

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JOSE VASQUEZ MORALES

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 147 WDA 2013

Appeal from the Judgment of Sentence March 8, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0011282-2009

BEFORE: PANELLA, J., DONOHUE, J., and ALLEN, J.

MEMORANDUM BY PANELLA, J.:

FILED JULY 10, 2014

Appellant, Jose Vasquez Morales, appeals from the judgment of sentence, *nunc pro tunc*, entered by the Honorable Kathleen A. Durkin, Court of Common Pleas of Allegheny County. Additionally, Morales's court-appointed counsel, Christy Foreman, Esquire, has petitioned to withdraw and has submitted an **Anders**¹ brief in support thereof contending that Morales's appeal is frivolous. After careful review, we grant counsel's petition to withdraw and affirm Morales's judgment of sentence.

The Commonwealth of Pennsylvania charged Morales with a multitude of crimes arising from his actions during the evening of April 6, 2009. On that night, Morales was staying with Wilma Stevens. At one point in the

¹ **Anders v. California**, 386 U.S. 738 (1967).

night, Stevens believed that Morales was trying to steal from her, and the two began fighting. Morales took a gun from Stevens during the fight, and eventually, Stevens forced Morales from her home by hitting him over the head with a ceramic vase and pushing him out the back door.

Immediately thereafter, Stevens heard gunshots coming from outside her home. She proceeded to her front door to ensure that it was secured to find that Morales was shaking the door knob in attempt to re-enter the house. Stevens did not call for help, believing that Morales merely needed time to cool off. Several minutes later, Stevens again heard gunshots.

At around that time, Officer Ryan Young observed Morales crossing the street and could see that Morales was covered in blood. Hoping to assist Morales, Officer Young stopped his vehicle approximately 25 feet from Morales. Once Officer Young trained his spotlight on Morales, he noticed that Morales was wielding a single firearm with both hands.

As Officer Young radioed for backup, he observed that Morales was running towards him. Officer Young began to exit his cruiser in case he needed to draw his service weapon, at which point Morales rounded the front of the cruiser and raised the firearm above his head and ultimately pointed it at Officer Young. Shortly thereafter, Morales pulled the trigger on his weapon in an attempt to fire at Officer Young. With the help of Officer Aaron Loughran, Officer Young managed to disable Morales.

During the subsequent investigation, 4 empty shells were found in the .38 caliber revolver used by Morales. 3 bullets were found in the back door of Stevens's home, and these bullets were determined to have come from a .38 caliber revolver. After a trial, a jury convicted Morales of one count of attempted homicide, one count of aggravated assault, one count of discharging a firearm into an occupied structure, and one count of resisting arrest. On March 8, 2011, the trial court sentenced Morales to a term of imprisonment of thirteen and one-half years to twenty-seven years. Counsel for Morales filed post-sentence motions, but did not file a notice of appeal when the motions were denied by operation of law.

Morales subsequently filed a petition pursuant to the Post Conviction Relief Act, and on December 21, 2012, the PCRA court granted reinstatement of Morales's direct appeal rights. Attorney Foreman timely filed a notice of appeal on Morales's behalf.

Preliminarily, we note that Attorney Foreman has petitioned to withdraw and has submitted an **Anders** brief in support thereof contending that Morales's appeal is frivolous. The Supreme Court of Pennsylvania has articulated the procedure to be followed when court-appointed counsel seeks to withdraw from representing an appellant on direct appeal as follows:

[I]n the **Anders** brief that accompanies court-appointed counsel's petition to withdraw, counsel 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 arguably believes 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, 602 Pa. 159, 178-79, 978 A.2d 349, 361 (2009).

We note that Attorney Foreman has complied with all of the requirements of **Anders** as articulated in **Santiago**.² We will now proceed to examine the issues set forth in the **Anders** brief, which Morales believes to be of arguable merit.³

Morales seeks to raise two issues on appeal:

1. Whether the evidence in this matter was insufficient to sustain Appellant's convictions of criminal attempt-criminal homicide, aggravated assault, discharging firearm into an occupied structure and resisting arrest.
2. Whether the jury's guilty verdict in this matter was against the weight of the evidence.

² Additionally, Attorney Foreman confirms that she sent a copy of the **Anders** brief to Morales as well as a letter explaining to Morales that he has the right to proceed *pro se* or the right to retain new counsel. A copy of the letter is appended to Attorney Foreman's petition, as required by this Court's decision in **Commonwealth v. Millisock**, 873 A.2d 748 (Pa. Super. 2005), in which we held that "to facilitate appellate review, ... counsel *must* attach as an exhibit to the petition to withdraw filed with this Court a copy of the letter sent to counsel's client giving notice of the client's rights." **Id.**, at 749 (emphasis in original).

³ Morales filed a handwritten document, in Spanish, in response to Attorney Foreman's **Anders** brief. To the best of our ability to translate the document, it appears that Morales is alleging police and prison staff corruption, the denial of a translator to write his response for him, and assorted other inconveniences in his daily prison life, such as the lack of a television.

Appellant's Brief, at 5.

In his first issue, Morales argues that the evidence at trial was insufficient to support his convictions for attempted homicide, aggravated assault, discharging a firearm into an occupied structure, and resisting arrest. Our standard of review is well established. "We must determine whether the evidence admitted at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, support all of the elements of the offense beyond a reasonable doubt." ***Commonwealth v. Cooper***, 596 Pa. 119, 130, 941 A.2d 655, 662 (2007).

