrant a conviction for criminal conspiracy because there was no evidence of an agreement. ***Id.*** at 54.

When reviewing a challenge to the sufficiency of the evidence, we are governed by the following standard:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim, the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
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> In applying the above test, we may not [re]weigh the evidence and substitute our judgment for the fact-finder.

Commonwealth v. James, 297 A.3d 755, 764 (Pa. Super. 2023) (citations omitted and formatting altered), *appeal denied*, 362 MAL, 2023, 2023 WL 8614241 (Pa. filed Dec. 13, 2023).

The Crimes Code defines corrupt organizations, in relevant part, as follows:

> (1) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity in which such person participated as a principal, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise: Provided, however, That a purchase of securities on the open

> market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issue held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase, do not amount in the aggregate to 1% of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer: Provided, further, That if, in any proceeding involving an alleged investment in violation of this subsection, it is established that over half of the defendant's aggregate income for a period of two or more years immediately preceding such investment was derived from a pattern of racketeering activity, a rebuttable presumption shall arise that such investment included income derived from such pattern of racketeering activity.
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> (2) It shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.
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> (3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.
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> (4) It shall be unlawful for any person to conspire to violate any of the provisions of paragraphs (1), (2) or (3) of this subsection.

18 Pa.C.S. § 911(b).

The Crimes Code defines "enterprise" as "any **individual** . . . engaged in commerce[.]" 18 Pa.C.S. § 911(h)(3) (emphasis added). This Court has held that for purposes of the corrupt organizations statute, an enterprise exists where a defendant and his straw purchasers "formed an association in fact to carry out illegal purchases of firearms." ***Commonwealth v. Hill***, 210 A.3d 1104, 1114 (Pa. Super. 2019); ***see also Commonwealth v. Johnson***,

67 WDA 2022/68 WDA 2022, 2023 WL 3848375 at *9 (Pa. Super. filed June 6, 2023) (unpublished mem.).[3]

To establish criminal conspiracy, the Commonwealth must prove beyond a reasonable doubt that a defendant entered into an agreement with another person or persons to "engage in conduct which constitutes [a] crime or an attempt or solicitation to commit [a] crime." 18 Pa.C.S. § 903(a)(1).

Here, the trial court addressed Appellant's sufficiency claims as follows:

> Appellant in the instant matter is . . . a person engaged in commerce associated with an illegitimate enterprise. The evidence presented at trial, viewed in the light most favorable to the Commonwealth, established that Appellant conducted an operation whereby he would fraudulently buy vehicles using false identities, wash the liens from the titles of the vehicles, register them in Pennsylvania using false identities, and then sell the vehicles for personal profit. Evidence also established that Appellant and several acquaintances fraudulently purchased insurance policies and opened various bank accounts in association with this scheme. Based on these facts and based on the activities conducted by Appellant and his acquaintances, there was sufficient evidence from which the jury could have found that Appellant was part of an illegitimate entity and such entity was engaged in commerce.
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> In this matter, there was ample evidence that Appellant formed agreements with various acquaintances to partake in various illicit activities in furtherance of Appellant's corrupt organizations activities. Specifically, [Antoinette] Castrovinci and [Deniss] Quintana both testified that Appellant asked them to perform various illegal tasks for Appellant and that he would pay them for these tasks. These tasks included fraudulently opening bank accounts using fraudulent documents and identifications, as well as fraudulently registering vehicles using fraudulent documents

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[3] We may cite to this Court's unpublished memoranda filed after May 1, 2019 for persuasive value. ***See*** Pa.R.A.P. 126(b).

> and identifications. These agreements between Appellant and his female acquaintances allowed Appellant to further his illicit scheme of title washing, and, therefore, the evidence, viewed in the light most favorable to the Commonwealth, was sufficient for the jury to conclude that Appellant had committed the crime of conspiracy in connection with the offense of corrupt organizations.

Trial Ct. Op. at 20-22 (some formatting altered).

