

V.

Appellant

No. 92 WDA 2023

FILED: January 18, 2024

On May 19, 2022, Jordyn Schmidt, Foreman's girlfriend, returned to their apartment in a vehicle they shared following a doctor's appointment. Foreman was waiting for her in the driveway because he suspected that she did not go to the appointment and was cheating on him and using drugs.

* Former Justice specially assigned to the Superior Court.

Foreman told Schmidt to get out of the vehicle or he would rip her out. Schmidt got out of the vehicle and they argued as they went into their apartment. Once inside, Foreman continued to scream at Schmidt, grabbed her hair, and bent her neck over the kitchen countertop. Foreman then spat on Schmidt, dumped cold water on her, and kicked her two times. Schmidt and Foreman subsequently proceeded outside and continued arguing.

An anonymous call was placed to the police about the disturbance, and Trooper Cameron Ferguson responded to the scene. After discussing the matter with both Schmidt and Foreman, Trooper Ferguson arrested Foreman and filed a criminal complaint, charging him with simple assault, disorderly conduct, possession of a controlled substance, possession of drug paraphernalia, and harassment. Following a preliminary hearing, the charges were bound over to the trial court.

The trial court scheduled the matter for a non-jury trial on November 18, 2022. On that date, Foreman did not appear for trial. As a result, Foreman's counsel made an oral motion to continue the trial due to Foreman's absence. The trial court denied the motion. The Commonwealth then withdrew the possession of a controlled substance and drug paraphernalia charges. At trial, the Commonwealth presented the testimony of Trooper Ferguson and Schmidt. Following trial, the trial court found Foreman guilty of disorderly conduct and harassment, and not guilty of simple assault. The trial court sentenced Foreman to 12 months of probation for the disorderly conduct

conviction, to be followed consecutively by 90 days of probation for the harassment conviction. Foreman appealed.

On appeal, Attorney Corcoran has filed an **Anders** brief. Attorney Corcoran also filed an application to withdraw as counsel with this Court on August 21, 2023. Foreman filed neither a *pro se* brief, nor retained alternate counsel.

We must first determine whether Attorney Corcoran has complied with the dictates of **Anders** in petitioning to withdraw from representation. **See Commonwealth v. Goodwin**, 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*) (stating that “[w]hen faced with a purported **Anders** brief, this Court may not review the merits of any possible underlying issues without first examining counsel’s request to withdraw.” (citation omitted)). Pursuant to **Anders**, when an attorney believes that an appeal is frivolous and wishes to withdraw as counsel, he or she must

(1) petition the court for leave to withdraw stating that after making a conscientious examination of the record and interviewing the defendant, counsel has determined the appeal would be frivolous; (2) file a brief referring to any issues in the record of arguable merit, and (3) furnish a copy of the brief to defendant and advise him of his right to retain new counsel or to raise any additional points that he deems worthy of the court’s attention.

Commonwealth v. Burwell, 42 A.3d 1077, 1083 (Pa. Super. 2012) (citations omitted).

Additionally, the Pennsylvania Supreme Court has determined that a proper **Anders** brief must

(1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (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.

Commonwealth v. Santiago, 978 A.2d 349, 361 (Pa. 2009).

Here, Attorney Corcoran has complied with the requirements set forth in ***Anders*** by indicating that he examined the record and determined that an appeal would be frivolous. Further, Attorney Corcoran's ***Anders*** brief meets the standards set forth in ***Santiago***, by setting forth his conclusions that Foreman's claims are frivolous. Finally, Attorney Corcoran provided a letter to Foreman, informing him of his intention to withdraw as counsel, and advising Foreman of his rights to retain new counsel, proceed *pro se*, and file additional claims. Because Attorney Corcoran has satisfied the technical requirements for withdrawing from representation, we will independently review the record to determine whether Foreman's appeal is, in fact, wholly frivolous. ***See Commonwealth v. Wrecks***, 931 A.2d 717, 721 (Pa. Super. 2007) (stating that once an appellate court determines that counsel's petition and brief satisfy ***Anders***, the court must then conduct its own review of the appeal to determine if it is wholly frivolous).

In his first claim, Foreman argues that the trial court erred in denying his motion for a continuance and proceeding with the non-jury trial *in absentia*. ***See Anders*** Brief at 11-13.

"Article I, § 9 of the Pennsylvania Constitution and Pennsylvania Rule of Criminal Procedure 602 guarantee the right of an accused to be present in the courtroom at every stage of a criminal trial." **Commonwealth v. Hunsberger**, 58 A.3d 32, 38 (Pa. 2012) (citation omitted). However, Pennsylvania law permits trial *in absentia* if the defendant's absence is without cause. **See** Pa.R.Crim.P. 602(A) ("The defendant's absence without cause at the time scheduled for the start of trial or during trial shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence."); **see also Commonwealth v. DeCosta**, 197 A.3d 813, 816 (Pa. Super. 2018). "Where the Commonwealth has demonstrated by a preponderance of the evidence that the defendant is absent 'without cause' and he knowingly and intelligently waived his right to be present, he may be tried *in absentia*." **Commonwealth v. Hill**, 737 A.2d 255, 259 (Pa. Super. 1999) (citation omitted); **see also** Pa.R.Crim.P. 602, cmt. "However, when a defendant is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily, he is not absent 'without cause' and therefore cannot be tried in absentia." **Hill**, 737 A.2d at 259 (citation omitted). It is within the trial court's discretion to proceed with trial *in absentia* instead of granting a continuance. **See Commonwealth v. Wilson**, 712 A.2d 735, 739 (Pa. 1998).

