J-S11028-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ERIC REYES-MUNOZ,	:	
	:	
Appellant	:	No. 1400 MDA 2012

Appeal from the Judgment of Sentence Entered July 20, 2012,
In the Court of Common Pleas of Berks County,
Criminal Division, at No. CP-06-CR-0004732-2011.

BEFORE: PANELLA, SHOGAN and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: March 14, 2013

Appellant, Eric Reyes-Munoz, appeals from the judgment of sentence entered after a jury found him guilty of simple assault, recklessly endangering another person ("REAP"), and resisting arrest. We affirm.

The trial court set forth the factual history of this case as follows:

> At approximately 2:00 AM on November 15, 2011, Reading Police Officers Stacie Courtesis and George Gonzalez were dispatched in separate vehicles to 38 North 11th Street, Reading, Berks County, Pennsylvania for a potential Protection From Abuse Order (PFA) violation. N.T., Trial, 7/19/[12]-7/20/12 ("Trial"), at 5-6. Upon arrival at the call address, Officer Courtesis spoke with Nancy Aquirre, [Appellant's] ex-girlfriend. N.T., Trial, at 6. Ms. Aquirre stated that [Appellant] came to her door and asked to talk to her. She then told Officer Courtesis that she showed [Appellant] the PFA and he left soon after. N.T., Trial, at 6-8. After a brief search of the area, Officer Courtesis left the scene, returned to City Hall, and began paperwork for a PFA violation. N.T., Trial, at 8.

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*Retired Senior Judge assigned to the Superior Court.

> Officer Gonzalez remained on the scene, and resumed patrol duties in the area. N.T., Trial, at 27-28. After a few times circling the area, Officer Gonzalez observed a male, [Appellant] matching the description given by Ms. Aquirre banging on the door to the building at 38 North 11th Street. N.T., Trial, at 28. Officer Gonzalez then parked his vehicle at the building and approached [Appellant]. Officer Gonzalez then asked [Appellant] if he was "Eric," the name that Ms. Aquirre had given earlier. N.T., Trial, at 30[]-31. After [Appellant] responded affirmatively, Officer Gonzalez grabbed [Appellant] by the wrist. N.T., Trial, at 31-32. [Appellant] then pulled away from Officer Gonzalez, and, when Officer Gonzalez again tried to apprehend [Appellant], [Appellant] shoved Officer Gonzalez down the front steps of the building. N.T., Trial, at 31-33.
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> [Appellant] then fled from Officer Gonzalez, and Officer Gonzalez pursued [Appellant] south on 11th Street. N.T., Trial, at 33. While in pursuit, Officer Gonzalez radioed to dispatch and informed them that he was in pursuit. N.T., Trial, at 33-34. Officer Gonzalez eventually located [Appellant] underneath a porch and took [Appellant] into custody by pulling [Appellant] out from underneath the porch. N.T., Trial, at 35-36. At some point during [Appellant's] flight and his arrest, he sustained a cut to his head and required medical treatment, which was immediately provided. N.T., Trial, at 37-38.

Trial Court Opinion, 10/18/12, at 2-3.

Immediately after Appellant's conviction, the trial court sentenced him to imprisonment for an aggregate term of 36 to 72 months. Appellant filed post-sentence motions, which the trial court denied. This appeal followed.

On appeal, Appellant raises four issues for our consideration:

> 1. Whether the evidence was insufficient to support the guilty verdicts for simple assault and recklessly endangering another person where the Commonwealth failed to establish that Appellant acted recklessly or intended to cause serious bodily injury?

2. Whether the court committed reversible error when the court would not allow Doctor [Gulati] to testify to how Appellant's injury occurred which was written in a medical report given by the Appellant during the course of medical treatment?

3. Whether the sentencing court erred when it imposed a consecutive sentence of incarceration upon Appellant for the crimes of simple assault and recklessly endangering another person when these crimes merge for sentencing purposes?

4. Whether the trial court abused its discretion by imposing an aggregate sentence of 36-72 months where sentence was excessive and unreasonable and the court showed obvious prejudice towards the Appellant by sentencing Appellant in front of the jury, explaining that Appellant is an R-Fel and listing his prior convictions, then sentencing Appellant to consecutive terms?

