NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. SEVILLE J. ALI, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3056 EDA 2016

Appeal from the Judgment of Sentence Entered April 7, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0005228-2014

BEFORE: BENDER, P.J.E., LAZARUS, J., and KUNSELMAN, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED MAY 29, 2018**

Appellant, Seville J. Ali, appeals from the judgment of sentence of an aggregate term of 10 to 20 years' incarceration, imposed after he was convicted, following a non-jury trial, of aggravated assault, 18 Pa.C.S. § 2702(a)(1), and possessing instruments of crime (PIC), 18 Pa.C.S. § 907(b). Appellant seeks to raise several issues on appeal, including challenges to the sufficiency and weight of the evidence to sustain his convictions. Additionally, Appellant's counsel, John Belli, Esq., seeks to withdraw his representation of Appellant pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009). After careful review, we affirm Appellant's judgment of sentence and grant counsel's petition to withdraw.

The trial court summarized the facts of Appellant's case, as follows:

> This is a case involving an incident that occurred on February 22, 2014 at 438 West Queen Lane where Appellant shot Complainant, Keith Chapelle[,] in the arm just outside Mr. Chapelle's front door.
>
> Prior to February 22, 2014, Mr. Chapelle and Appellant had a cordial relationship. Mr. Chapelle ran a moving business with U-Haul to help people load and unload moving trucks. Appellant completed some moving jobs for Mr. Chapelle's business and helped Mr. Chapelle find other workers. While Appellant worked for Mr. Chapelle, Mr. Chapelle found out that some of his other workers had noticed that Appellant habitually kept his doors to both his home and car open. Mr. Chapelle thought that these workers were planning on stealing from Appellant. Mr. Chapelle fired these workers and informed Appellant about what happened and that everything had been handled. Afterward[,] Appellant shook his hand and they both went to the corner store together. This occurred just over a month before the shooting.
>
> Mr. Chapelle continued to hire Appellant's friends[,] and Mr. Chapelle had started to hear that Appellant did not like him. During this time, Appellant would have conversations with Mr. Chapelle's wife where he would say that he felt like Mr. Chapelle was trying to set Appellant up. Appellant had told Mr. Chapelle's wife during these conversations where Appellant felt threatened that, "bullets can go through floors." After Mr. Chapelle found out that Appellant had a problem with him he no longer spoke to Appellant. Prior to February 22, 2014, Appellant and Mr. Chapelle had not argued.
>
> On February 22, 2014 at 9:00 PM, Mr. Chapelle had returned to his apartment building[,] which he shared with Appellant. Appellant's apartment was directly under Mr. Chapelle's. When Mr. Chapelle arrived to the building, Appellant was standing on the porch and then engaged in conversation with Mr. Chapelle. Mr. Chapelle then attempted to walk past him. Appellant … became physical with Mr. Chapelle. Appellant boxed Mr. Chapelle in so that he could not move. The two men beg[a]n arguing and Appellant said that, "If anything happens to him or his family he already told his people 'second floor[.'"]

Mr. Chapelle's wife then came downstairs to bring Mr. Chapelle inside their home. Mr. Chapelle and his wife turned the corner to enter Mr. Chapelle's apartment through the door on the side of the house. While Mr. Chapelle and his wife turned the corner, Appellant entered his apartment. Appellant's girlfriend Crystal then yelled, "No, don't do that." When Appellant came back out of his apartment, he had a silver gun.

Appellant approached Mr. Chapelle with the gun at his side while Mr. Chapelle was at his apartment door. When Appellant was ten feet away from Mr. Chapelle, Appellant raised the gun, pointed it at Mr. Chapelle's chest and shot him in the left arm. As Mr. Chapelle fell to the ground, Appellant advanced towards him and yelled, "If you tell anybody, if you call the cops, I'll kill you. I swear to God I'll kill your family." As Appellant stood over Mr. Chapelle, he heard another click from the gun but no shot was fired. Appellant left around the corner on the porch and Mr. Chapelle ran inside the home. The police arrived within minutes and took a statement from Mr. Chapelle. Afterward, Mr. Chapelle was transported to Temple Hospital.

The first responding officer, Officer Matthew Lally, entered Appellant's home upon arrival. During a search of the first floor of the apartment for other victims and Appellant, Officer Lally discovered a .380 [caliber bullet] in [] Appellant's toilet. Detective James Sloan's investigation revealed a trail of blood leading from Mr. Chapelle's apartment entrance along the porch. Detective Sloan also found a spent .380 cartridge on the corner of the porch. That [fired cartridge] was placed on property receipt number 3130139. After obtaining a search warrant and searching the home, Detective Sloan recovered nine .380 [caliber bullets], eight in the Appellant's bedroom and one in the toilet. The nine [bullets] were placed on property receipt number 3130140.