Based on our review of the record and viewing the evidence in the light most favorable to the Commonwealth, we conclude that there was sufficient evidence to sustain Appellant's convictions for corrupt organizations and conspiracy. As noted by the trial court, the Commonwealth presented two witnesses who testified that they performed illegal tasks for Appellant in exchange for money. Therefore, we agree with the trial court that the Commonwealth presented evidence from which the jury could have found that Appellant was part of an illegitimate entity and that such entity was engaged in commerce. ***See*** 18 Pa.C.S. § 911(h)(3); ***Hill***, 210 A.3d at 1114. This evidence also establishes that there was an agreement to commit the crime of corrupt organizations. ***See*** 18 Pa.C.S. § 903(a). Accordingly, we find that the Commonwealth presented sufficient evidence to sustain Appellant's convictions for corrupt organizations and conspiracy, and Appellant is not entitled to relief. ***See id.***

Confrontation Clause

In his next issue on appeal, Appellant contends that the trial court erred when it permitted New Jersey Police Officer Amber Fontanella to testify using Zoom videoconferencing technology. Appellant's Brief at 25. Specifically,

Appellant argues that permitting Officer Fontanella to testify via Zoom violated Appellant's constitutional rights under both the United States and Pennsylvania Constitutions' respective Confrontation Clauses. ***Id.*** Therefore, Appellant concludes that he is entitled to a new trial. ***Id.*** at 31.

"The admission of evidence is committed to the sound discretion of the trial court and our review is for an abuse of discretion." ***Commonwealth v. Kane***, 188 A.3d 1217, 1229 (Pa. Super. 2018) (citation omitted).

As our Supreme Court has explained,

> [a]n appellate court will not find an abuse of discretion "based on a mere error of judgment, but rather . . . where the [trial] court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." Importantly, an appellate court should not find that a trial court abused its discretion merely because the appellate court disagrees with the trial court's conclusion. Indeed, "when reviewing the trial court's exercise of discretion, it is improper for an appellate court to 'step[] into the shoes' of the trial judge and review the evidence *de novo*."

Commonwealth v. Gill, 206 A.3d 459, 466-67 (Pa. 2019) (citations omitted).

"Under the Confrontation Clause of the Sixth Amendment, a criminal defendant has a right to confront witnesses against him." ***Commonwealth v. Rivera***, 773 A.2d 131, 137 (Pa. 2001) (citation omitted). "We have held that the Confrontation Clause of the Pennsylvania Constitution affords defendants the same rights as the Sixth Amendment of the United States

Constitution." ***Commonwealth v. Yohe***, 39 A.3d 381, 384 n.4 (Pa. Super. 2012) (citation omitted).

While "the Confrontation Clause of the Sixth Amendment reflects a preference for face-to-face confrontation, face-to-face confrontation is neither an absolute nor an indispensable requirement." ***Commonwealth v. Williams***, 84 A.3d 680, 684 (Pa. 2014) (citing ***Maryland v. Craig***, 497 U.S. 836, 844-50 (1990)). Indeed, the United States Supreme Court has explained that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." ***Craig***, 497 U.S. at 850 (citations omitted).

In ***Commonwealth v. Atkinson***, 987 A.2d 743 (Pa. Super. 2009), this Court considered the trial court's decision to allow the Commonwealth to use a two-way videoconferencing system to present testimony from an incarcerated witness. ***Id.*** at 745. Initially, this Court noted that the ***Craig*** test requires "both important public policy and indicia of reliability sufficient to trump [the a]ppellant's right to confrontation." ***Id.*** at 750. Further, the ***Atkinson*** Court explained that in cases where videoconferencing was permitted, there were compelling policy concerns such as "severe emotional damage to a child victim or testimony that would otherwise not be taken because [an adult] witness is terminally ill." ***Id.*** at 751; ; ***see also id.*** at 749 (citing, *inter alia*, ***Bush v. Wyoming***, 193 P.3d 203, 214-16 (Wy. 2008)

(finding that there was a sufficient public policy concern to allow videoconferencing where "[a] witness suffered from numerous ailments and arrangements were made to have him testify from the local district attorney's office" but concluding that the trial court erred in allowing the witness's wife to testify via video "because of the stress she would suffer from having to leave her husband" as "there was not a sufficient public policy concern").