Appellant's Brief at 7 (full capitalization and centering of text omitted).

Appellant first challenges the sufficiency of the evidence supporting his convictions for simple assault and REAP. When reviewing such a challenge, we evaluate the record in the light most favorable to the Commonwealth as the verdict winner, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. ***Commonwealth v. Duncan***, 932 A.2d 226, 231 (Pa. Super. 2007) (citation omitted). "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." ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa. Super. 2005), *appeal denied*, 585 Pa. 685, 887 A.2d 1239 (2005). However, the Commonwealth need not establish guilt to a mathematical

certainty, and it may sustain its burden by means of wholly circumstantial evidence. ***Duncan***, 932 A.2d at 231. Moreover, this Court may not substitute its judgment for that of the factfinder, and where the record contains support for the convictions, they may not be disturbed. ***Id.*** Lastly, we note that the finder of fact is free to believe some, all, or none of the evidence presented. ***Commonwealth v. Hartle***, 894 A.2d 800, 804 (Pa. Super. 2006).

Pursuant to the Pennsylvania Crimes Code, "[a] person is guilty of assault if he . . . attempts by physical menace to put another in fear of imminent serious bodily injury[.]" 18 Pa.C.S.A. § 2701(a)(3). As applied in the context of simple assault, "physical menace" includes pushing, shoving, and other forms of physical force or threat. ***See Commonwealth v. Eckrote***, 12 A.3d 383 (Pa. Super. 2010) (defendant charged at, physically restrained, and shoved victim into vehicle); ***Commonwealth v. Smith***, 848 A.2d 973 (Pa. Super. 2004), *appeal denied*, 580 Pa. 705, 860 A.2d 489 (2004) (defendant struck victim in chest); ***Commonwealth v. Little***, 614 A.2d 1146 (Pa. Super. 1992), *appeal denied*, 533 Pa. 608, 618 A.2d 399 (1992) (defendant erratically emerged from home carrying shotgun, shouting and advancing from porch); ***Commonwealth v. Jorgenson***, 492 A.2d 2 (Pa. Super. 1985) (defendant struck victim twice across face).

"Serious bodily injury" is defined as "[b]odily 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.A. § 2301. To sustain a conviction of simple assault, the Commonwealth need not establish that the victim actually suffered bodily injury. ***Commonwealth v. Polston***, 616 A.2d 669, 679 (Pa. Super. 1992), *appeal denied*, 534 Pa. 638, 626 A.2d 1157 (1993) (citation omitted).

Here, the trial court concluded that Appellant's first sufficiency claim lacks merit: "Officer Gonzalez testified that [Appellant] shoved him down a small flight of stairs so that he landed on his rear. As such, the jury could properly find that [Appellant] attempted by physical menace to place Officer Gonzalez in fear of imminent serious bodily injury." Trial Court Opinion, 10/18/12, at 6. In response, Appellant relies on ***Commonwealth v. Fry***, 491 A.2d 843 (Pa. Super. 1985),[1] arguing that, like Fry's victim, "Officer Gonzalez was likely alarmed by [Appellant's] physical contact. However,

[1] 18-year-old Fry grabbed a ten-year-old girl from behind and lifted her off the ground. When bystanders approached, Fry put the victim down and walked away. Reversing, the ***Fry*** panel concluded the evidence was not sufficient to support the simple assault conviction: "[T]he only evidence of physical menace was that Fry put his arms around the child and picked her up. He did not strike or attempt to subdue her by physical means. He did not threaten to inflict bodily injury upon her. There was no evidence that serious bodily injury was imminent or that appellant intended to put the child in fear thereof." ***Fry***, 491 A.2d at 845. We distinguish ***Fry*** factually given the evidence that Appellant used physical force against Officer Gonzalez, shoving him down four concrete steps in an effort to avoid arrest.

being alarmed and frightened is insufficient to prove that Appellant had the specific intent to put Officer Gonzalez in fear of imminent serious bodily injury." Appellant's Brief at 14-15. Contrarily, the Commonwealth argues that Appellant's conduct satisfies the elements of simple assault:

> As a uniformed police officer attempted to take him into custody for a PFA violation, [Appellant] escaped the officer's grasp and shoved him down a small flight of concrete stairs. Although the officer fortunately was not injured, this type of fall could easily have resulted in serious bodily injury. The intent of [Appellant] to inflict this serious bodily injury was proven circumstantially by his resistance to the officer's authority and then shoving [the officer] down the stairs.