Tracey Brown is the next door neighbor to both Appellant and Mr. Chapelle and was present inside Appellant's apartment just before the altercation. Ms. Brown, claimed to have seen a knife in Mr. Chapelle's hand. Ms. Brown then went upstairs in her apartment which is adjacent to Appellant's apartment. While inside her apartment, Ms. Brown heard one gunshot. When asked about the knife, Ms. Brown could not identify where the knife came from, how Mr. Chapelle was holding it, or what he was doing with it. When questioned by police that evening Ms. Brown did not mention that she had seen a knife. The first time Ms. Brown mention[ed] the knife [was] to Appellant's lawyers. The record

> does not indicate that a knife was recovered during police investigation.
>
> Upon taking the stand, Appellant claim[ed] that Mr. Chapelle emerged from his apartment to talk to Appellant. Appellant claim[ed] that Mr. Chapelle initiated the conversation by accusing Appellant of making threats against Mr. Chapelle's daughter. During the altercation, Appellant claim[ed] that Mr. Chapelle pushed him against the door to Appellant's apartment. Appellant claim[ed] to have seen a knife. Appellant claim[ed] that after pulling the knife, Mr. Chapelle charged after Appellant through the front door to his home. According to Appellant, Mr. Chapelle struggled with Ms. Brown to get through the door while holding that knife in his hand. As Mr. Chapelle was trying to come through the door, Appellant grabbed his gun and fired a shot at Mr. Chapelle while Appellant was standing in his living room. After firing the shot, Appellant claim[ed] to have hid[den] the gun behind his mantle four feet above the floor and fled. Upon investigation, Detective Sloan did not recover a gun from the apartment or any spent shell casings in the home.
>
> At the beginning of the trial, defense counsel raised an objection to the use of photographs marked C1 A through J on the grounds that he had not seen them before and they had not been passed in discovery. The discovery letter provided by the prosecutor indicated that the photos had been passed in discovery. Upon inquiry from this [c]ourt, defense counsel said that his objection was not strenuous. This [c]ourt offered defense counsel all the time he needed to prepare using the photographs. After a recess, defense counsel thanked this [c]ourt and proceedings continued. During the proceedings, defense counsel referenced material included in the discovery.

Trial Court Opinion (TCO), 8/9/17, at 2-6 (citations to the record omitted).

At the close of Appellant's non-jury trial, the trial court convicted him of aggravated assault and PIC. On April 7, 2016, the court sentenced Appellant to 10 to 20 years' incarceration for his aggravated assault conviction, and a concurrent term of 2½ to 5 years' incarceration for his PIC offense. Appellant filed a timely post-sentence motion, which was denied by operation of law on

August 15, 2016. He then filed a timely notice of appeal, and he also timely complied with the trial court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Therein, Appellant preserved the following claims for our review:

> [I.] The evidence was insufficient as a matter of law to convict [Appellant] of Aggravated Assault. The evidence presented at trial was insufficient to show that [Appellant] attempted to cause serious bodily injury to another, or caused such injury intentionally, knowingly or recklessly under the circumstances manifesting an extreme indifference to the value of human life.
>
> [II.] The evidence presented at trial was insufficient to convict [Appellant] of aggravated assault because [Appellant] acted in self-defense and the Commonwealth did not disprove justification beyond a reasonable doubt.
>
> [III.] The evidence was insufficient as a matter of law to convict [Appellant] of [PIC]. The evidence presented at trial was insufficient to show that [Appellant] possessed an instrument of crime with the intent to employ it criminally.
>
> [IV.] The verdict of guilty with respect to the charge of aggravated assault is against the weight of the evidence to such a degree as to shock one's conscience and sense of justice.
>
> [V.] The verdict of guilty with respect to the charge of [PIC] is against the weight of the evidence to such a degree as to shock one's conscience and sense of justice.
>
> [VI.] The [t]rial [c]ourt erred in permitting the introduction of photographs marked as Commonwealth Exhibit C1 A through J, mid-trial, which had not been provided to [the] defense in violation of Pa.R.Crim.P[.] 573.

Appellant's Pa.R.A.P. 1925(b) Statement, 10/5/16, at 1-2 (unnumbered). On August 9, 2017, the trial court issued an opinion addressing these claims.