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

A review of the record reveals that at the onset of trial, following the [trial c]ourt's] acknowledgment of [Foreman's]

failure to appear that day for trial, trial counsel set forth various grounds for a defense continuance. N.T.[,] 11/18/22, p.p. 3-7. First, defense counsel noted that [Foreman] had contacted his office at 3:21 p.m. on the day prior, and upon his return to the office, defense counsel called [Foreman] at 3:50 p.m. **Id.** p. 3. [Foreman] requested that counsel seek a continuance, as "... there was no way he could make it to [the] nonjury trial because he was out of town working." **Id.** Defense counsel also informed the [trial c]ourt that the case had been listed for non-jury trial, as [Foreman], after two or three discussions, felt this was the best course, and [Foreman] later did not appear for Call of the List. **Id.**, p. 4. As to [Foreman's] prior failure to appear for Call, defense counsel indicated that "I don't know if he was working or overslept." **Id.** Ultimately, defense counsel represented that [Foreman] was aware of his obligation to appear for non-jury trial on that date, and counsel further represented that his office had previously sent [Foreman] notice with respect to the date. **Id.**[;] Def. Ex. 1.

In response to [Foreman's] request, the Commonwealth noted the presence of the victim, and indicated [its] ability to proceed *in absentia*. **Id.**, p. 5. In turn, the [trial c]ourt denied [Foreman's] continuance, noting that "[i]t appears to me that [Foreman] is not being forthwith with the [trial c]ourt as to why he is not here." **Id.**, p. 6. Defense counsel then raised a secondary request for postponement, indicating that [Foreman] told him that "... he anticipated going to the Emergency Room or a Medwell or a medical care provider because he felt he had COVID potentially." **Id.** Counsel advised him to submit medical documentation for the [trial c]ourt's consideration; however, same was not forthcoming. **Id.**, pp. 6-7. Defense counsel also noted that he attempted to call [Foreman] at 10:15 a.m., as the trial was scheduled for 10:30 a.m., but "... nobody picked up and the recording said there's a voice mail box that has not been activated." **Id.**, p. 7.

Accordingly, the [trial c]ourt again denied [Foreman's] continuance, and proceeded with nonjury trial. **Id.** ...

Overall, ... the record fully sets forth the bases for [Foreman's] continuance requests, and the rationale for our denials. ... [T]he record clearly evidences our skepticism as to [Foreman's] requests, largely premised upon [Foreman's] previous failure to appear, without excuse, for Call of the List, as

well as our opportunity to observe [Foreman's] demeanor at sentencing and to assess credibility. ...

Trial Court Opinion, 5/2/23, at 2-4.

The record establishes that Foreman had notice of the trial and counsel attempted to contact him on the day of trial to no avail. Foreman has not presented any evidence to suggest he was sick, in the hospital, or working at the time of the trial. As he voluntarily waived his right to be at trial, Foreman was absent without cause. **See Wilson**, 712 A.2d at 738 ("Unless the defendant is prevented from attending the proceedings for reasons beyond his or her control, then the defendant is expected to be present at all stages of the trial."); **see also** Pa.R.Crim.P. 902(A). Therefore, we conclude that the trial court did not abuse its discretion in denying the motion to continue and proceeding with trial *in absentia*. **See Commonwealth v. Sullens**, 619 A.2d 1349, 1353 (Pa. 1992) (where the defendant knew of his trial and willingly absented himself from the proceedings, he was absent without cause and the trial court properly tried him *in absentia*). Accordingly, this claim is frivolous.

In his second claim, Foreman contends that the evidence was insufficient to support his convictions. **See Anders** Brief at 13-15.

Our standard of review for sufficiency claims is as follows:

The standard we apply is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not

preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Edwards, 229 A.3d 298, 305-06 (Pa. Super. 2020) (citation, brackets, and ellipses omitted).

"A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he ... engages in fighting or threatening, or in violent or tumultuous behavior." 18 Pa.C.S.A. § 5503(a)(1). Further, to sustain a harassment conviction, the evidence must show that the defendant had the specific "intent to harass, annoy or alarm another ... strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same[.]" 18 Pa.C.S.A. § 2709(a)(1). "Such an intent may be inferred from the totality of the circumstances." ***Commonwealth v. Coniker***, 290 A.3d 725, 734 (Pa. Super. 2023) (citation and quotation marks omitted).