Commonwealth's Brief at 8.

Viewing the evidence in the light most favorable to the Commonwealth, as we must under our standard of review, we discern no error. Officer Gonzalez attempted to arrest Appellant. N.T., 7/19-20/12, at 30-31. Appellant responded in a resistant, combative, and hostile manner. To avoid arrest, Appellant shoved the officer in the chest, causing him to fall backwards down four concrete steps. ***Id.*** at 31-33. Although the officer was not injured, given the evidence that Appellant shoved Officer Gonzalez backwards down four concrete steps, the jury could find that Appellant attempted by physical menace to put the officer in fear of imminent serious bodily injury. Thus, Appellant's argument that the evidence was not sufficient to support the simple assault conviction fails.

Appellant also challenges the sufficiency of the evidence supporting the REAP conviction. "A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S.A. § 2705. To sustain a REAP conviction, "the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so." ***Commonwealth v. Hopkins***, 747 A.2d 910, 915 (Pa. Super. 2000). The *mens rea* for REAP is "a conscious disregard of a known risk of death or great bodily harm to another person." ***Id.*** (citation omitted).

Here, the trial court concluded that the evidence of Appellant "push[ing] Officer Gonzalez down a small flight of stairs resulting in Officer Gonzalez landing on his rear" was sufficient to sustain the conviction for REAP; therefore, "the claim must fail." Trial Court Opinion, 10/18/12, at 6-7. Relying on ***Commonwealth v. Trowbridge***, 395 A.2d 1337 (Pa. Super. 1978),[2] Appellant argues that, like Trowbridge, he "did not have the

[2] Trowbridge engaged in a verbal altercation with police officers and then pointed an unloaded gun at them. Reversing, the ***Trowbridge*** panel concluded the evidence was insufficient to support the REAP conviction: "When appellant pointed her BB gun at [the] officers …, it was unloaded. As we have indicated, this in itself does not create a danger of death or serious bodily harm, and thus no violation of § 2705." ***Trowbridge***, 395 A.2d at 1341. We distinguish ***Trowbridge*** factually given the evidence that Appellant used physical force against Officer Gonzalez, pushing him down four concrete steps, which created a danger of death or serious bodily injury.

necessary recklessness to put Officer Gonzalez in danger of death or serious bodily injury." Appellant's Brief at 16.[3] The Commonwealth responds that Appellant disregarded "the known risk that serious bodily injury could result from such a fall" down concrete stairs. Commonwealth's Brief at 8.

Again, viewing the evidence in the light most favorable to the Commonwealth, we discern no error. As stated above, Officer Gonzalez attempted to arrest Appellant. N.T., 7/19-20/12, at 30-31. Appellant responded in a resistant, combative, and hostile manner. To avoid arrest, Appellant shoved the officer in the chest, causing him to fall backwards down four concrete steps. ***Id.*** at 31-33. In light of the evidence that Appellant shoved Officer Gonzalez down four concrete steps, the jury could find that Appellant recklessly engaged in conduct that placed the officer in danger of death or serious bodily injury. Thus, Appellant's argument that the evidence was not sufficient to support the REAP conviction fails.

Next, Appellant challenges the trial court's refusal to allow Dr. Neil Gulati to testify about the cause of the laceration on Appellant's head. According to defense counsel's offer of proof:

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[3] Appellant relies on ***Commonwealth v. Alexander***, 477 Pa. 190, 383 A.2d 887 (1978), "for the limited purpose of showing the intent to cause serious bodily injury." Appellant's Brief at 18 n.4. However, Appellant's reliance on ***Alexander*** is misplaced because the *mens rea* for the offense of REAP is not an intent to cause serious bodily injury, but "a conscious disregard of a known risk of death or great bodily harm to another person." ***Hopkins***, 747 A.2d at 915.