Our scope of review is plenary. ***See Commonwealth v. Weston***, 561 Pa. 199, 203 n.8, 749 A.2d 458, 460 n.8 (2000). We may not weigh the evidence and substitute our judgment for the fact-finder's, as the fact-finder solely determines the credibility of witnesses and is free to believe all, part or none of the evidence submitted. ***See Cooper***, 596 Pa. at 130, 941 A.2d at 662. "This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt." ***Commonwealth v. Swerdlow***, 636 A.2d 1173, 1176 (Pa. Super. 1994) (citation omitted).

To sustain an attempted homicide conviction the Commonwealth must prove the accused has "commit[ed] an act that is a substantial step towards

the commission of the crime with a specific intent to kill.” **Commonwealth v. Dale**, 836 A.2d 150, 152-153 (Pa. Super. 2003). “[T]he law permits the fact finder to infer that one intends the natural and probable consequences of his acts[.]” **Commonwealth v. Jackson**, 955 A.2d 441, 444 (Pa. Super. 2008). “The intent which is a prerequisite to a finding of murder is ... malice.” **Id.** “A jury may properly infer malice from the use of a deadly weapon on a vital part of the victim's body.” **Id.**

Officer Young testified that Morales pointed a firearm at him. **See** N.T., Trial, 12/13-14/10, at 85. Furthermore, Officer Young saw Morales’s “hand squeezing the trigger.” **Id.** Even though Officer Young began shooting at Morales, Morales continued to charge Officer Young with his firearm pointed at Officer Young. **See id.**, at 85-86. Officer Aaron Loughran testified that when he arrived on the scene, he felt that Morales was shooting at Officer Young, trying to kill him. **See id.**, at 99-100.

Detective Margaret Sherwood testified that she discovered four empty shell casings in the .38 caliber revolver used by Morales. **See id.**, at 51-52. However, only three discharged bullets were found in Stevens’s home. **See id.**, at 56.

This evidence is sufficient for a jury to conclude that Morales pointed his firearm at Officer Young and fired one bullet at him. Thus, the jury could reasonably infer that Morales had utilized a deadly weapon in an attempt to

strike Officer Young in a vital area. This is sufficient to support a verdict of attempted homicide.

Turning to Morales's challenge to his conviction for aggravated assault of a police officer, we note that aggravated assault of a police officer is defined as where a person "attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c)," which includes police officers. 18 Pa.C.S.A. § 2702(a)(2). "Serious bodily injury" is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. § 2301. A person "attempts" aggravated assault when he or she acts, with the required specific intent, "in a manner which constitutes a substantial step toward perpetrating a serious bodily injury upon another." **Commonwealth v. Gruff**, 822 A.2d 773, 776 (Pa. Super. 2003) (citing **Commonwealth v. Galindes**, 786 A.2d 1004, 1009 (Pa. Super. 2001)). Based upon the same evidence outlined above, the jury was entitled to conclude that Morales attempted to cause serious bodily injury to Officer Young.

Next, Morales challenges his conviction for discharging a firearm into an occupied structure. Wilma Stevens testified that immediately after closing her back door on Morales, she heard gunshots. **See** N.T., Trial, 12/13-14/10, at 38. As noted above, later investigation revealed three

bullet holes in the back door. **See *id.***, at 55-56. This evidence, in conjunction with the evidence regarding the empty shells in the firearm used by Morales set forth previously, was sufficient to allow the jury to conclude that Morales had in fact shot the firearm through the back door of Stevens's home while she was inside.

In his final sufficiency challenge, Morales claims that the evidence at trial was insufficient to support his conviction for resisting arrest. A person is guilty of resisting arrest if he, "with the intent of preventing a public servant from effecting a lawful arrest, or discharging any other duty, creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance." 18 PA. CONS. STAT. ANN. § 5104. We conclude that the evidence set forth above is more than sufficient to allow a jury to conclude that Morales intentionally interfered with Officer Young's discharge of his official duties and created a substantial risk to Officer Young, as well as requiring Officer Young and Officer Loughran to use substantial force in return. Thus, none of Morales's challenges to the sufficiency of the evidence have any merit.

Morales also challenges the weight of the evidence supporting his convictions. Our standard of review for a challenge to the weight of the evidence is well settled. We may not substitute our judgment for that of the fact finder, who is free to believe all, part, or none of the evidence and to

determine the credibility of the witnesses. **Commonwealth v. Diggs**, 949 A.2d 873, 879 (2008). The trial court may only award a new trial where the verdict is “so contrary to the evidence as to shock one’s sense of justice.” **Id.** A verdict is said to shocks one's sense of justice when “the figure of Justice totters on her pedestal,” or when “the jury’s verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience.” **Commonwealth v. Cruz**, 919 A.2d 279, 282 (Pa. Super. 2007) (citation omitted). Our review is thus limited to whether the trial court properly exercised its discretion, and relief is only granted where “the facts and inferences of record disclose a palpable abuse of discretion.” **Diggs**, 949 A.2d at 879.

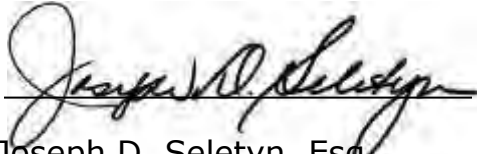
While the trial court did not explicitly address Morales’s post-sentence motion raising weight of the evidence, we have no difficulty in concluding that it did not abuse its discretion in denying the motion by operation of law. The factual scenario set forth above contains independent eyewitness testimony and forensic evidence supporting the convictions. There is no reason to believe that the trial court’s conscience should have been shocked by the verdicts. Thus, Morales’s final issue has no merit.

After examining the issues contained in the **Anders** brief and after undertaking our own independent review of the record, we concur with counsel’s assessment that the appeal is wholly frivolous.

J-S32004-14

Judgment of sentence affirmed. Permission to withdraw as counsel is granted. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/10/2012