At trial, Schmidt testified that she lived with Foreman. ***See*** N.T., 11/18/22, at 25. Schmidt indicated that on May 19, 2022, she left for a doctor's appointment while Foreman slept. ***See id.*** at 26. While she was gone, Foreman repeatedly contacted her cell phone because he thought she was

cheating on him and was using drugs. **See id.** at 26, 32. Upon arriving home, Schmidt found Foreman standing in the driveway. **See id.** at 27. Foreman yelled, "Get out of the car or I'm going to rip you out of the car." **Id.** After Schmidt got out of the vehicle, she and Foreman argued as they walked into their apartment. **See id.** at 27-28. Foreman continued to scream at Schmidt, asking her who she was with, and then he grabbed her hair and bent her neck over the kitchen countertop. **See id.** at 28-29. Foreman then spat on Schmidt, dumped a pitcher of water on her, and kicked her two times. **See id.** at 29-30. The couple subsequently went outside and continued arguing in the driveway until Trooper Ferguson arrived. **See id.** at 30-31.

Trooper Ferguson testified that he responded to Foreman's and Schmidt's home based upon an anonymous call about an ongoing domestic dispute. **See id.** at 9-10. Trooper Ferguson observed Foreman and Schmidt talking to each other and he noticed Schmidt had puffy eyes from crying. **See id.** at 10. Trooper Ferguson obtained a written statement from Schmidt, explaining the incident and additionally stating that she had pain in her side and a headache. **See id.** at 11-12. Trooper Ferguson then placed Foreman under arrest; in response, Foreman screamed at Schmidt asking why she was doing this to him and that he could not go to jail. **See id.** at 14, 16. Trooper Ferguson described Foreman's behavior as obnoxious. **See id.** at 16. Thereafter, Trooper Ferguson obtained a statement from Ferguson, in which Ferguson admitted that he and Schmidt argued upon her return that morning

because he suspected she was on a drug run. **See id.** at 18-19. In the statement, Foreman further acknowledged that his argument with Schmidt caused the disturbance leading a neighbor to call the police. **See id.** at 19.

When viewing the evidence in a light most favorable to the Commonwealth, as the verdict winner, we conclude that the evidence was sufficient to support the convictions. Schmidt testified about the argument and Foreman kicking her two times, pulling her hair, and dumping water on her. **See** Trial Court Opinion, 5/2/23, at 9 (finding Schmidt's testimony credible). Further, Foreman admitted that he engaged in a loud argument with Schmidt, which resulted in a neighbor calling the police. Therefore, the evidence established that Foreman intended to harass, alarm, or annoy Schmidt when he kicked her two times. **See Coniker**, 290 A.3d at 734. Moreover, it is clear that the fight between Schmidt and Foreman created enough of a public inconvenience to prompt a call to the police from a neighbor; therefore, the evidence was sufficient to find that Foreman intended to cause or created the risk of causing "public inconvenience, annoyance or alarm." 18 Pa.C.S.A. § 5503. Accordingly, this claim is also frivolous.

In his third claim, Foreman argues that the verdicts are against the weight of the evidence. **See Anders** Brief at 15.¹

¹ We note that after the Commonwealth presented its case-in chief, Foreman's counsel made an oral motion to dismiss, raising a false in one, false in all argument relating to Schmidt's testimony and the discrepancies between her (Footnote Continued Next Page)

A weight of the evidence claim is addressed to the discretion of the trial court:

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Talbert, 129 A.3d 536, 545-46 (Pa. Super. 2015) (citation omitted).

Here, the trial court rejected Foreman's weight challenge, finding that although Schmidt's testimony was inconsistent, her testimony about the incident was credible. **See** Trial Court Opinion, 5/2/23, at 9. The trial court noted that Foreman's own admissions to Trooper Ferguson confirmed the nature of the argument, and, therefore, the verdict was not based on conjecture. **See id.** We cannot reassess the credibility of Schmidt or reweigh the evidence presented at trial establishing Foreman committed harassment and disorderly conduct. It is well settled that the fact-finder must determine

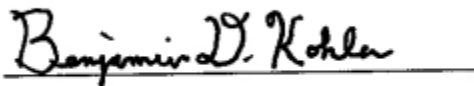
testimony at the preliminary hearing and trial. **See** N.T., 11/18/22, at 35. "'False in one, false in all' is a concept for assessing the weight of evidence." ***Commonwealth v. Vicens-Rodriguez***, 911 A.2d 116, 117 (Pa. Super. 2006). Therefore, we will address Foreman's weight challenge. **See** Pa.R.Crim.P. 607(A) (requiring a challenge to the weight of the evidence to be raised, *inter alia*, "orally, on the record, at any time before sentencing").

the weight given to the evidence and the “credibility of a witness is a question for the fact-finder.” ***Commonwealth v. Hall***, 830 A.2d 537, 542 (Pa. 2003) (citation omitted). Upon review, we conclude the evidence adequately supports the trial court’s determination that the verdicts were not so contrary to the evidence as to shock its conscience. Therefore, Foreman’s claim is frivolous.

As we cannot find any additional meritorious issues in the record, and we agree with Attorney Corcoran that Foreman’s appeal is frivolous, we grant his application for leave to withdraw from representation.

Application to withdraw as counsel granted. Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 1/18/2024