> [Dr. Gulati] is going to testify that [Appellant] had a laceration that required seven staples to close it. It was free of debris. It had no woodchips or paint chips in it. And when he was asked, [Dr. Gulati] reviewed the radiology report. And there were no skull fractures and no harm to the bone. And when [Appellant] was talking -- when [Appellant] was asked what happened to him by the radiologist, he stated by the gun.

N.T., 7/19-20/12, at 61.

The admission of evidence is a matter within the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. ***Commonwealth v. Collins***, 598 Pa. 397, 444, 957 A.2d 237, 265 (2008). "Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." ***Commonwealth v. Widmer***, 560 Pa. 308, 322, 744 A.2d 745, 753 (2000) (internal citation omitted).

After hearing argument from both counsel, the trial court explained its decision to limit Dr. Gulati's testimony:

> I will allow the doctor to testify as to the stiches, as to the blood that he saw and whatever else he saw. The Court will not allow him to testify as to what is in the report [--] what the radiologist said [Appellant] said to him. That is not part of treatment. It's not for a diagnosis. If you look at the recent case, as it is defined in 803, the one from the Commonwealth Court,[4] that is

[4] ***Gerald H. Smith, D.D.S., v. Bureau of Professional and Occupational Affairs, State Board of Dentistry***, No. 1272 C.D. 2011, unpublished memorandum (Pa. Cmwlth. filed July 13, 2012).

> the correct designation of the law in Pennsylvania, and the Court is going to follow the law.

N.T., 7/19-20/12, at 65-66.

Appellant argues that Dr. Gulati's testimony was admissible under the hearsay exception of Pennsylvania Rule of Evidence ("Pa.R.E.") 803(4) (**Statements for purposes of medical diagnosis or treatment**). Appellant's Brief at 20. The Commonwealth counters that Dr. Gulati's testimony does not fall within this hearsay exception. Commonwealth's Brief at 9 (citing ***Commonwealth v. Smith***, 545 Pa. 487, 681 A.2d 1288 (1996)). We agree with the Commonwealth.

Pa.R.E. 803(4) states:

> A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

The comment to Rule 803(4) provides that "[s]tatements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible." Pa.R.E. 803(4), *Comment* (citing ***Smith***).

The question in ***Smith*** was "whether testimony by a nurse wherein she repeated a statement made to her by an injured child identifying the child's alleged abuser was inadmissible hearsay or whether such testimony

was properly admitted under the medical treatment exception to the hearsay rule." ***Smith***, 545 Pa. at 490, 681 A.2d at 1289. The ***Smith*** Court opined:

> [T]here are essentially two requirements for a statement to come within this exception. First, the declarant must make the statement for the purpose of receiving medical treatment, . . . and second, the statement must be necessary and proper for diagnosis and treatment.

Smith, 545 Pa. at 493, 681 A.2d at 1291 (internal citations omitted). The panel then exemplified its point and applied the two-part test:

> By way of example, a person's statement, "I was hit by a car," made for the purpose of receiving medical treatment would come within the exception. It is important for doctors to know how the person sustained the injuries. However, a person's statement, "I was hit by the car which went through the red light," would not come within the exception, or at least that part of the statement which indicated that the car "went through the red light" would not. It is inconsequential and irrelevant to medical treatment to know that the car went through the red light.
>
> * * *
>
> We fail to see how the identity of the perpetrator of the physical abuse was pertinent to the treatment of [the victim's] scalding burns. What difference would it have made to the treatment of the burns whether a total stranger inflicted the burns or a close family relative? The Commonwealth simply fails to demonstrate that the identity of the abuser is pertinent to medical treatment.

Smith, 545 Pa. at 494-495, 681 A.2d at 1292.

In disposing of Appellant's challenge, we acknowledge the Commonwealth's sound application of ***Smith*** to the proposed testimony:

> The [***Smith***] Court was careful to exclude any portion of the relevant statement which was not specifically pertinent to adequate medical care, such as the identity of the perpetrator.