On November 27, 2017, Attorney Belli filed with this Court a petition to withdraw from representing Appellant. That same day, counsel also filed an

Anders brief, discussing the above-stated issues and concluding that they are frivolous, and that Appellant has no other, non-frivolous issues he could pursue herein. Accordingly,

> this Court must first pass upon counsel's petition to withdraw before reviewing the merits of the underlying issues presented by [the appellant]. ***Commonwealth v. Goodwin,*** 928 A.2d 287, 290 (Pa. Super. 2007) (*en banc*).
>
> Prior to withdrawing as counsel on a direct appeal under ***Anders,*** counsel must file a brief that meets the requirements established by our Supreme Court in ***Santiago.*** The brief must:
>
> > (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.
>
> ***Santiago,*** 978 A.2d at 361. Counsel also must provide a copy of the ***Anders*** brief to his client. Attending the brief must be a letter that advises the client of his right to: "(1) retain new counsel to pursue the appeal; (2) proceed pro se on appeal; or (3) raise any points that the appellant deems worthy of the court[']s attention in addition to the points raised by counsel in the ***Anders*** brief." ***Commonwealth v. Nischan,*** 928 A.2d 349, 353 (Pa. Super. 2007), *appeal denied*, 594 Pa. 704, 936 A.2d 40 (2007).

Commonwealth v. Orellana, 86 A.3d 877, 879-80 (Pa. Super. 2014). After determining that counsel has satisfied these technical requirements of ***Anders*** and ***Santiago***, this Court must then "conduct an independent review of the record to discern if there are any additional, non-frivolous issues overlooked

by counsel." ***Commonwealth v. Flowers***, 113 A.3d 1246, 1250 (Pa. Super. 2015) (citations and footnote omitted).

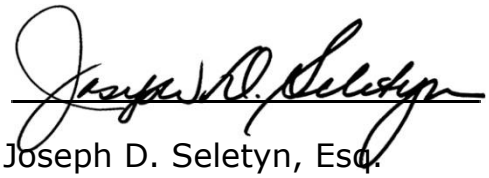
In this case, Attorney Belli's ***Anders*** brief complies with the above-stated requirements. Namely, he includes a summary of the relevant factual and procedural history, he refers to portions of the record that could arguably support Appellant's claim, and he sets forth his conclusion that Appellant's appeal is frivolous. He also explains his reasons for reaching that determination, and supports his rationale with citations to the record and pertinent legal authority. Attorney Belli states in his petition to withdraw that he has supplied Appellant with a copy of his ***Anders*** brief. Additionally, he attached to his petition to withdraw a letter directed to Appellant, in which he informs Appellant of the rights enumerated in ***Nischan***. Accordingly, counsel has complied with the technical requirements for withdrawal.

In satisfying our obligation to independently review the record to determine if Appellant's issues are frivolous, and to ascertain if there are any other, non-frivolous issues he could pursue on appeal, we have examined the certified record, the briefs of the parties, and the applicable law. Additionally, we have reviewed the well-crafted opinion of the Honorable Diana L. Anhalt of the Court of Common Pleas of Philadelphia County. We conclude that Judge Anhalt's thorough, well-reasoned opinion accurately explains why the issues presented by Appellant are frivolous. Moreover, our review of the record has revealed no other, non-frivolous issues that Appellant could assert herein. Accordingly, we affirm Appellant's judgment of sentence on the grounds set

forth by Judge Anhalt in her opinion, and grant Attorney Belli's petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw granted. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/29/18

Appendix "A"

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA
CRIMINAL DIVISION TRIAL

COMMONWEALTH OF PENNSYLVANIA	:	NO.: CP-51-CR-0005228-2014
v.	:	Superior Court No.: ~~1209~~ EDA 2016
SEVILLE ALI	:	3056

OPINION

ANHALT, J.

Appellant in the above-captioned matter appeals this Court's judgment regarding his convictions for Aggravated Assault, 18 Pa.C.S.A. §§ 2702(a) and Possession of an Instrument of Crime 18 Pa.C.S.A. §§ 907(a). The Court submits the following Opinion in accordance with the requirements of Pa.R.A.P. 1925(a). For the reasons set forth herein, the Court holds that the judgment should be affirmed.

PROCEDURAL HISTORY

On March 14, 2014, Police arrested and charged Appellant, Seville Ali with Aggravated Assault, Possession of an Instrument of Crime ("PIC") and other related offenses. On January 5, 2016, Appellant waived his right to a jury and proceeded to a bench trial before this Court. On January 6, 2016, the Court found Appellant guilty of Aggravated Assault (F-1) and Possession of an Instrument of Crime (M-1) and not guilty of all other charges. On April 7, 2016, this Court sentenced Appellant to 10-20 years of state incarceration on the charge of Aggravated Assault and 2.5-5 years of state incarceration on the charge of PIC to run concurrent to one another.