Ultimately, the ***Atkinson*** Court found that "the Commonwealth's main purpose in using the videoconferencing system was to expedite disposition." ***Id.*** at 750. Therefore, the ***Atkinson*** Court concluded: "the use of the videoconferencing equipment violated [the a]ppellant's right to confrontation. No compelling state interest has been advanced. While efficiency and security are important concerns, they are not sufficient reasons to circumvent [the a]ppellant's constitutional right to confrontation." ***Id.*** (citation omitted); ***see also Commonwealth v. McCloud***, 322 A.3d 653, 657 (Pa. Super. 1974) (stating that "[t]he constitutional right of confrontation and cross-examination . . . cannot be sidestepped because it happens to be convenient for one of the parties. The difficulty of obtaining witnesses is not sufficient grounds for liberalizing an exception to the hearsay rule if the effect of such liberalization is to deny an accused a fair trial. . . . [E]xpediency is not a sound ground upon which a denial of a constitutional right may be based." (citations omitted and some formatting altered)).

Here, the trial court addressed Appellant's Confrontation Clause claim as follows:

> In the instant matter, Amber Fontanella, the police officer who testified via video, had traveled from her home state of New Jersey and was scheduled to testify in person during the second day of trial. However, Officer Fontanella was unable to testify on the second day of trial because the Commonwealth's witnesses who were scheduled to testify prior to Officer Fontanella (and many who had also traveled from other states to testify) had not yet completed their testimony as anticipated. Officer Fontanella was unable to appear in person after the second day of trial because a family member was undergoing surgery. Due to this extenuating circumstance involving the illness of a family member, [the trial court] permitted Officer Fontanella to testify on the third day of trial via the Zoom videoconferencing platform. This was not a situation where prerecorded witness testimony was presented to the jury and Appellant in lieu of live testimony and without opportunity for the Appellant and witness to view each other in real time. The Zoom video was presented on a large television screen which the jury and Appellant were both able to view the witness live and in real time, and the Zoom testimony occurred without any technological difficulties. Appellant and Officer Fontanella were able to view each other through the video screen, and Appellant was able to cross-examine the officer and ask her any questions he wished to ask her over the video platform. Moreover, the officer was able to authenticate various physical evidence that was presented by the Commonwealth in the courtroom. All this considered, the jury was fully able to evaluate the demeanor of the officer to the extent necessary to reach a well-reasoned credibility determination as to her testimony.
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> While Appellant may suggest that Office[r] Fontanella's unavailability to testify in person was a scheduling conflict that falls on the Commonwealth, [the trial court] maintains that the inability of Officer Fontanella to testify in person during the time frame initially scheduled for her was the result of Appellant's dilatory tactics at trial, which included stall tactics such as cross-examining multiple witnesses for up to four hours, pausing for several minutes between questions, asking the same questions repeatedly despite sustained objections from the Commonwealth, and repeatedly ignoring [the trial court's] warnings about his behavior in court (including the repeated use of a cell phone).

Trial Court Op. at 14-15.

As noted previously, the ***Craig*** test requires the existence of a "compelling state interest" in order to circumvent a defendant's constitutional right to confrontation. ***See Atkinson***, 987 A.2d at 750. Here, Officer Fontanella had a scheduling conflict on the third day of trial that both the trial court and the Commonwealth believed to have been caused by Appellant's lengthy cross-examination of witnesses during trial. Although we appreciate the trial court's exasperation with Appellant's courtroom antics that included his use of a cell phone in open court, and the repetitive, lengthy questioning of witnesses, we are constrained to conclude that the Commonwealth has not advanced a compelling state interest that would justify Officer Fontanella's testimony via Zoom over Appellant's objection to the virtual proceeding. ***See Atkinson***, 987 A.2d at 749-50 (citing ***Bush***, 193 P.3d at 214-16).