> *See Smith*, at 1291-1292. *See also Commonwealth v. D.J.A.*, 800 A.2d 965 (Pa. Super. 2002).
>
> * * *
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> Based upon the offer of proof made at trial, Dr. Gulati would have testified that the radiology report indicated that when asked by the radiologist, [Appellant] stated that the injury was caused "by the gun." (N.T., p. 62). *Considering that the only person that [Appellant] had contact with at or about the time of his arrest was Officer Gonzalez, this statement would necessarily have identified Officer Gonzalez as the person who allegedly struck him with the gun. As stated above, Smith prohibits this testimony.*

Commonwealth's Brief at 10 (emphasis supplied). In sum, the first part of the proffered testimony was admissible under ***Smith*** because it identified the cause of Appellant's injury, *i.e.*, being hit in the head. As such, it was pertinent to medical treatment. However, under ***Smith***, the second part the proffered testimony was not admissible because it implicitly identified Officer Gonzalez as the person who allegedly inflicted the injury. As such, it was not pertinent to medical treatment. Accordingly, we discern no abuse of the trial court's discretion in limiting Dr. Gulati's testimony.

In his third issue, Appellant challenges the imposition of sentences on the simple assault and REAP convictions. According to Appellant, the simple assault conviction should have merged with the REAP conviction for sentencing purposes. Appellant's Brief at 25 (citing ***Commonwealth v.***

Cavanaugh, 420 A.2d 674 (Pa. Super. 1980)).[5] In contrast, the Commonwealth argues that Appellant has waived this issue because he failed to include it in his Rule 1925(b) statement. Commonwealth's Brief at 11. The trial court did not address this issue in its Rule 1925(a) opinion.

Whether Appellant's convictions merge for sentencing is a question implicating the legality of Appellant's sentence. ***Commonwealth v. Wade***, 33 A.3d 108, 115 (Pa. Super. 2011), *appeal denied*, ___ Pa. ___, 51 A.3d 839 (2012) (citing ***Commonwealth v. Baldwin***, 604 Pa. 34, 38, 985 A.2d 830, 833 (2009)). A legality-of-sentence issue cannot be waived and "may be reviewed *sua sponte* by this Court," due to the fact that an "illegal sentence must be vacated." ***Commonwealth v. Randal***, 837 A.2d 1211, 1214 (Pa. Super. 2003). Hence, we shall review Appellant's merger issue. In doing so, our standard of review is *de novo*, and the scope of our review is plenary. ***Wade***, 33 A.3d at 116.

The merger statute reads as follows:

> 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.

[5] Appellant's reliance on ***Cavanaugh*** is misplaced because it involved a conviction of simple assault under section 2701(a)(1), not section 2701(a)(3).

42 Pa.C.S.A. § 9765. "[Section] 9765 prohibits the merger of sentences unless a strict two-part test is met. First, the convictions must be based on a single criminal act. Second, all of the statutory elements of one of the offenses must be included in the statutory elements of the other." ***Wade***, 33 A.3d at 116.

Applying section 9765 to the sentence at hand, we conclude that simple assault by physical menace is not a lesser-included offense of REAP for two reasons. First, simple assault by physical menace requires a specific intent, whereas REAP requires reckless conduct. 18 Pa.C.S.A. §§ 2701(a)(3) and 2705. Thus, because the offense of REAP does not necessarily include all the elements of simple assault by physical menace, the latter is not subsumed in the former. ***Commonwealth v. Gouse***, 429 A.2d 1129, 1132 n.3 (Pa. Super. 1981) (citations omitted).

Second, simple assault by physical menace is not a lesser-included offense of REAP because both offenses are misdemeanors of the second degree. 18 Pa.C.S.A. §§ 2701(b) and 2705. The similar grading of the two offenses fails to meet the requirement that a lesser-included offense be, in fact, a less serious crime in terms of its classification and degree. ***Gouse***, 429 A.2d at 1132 n.3. Based on the foregoing, therefore, we conclude that the trial court did not err by imposing sentences on the simple assault and REAP convictions.

Finally, Appellant challenges his sentence as excessive and unreasonable and the result of judicial prejudice. Our standard of review is as follows:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Bricker, 41 A.3d 872, 875 (Pa. Super. 2012) (quoting ***Commonwealth v. Cunningham***, 805 A.2d 566, 575 (Pa. Super. 2002), *appeal denied*, 573 Pa. 663, 820 A.2d 703 (2003) (citations omitted)).