However, we observe that, on this record, the evidence establishing Appellant's guilt was overwhelming. ***See*** Trial Ct. Op. at 2-7, 20-21 (summarizing the testimony from Castrovinci and Quintana, who testified that Appellant asked them to perform various illegal tasks for Appellant and that he would pay them for these tasks). Additionally, Officer Fontanella's testimony was limited, as she only testified regarding the circumstances of a traffic stop that occurred in New Jersey and the debit cards in Appellant's possession when he was taken into custody. ***See*** N.T. Trial, 6/15/22, at 509-21. Therefore, we decline to find reversible error. ***See Commonwealth v. Fitzpatrick***, 255 A.3d 452, 483 (Pa. 2021) (finding that an error is not reversible when the properly admitted and uncontradicted evidence of guilt

was so overwhelming); ***Commonwealth v. Brown***, 139 A.3d 208, 219-20 (Pa. Super. 2016) (same). For these reasons, Appellant is not entitled to relief.

Hearsay

Appellant next argues that the trial court "improperly denied him the right to call a key defense witness based on an erroneous interpretation of the rule against hearsay." Appellant's Brief at 42. Specifically, Appellant argues that the trial court should have permitted him to call his private investigator to testify as to prior inconsistent statements of two of the Commonwealth's cooperating witnesses "because the statements were classic impeachment material." ***Id.*** at 43.

Here, the trial court addressed Appellant's claim as follows:

> During trial, when Appellant attempted to call his private investigator as a witness, Appellant was asked for an offer of proof as to the content of the witness's testimony. Appellant explained to [the trial court] that his private investigator would have testified about a conversation he (the investigator) had with two of the Commonwealth's witnesses—namely, Castrovinci and Quintana. [N.T. Trial, 6/16/22, at 798]. During this conversation, which was recorded and which recordings Appellant used during an attempt to impeach Castrovinci and Quintana on cross-examination, the two women relayed to the investigator that Trooper Charles Wood had coerced them into changing their stories and making up stories about Appellant's involvement in the case, and they also relayed that they were afraid of Trooper Wood because he had harassed them. [***Id.*** The trial court] agreed with the Commonwealth's argument that the private investigator's testimony would be inadmissible hearsay, and, therefore, did not allow the [investigator] to testify.
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> The Pennsylvania Rules of Evidence define hearsay as "an out-of-court statement made by a declarant, which is offered into

evidence to prove the truth of the matter asserted." Pa.R.E. 801. Statements classified as hearsay are not admissible in court proceedings unless they fall within one of the enumerated exceptions in Pa.R.E. 803. One such exception is a prior inconsistent statement of a witness, which is defined by the Rules of Evidence as "a prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony." Pa.R.E. 803.1(1). A prior inconsistent statement is admissible as an exception to the rule against hearsay provided that it: (a) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; (b) is a writing signed and adopted by the declarant; or (c) is a verbatim contemporaneous electronic recording of an oral statement. Pa.R.E. 803.1(1)(A)-(C).

On the other hand, when it comes to **extrinsic** evidence of prior inconsistent statements, such extrinsic evidence is only admissible if, **during the examination of the witness**: (1) the statement, if written, is shown to, or if not written, its contents are disclosed to, the witness; (2) **the witness is given an opportunity to explain or deny the making of the statement**; and (3) the opposing party is given an opportunity to question the witness. Pa.R.E. 613(b).

In the instant matter, Appellant indicated that it was his intention to call his private investigator to testify as to his personal account of what Castrovinci and Quintana told him. Inasmuch as the private investigator's testimony would constitute **extrinsic** evidence of Castrovinci and Quintana's statements, per Pa.R.E. 613(b), Appellant would have been required to present the private investigator's testimony/personal account to Castrovinci and Quintana so that they could be given an opportunity to explain or deny the validity of the investigator's personal account of their statements. Appellant, however, did not indicate that it was his intention to confront Castrovinci and Quintana with the private investigator's testimony in an attempt to impeach them on the witness stand; in fact, Appellant had already tried to impeach Castrovinci and Quintana with their own statements during his cross-examination of them earlier in the trial. Rather, his intention was to call his private investigator so that he could essentially provide a narrative as to his personal account or recollection of the two women's testimony. That testimony on its own was [inadmissible] hearsay, and [the trial court] did not err in its decision to exclude the private investigator's testimony.