Appellant's claims implicate certain discretionary aspects of his sentence. "A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004), *appeal denied*, 580 Pa. 695, 860 A.2d 122 (2004)). As we observed in ***Commonwealth v. Moury***, 992 A.2d 162 (Pa. Super. 2010):

> [a]n appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
>
> > [W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. [720]; (3) whether appellant's brief has

> a fatal defect, Pa.R.A.P. 2119(f)[6]; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Moury, 992 A.2d at 170 (citation omitted). A substantial question asks if "the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process." ***Commonwealth v. Rhoades***, 8 A.3d 912, 916 (Pa. Super. 2010), *appeal denied*, 611 Pa. 651, 25 A.3d 328 (2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1746 (2012). We evaluate whether a particular issue constitutes a substantial question on a case-by-case basis. ***Commonwealth v. Kenner***, 784 A.2d 808, 811 (Pa. Super. 2001), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2002).

Here, the first three requirements of the four-part test are met. Appellant filed a timely motion for modification of his sentence, a timely appeal, and a Rule 2119(f) statement. ***Moury***, 992 A.2d at 170. Thus, we examine whether Appellant has raised a substantial question.

Appellant's Rule 2119(f) statement presents his arguments as follows:

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[6] Pa.R.A.P. Rule 2119(f) provides as follows:

> **Discretionary aspects of sentence.** An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

> The sentencing court showed obvious prejudice towards Appellant by sentencing Appellant while the jury was still present in the court room. The sentencing judge explained to the jury that Appellant is an R-FEL, explained what an R-FEL is and listed Appellant's prior convictions on the record, demonstrating the sentencing judge's prejudice towards Appellant in imposing consecutive sentences. … Viewing the record as a whole, the sentencing court did not consider any other statutory factor other than the nature of Appellant's criminal actions and his prior record.

Appellant's Brief at 11.

First, Appellant alleges that the trial court "showed prejudice towards [him] by allowing the jury to remain in the court room;" telling the jury that he "is an R-Fel" and explaining to the jury what an R-Fel is; listing "all of Appellant's prior convictions;" and stating that Appellant "was currently on special probation for an offense that occurred in 2009." Appellant's Brief at 29. Disturbingly, Appellant charges the trial court with "implying that the jury should have found Appellant guilty of the more serious offenses." ***Id.***

The record before us reveals that the jury heard evidence on July 19, 2012, and then adjourned for the evening. N.T., 7/19-20/12, at 100. The next morning, the jury heard closing arguments and the court's charge, and then entered its verdict. ***Id.*** at 101. Following the verdict and some discussion about Appellant's pre-sentence report, defense counsel advised the trial court: "My client would like to be sentenced today." ***Id.*** at 102. In response, the trial court addressed the jury:

> THE COURT: All right. Members of the jury, we will proceed to sentence the defendant today. I'm not going to

> make you wait around for it. If you want to wait, you can sit back. … So you're welcome to stay here if you want to, or you can leave. Mr. Garrett will walk over with anybody who wants to leave now. We will proceed to sentencing. So you can tell me. If you want to sit there, you can. If not, you can head over to the jury room. I think people want to wait. That's fine.

N.T., 7/19-20/12, at 102. While members of the jury remained in the courtroom, the trial court reviewed Appellant's pre-sentence report, heard from the prosecutor, defense counsel, and Appellant, and stated reasons for its sentence on the record. ***Id.*** at 103-109. It then sentenced Appellant. ***Id.*** at 109-112. Immediately thereafter, the trial court addressed the jury:

> Members of the jury, the last thing that the defendant has to do for me is acknowledge to me that he understands his rights after he has been sentenced. And I hope that you were able to hear everything I said why the sentence was imposed.
>
> We will all remain seated while the jury is excused. I will still send you letters.
>
> (whereupon, the jury left the courtroom at 2:54 p.m.)

Id. at 113.