Trial Ct. Op. at 16-17 (emphases in original).

Following our review of the record, we discern no abuse of discretion by the trial court. ***See Gill***, 206 A.3d at 466-67; ***Kane***, 188 A.3d at 1229. The trial court thoroughly addressed implications of allowing testimony from Appellant's private investigator and correctly concluded that the testimony was inadmissible. ***See*** Trial Ct. Op. at 16-17. Therefore, we affirm based on the trial court's analysis of this issue.

Merger of Sentence

In his final issue, Appellant claims that his convictions for corrupt organizations and conspiracy to commit corrupt organizations should have merged for sentencing purposes. Appellant's Brief at 56. In support, Appellant argues that "[t]hey are the exact same statute, they are both ongoing crimes involving a pattern of activity, and the jury was not asked to find separate conspiracies or violations of (b)(4) of the corrupt organizations statutes." ***Id.***

Questions concerning whether convictions should merge for sentencing purposes implicate the legality of sentence. ***James***, 297 A.3d at 769. When reviewing the legality of a sentence, "our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Tighe***, 184 A.3d 650, 584 (Pa. Super. 2018) (citations omitted).

Section 9765 of the Sentencing Code states:

> 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.

Our Supreme Court has explained that Section 9765 "prohibits merger 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. B. Baldwin***, 985 A.2d 830, 833 (Pa. 2009). "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." ***Commonwealth v. Healey***, 836 A.2d 156, 157-58 (Pa. Super. 2003) (citation omitted).

To determine whether there is a single criminal act, we must examine the crimes as charged by the Commonwealth. ***Commonwealth v. Jenkins***, 96 A.3d 1055, 1060 (Pa. Super. 2014); ***see also Commonwealth v. Kimmel***, 125 A.3d 1272, 1277 (Pa. Super. 2015) (*en banc*) (considering the criminal complaint, criminal information, and affidavit of probable cause, and concluding that the Commonwealth established the factual predicates to avoid merger); ***Commonwealth v. Martinez***, 153 A.3d 1025, 1032 (Pa. Super. 2016) (stating that because "neither the charging information nor supporting documents of record describe the operative facts in such a way as to distinguish the specific conduct underlying the offenses," this Court could not

conclude "that the offenses were based on two discrete criminal acts for purposes of avoiding merger at sentencing" (citation omitted)).

Here, the Commonwealth's criminal information charged Appellant with corrupt organizations and conspiracy based on acts that occurred between August 17, 2013 and September 25, 2015. The information described each charge as follows:

> The actor did, having received any income derived, directly or indirectly, from a pattern of racketeering activity in which he participated as a principal, use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise and/or did through a pattern of racketeering activity acquire or maintain, directly or indirectly, any interest in or control of any enterprise and/or did, while employed by or associated with any enterprise, conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity and/or did conspire to engage in any of the above conduct. CORRUPT ORGANIZATIONS – 18 Pa.C.S. § 911[(b)](1)-(4).

Bill of Information, 4/29/19, Ct. 2.

> The defendant did, with the intent of promoting or facilitating the commission of a crime agree with another person or persons that they or one or more of them would engage in conduct which constituted such crime or an attempt or solicitation to commit such crime or did agree to aid another person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime and in pursuance of such conspiracy an overt act was committed. Crime: Corrupt Organizations - Employee Other Person(s): Alicia Lyons, Antoinette Castrovinci, and/or Deniss Quintana CRIMINAL CONSPIRACY – 18 Pa.C.S. § 903(a)(1)

Bill of Information, 4/29/19, Ct. 3.[4]

Based on the plain language of the bills of information filed by the Commonwealth in the instant case, we are unable to conclude that the Commonwealth alleged two separate criminal acts when it charged Appellant with both corrupt organizations under Section 911(b)(4) and criminal conspiracy. ***See Kimmel***, 125 A.3d at 1277; ***Jenkins***, 96 A.3d at 1060. Accordingly, we must review the elements of these two offenses to determine whether the convictions merge for sentencing purposes. ***See B. Baldwin***, 985 A.2d at 833.