Upon review, we conclude that Appellant's novel challenge to his sentence does not raise a substantial question. Appellant does not direct our attention to a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process that was violated by the jury being present during Appellant's sentencing. Moreover, precedent exists for this scenario. ***See Commonwealth v. Flor***, 606 Pa. 384, 438, 998 A.2d 606, 648 (2010)

("[T]he court also invited the jury to return to the courtroom for the afternoon session, at which time the court imposed sentence on Appellant's remaining, non-capital counts."). Thus, we deny Appellant's request for permission to appeal this discretionary aspect of his sentence.

As for Appellant's remaining arguments, we reiterate that a sentencing court's decision to impose consecutive sentences does not raise a substantial question. ***Commonwealth v. Marts***, 889 A.2d 608 (Pa. Super. 2005). Similarly, an argument that the sentencing court failed to adequately consider mitigating factors in favor of a lesser sentence does not present a substantial question. ***Commonwealth v. Ratushny***, 17 A.3d 1269, 1273 (Pa. Super. 2011) (citations omitted). Thus, we deny Appellant's request for permission to appeal these two discretionary aspects of his sentence.

On the other hand, "an averment that the court sentenced based solely on the seriousness of the offense and failed to consider all relevant factors raises a substantial question." ***Bricker***, 41 A.3d at 875 (quoting ***Commonwealth v. Macias***, 968 A.2d 773, 776 (Pa. Super. 2009)). Thus, we will review Appellant's challenge to this discretionary aspect of his sentence.

Pursuant to Pennsylvania's general sentencing standards:

> the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

42 Pa.C.S.A. § 9721(b).

Here, the trial court explained its sentencing rationale as follows:

> The Court: All right. The Court here today has considered the age of the defendant. The Court has considered the nature of the offense. The Court has considered the guideline ranges which were placed on the record, noting that the defendant's criminal history began in 1997 and continues through 2009, when he was presently had [sic] a detainer lodged against him for a special probation period that would have begun at the conclusion of his state sentence for one of the charges in 2009.
>
> The Court having considered as well the trial testimony here today, and the jury having found the defendant guilty of simple assault, recklessly endangering, and resisting arrest. The Court having noted that his defendant is what's known as a repeat felon because of his numerous convictions.
>
> The Court has considered all those factors, the recommendation by the District Attorney,[7] the recommendation from defense counsel, and the

[7] According to the Commonwealth:

> [p]revious court documents indicated that [Appellant] was a repeat felon in the "RFEL" category, and he was under supervision at the time the instant offense was committed. (N.T., p. 103-106). Because of this prior record score category, the standard range for sentencing coincided with the maximum permissible sentence. (N.T., p. 105-106). For these reasons, the Commonwealth requested the imposition of consecutive maximum sentences for all three offenses. (N.T., p. 106).

Commonwealth's Brief at 14.

> statements of the defendant that he remain in Berks County Prison.[8]
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> . . .
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> Having considered all of those factors, the Court is prepared to enter orders. I did want to add on the record that I'm considering that he has a burglary from 2009, retail theft from 2008, retail theft in 2004, receiving stolen property from 2004, possession of a controlled substance in 2006, another one in 2007, theft by unlawful taking and burglary in 1999, and unauthorized use of a motor vehicle in 2001.
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> **N.T., Trial, at 107-[1]09.**
>
> Here, the Court sentenced [Appellant] to sentences within the standard range for the offenses committed. **N.T., Trial, at 105.** The Court considered all of the factors noted above, and, in light of the extensive criminal history of [Appellant], which includes several felonies, the Court deemed it proper to sentence [Appellant] to serve consecutive sentences. **N.T., Trial, at 109-110.** For all of the reasons listed above, the Court did not abuse its discretion in sentencing [Appellant], and [Appellant's] argument must fail.

Trial Court Opinion, 10/18/12, at 11-12.

Upon review, we discern no abuse of discretion. The record reveals that the sentencing court expressly and implicitly considered the statutory factors of section 9721(b). N.T., 11/19-20/12, at 105-110. Appellant's contrary claim fails.

Judgment of sentence affirmed.

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[8] Defense counsel spoke of Appellant's three children and two years of college education in Puerto Rico. N.T., 7/19-20/12, at 107. Appellant expressed his desire to serve his sentence in the county so he "could communicate with [his] family." ***Id.*** at 107.