As noted above, Appellant was convicted of one count of corrupt organizations as charged at 18 Pa.C.S. § 911(b)(4), which prohibits a person from **conspiring** to violate any of the provisions of paragraphs (1), (2) or (3) of this Subsection 911(b). ***See*** 18 Pa.C.S. § 911(b)(4). Appellant was also convicted of one count of criminal conspiracy, which the Crimes Code defines as follows:

> **(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:

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[4] We note that in the criminal complaint filed on May 7, 2018 by the Pennsylvania State Police, the sole count of criminal conspiracy alleged that Appellant conspired to commit insurance fraud, theft, and receiving stolen property. ***See*** Criminal Compl., 5/7/18, at 3. The Pennsylvania Rules of Criminal Procedure mandate that "the issues at trial shall be defined by [the bills of] information." Pa.R.Crim.P. 560(D). Accordingly, for the purposes of the instant merger analysis, we are bound by the language contained in the bills of information. ***See id.***

> (1) agrees with such other 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; or
>
> (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S. § 903(a).

Based on the language of the two statutes, we find that these two convictions merge for sentencing purposes. In order for a defendant to be convicted of corrupt organizations at Section 911(b)(4), a fact finder would have to find beyond a reasonable doubt that the defendant **conspired** to violate any of the three other sub-sections under the corrupt organizations statute. ***See*** 18 Pa.C.S. § 911(b)(4). Because conspiracy is an element of the relevant subsection of the corrupt organizations statute, Appellant's convictions for corrupt organizations at Section 911(b)(4) and criminal conspiracy to commit corrupt organizations—employee[5] merge for sentencing purposes.[6] For these reasons, we affirm Appellant's convictions while vacating the judgment of sentence and remand for resentencing.

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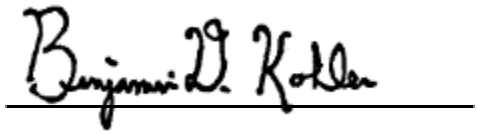
[5] ***See*** 18 Pa.C.S. § 911(b)(3).

[6] We note that both the Commonwealth and the trial court direct this Court to our decision in ***Commonwealth v. Stocker***, 622 A.2d 333 (Pa. Super. 1993). In ***Stocker***, the defendant was convicted of two counts of corrupt organizations as charged at 18 Pa.C.S. § 911(b)(2) and one count of corrupt organizations as charged at 18 Pa.C.S. § 911(b)(4). ***Stocker***, 622 A.2d at 337 nn. 1-2. The defendant in ***Stocker*** was not convicted of criminal conspiracy at 18 Pa.C.S. § 903. At sentencing, the trial court imposed consecutive sentences for one count of corrupt organizations at Section
(Footnote Continued Next Page)

Judgment of sentence vacated. Case remanded for resentencing. Jurisdiction relinquished.

Judgment Entered.



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Prothonotary

Date: 1/18/2024

911(b)(2) and the single count of corrupt organizations at Section 911(b)(4). ***Id.*** at 337. The trial court did not impose any sentence for the second count of corrupt organizations at Section 911(b)(2). ***Id.*** at 337 n.3.

On appeal, the defendant claimed that these convictions should have merged for sentencing purposes. ***Id.*** at 347. This Court affirmed the judgment of sentence, holding that, "[i]t is a fundamental principle of law that the crimes of conspiracy and the completed underlying offense do not merge." ***Id.*** (citation omitted).

Here, Appellant was convicted of corrupt organizations at 18 Pa.C.S. § 911(b)(4) and criminal conspiracy as charged at 18 Pa.C.S. § 903. Accordingly, we find that ***Stocker*** is inapposite to the instant case.