Appellant filed a timely notice of appeal on September 12, 2016. On September 16, 2016, the Court ordered Appellant to file a Pa.R.A.P. 1925(b) Statement of Matters Complained of on

Appeal within 21 days. On October 5, 2016, Appellant filed a Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal. Appellant raises the following issues on appeal:

A. The evidence was insufficient as a matter of law to convict Defendant of Aggravated Assault. The evidence presented at trial was insufficient to show that Defendant attempted to cause serious bodily injury to another, or caused such injury intentionally, knowingly or recklessly under the circumstances manifesting an extreme indifference to the value of human life.
B. The evidence presented at trial was insufficient to convict Defendant of aggravated assault because Defendant acted in self-defense and the Commonwealth did not disprove justification beyond a reasonable doubt.
C. The evidence was insufficient as a matter of law to convict Defendant of possessing an instrument of crime. The evidence presented at trial was insufficient to show that Defendant possessed an instrument of crime with the intent to employ it criminally.
D. The verdict of guilty with respect to the charge of aggravated assault is against the weight of the evidence to such a degree as to shock one's conscience and sense of justice.
E. The verdict of guilty with respect to the charge of possessing an instrument of crime is against the weight of the evidence to such a degree as to shock one's conscience and sense of justice.
F. The Trial Court erred in permitting the introduction of photographs marked as Commonwealth Exhibit C1 A through J, mid-trial, which had not been provided to defense in violation of Pa R.Crim.P 573.

FACTUAL HISTORY

This is a case involving an incident that occurred on February 22, 2014 at 438 West Queen Lane where Appellant shot Complainant, Keith Chapelle in the arm just outside Mr. Chapelle's front door. (Notes on Testimony, 1/6/2016, at 7, 31).

Prior to February 22, 2014, Mr. Chapelle and Appellant had a cordial relationship. Mr. Chapelle ran a moving business with U-Haul to help people load and unload moving trucks. (N.T., 1/6/2016, at 8-9). Appellant completed some moving jobs for Mr. Chapelle's business and helped Mr. Chapelle find other workers. (N.T., 1/6/2016, at 8-10). While Appellant worked for Mr. Chapelle, Mr. Chapelle found out that some of his other workers had noticed that Appellant habitually kept his doors to both his home and car open. (N.T., 1/6/2016, at 11-12). Mr. Chapelle

thought that these workers were planning on stealing from Appellant. (N.T., 1/6/2016, at 12-13). Mr. Chapelle fired these workers and informed Appellant about what happened and that everything had been handled. (N.T., 1/6/2016, at 14-15). Afterward Appellant shook his hand and they both went to the corner store together. (N.T., 1/6/2016, at 15). This occurred just over a month before the shooting. (N.T., 1/6/2016, at 13).

Mr. Chapelle continued to hire Appellant's friends and Mr. Chapelle had started to hear that Appellant did not like him. (N.T., 1/6/2016, at 15). During this time, Appellant would have conversations with Mr. Chapelle's wife where he would say that he felt like Mr. Chapelle was trying to set Appellant up. (N.T., 1/6/2016, at 15). Appellant had told Mr. Chapelle's wife during these conversations where Appellant felt threatened that, "bullets can go through floors." (N.T., 1/6/2016, at 22). After Mr. Chapelle found out that Appellant had a problem with him he no longer spoke to Appellant. (N.T., 1/6/2016, at 16). Prior to February 22, 2014, Appellant and Mr. Chapelle had not argued. (N.T., 1/6/2016, at 16).

On February 22, 2014 at 9:00 PM, Mr. Chapelle had returned to his apartment building, which he shared with Appellant. (N.T., 1/6/2016, at 16-17). Appellant's apartment was directly under Mr. Chapelle's. (N.T., 1/6/2016, at 18-19). When Mr. Chapelle arrived to the building, Appellant was standing on the porch and then engaged in conversation with Mr. Chapelle. (N.T., 1/6/2016, at 17). Mr. Chapelle then attempted to walk past him. (N.T., 1/6/2016, at 17). Appellant then became physical with Mr. Chapelle. (N.T., 1/6/2016, at 17). Appellant boxed Mr. Chapelle in so that he could not move. (N.T., 1/6/2016, at 17). The two men begin arguing and Appellant said that, "If anything happens to him or his family he already told his people 'second floor'." (N.T., 1/6/2016, at 21).

Mr. Chapelle's wife then came downstairs to bring Mr. Chapelle inside their home. (N.T., 1/6/2016, at 24). Mr. Chapelle and his wife turned the corner to enter Mr. Chapelle's apartment through the door on the side of the house. (N.T., 1/6/2016, at 24). While Mr. Chapelle and his wife turned the corner, Appellant entered his apartment. (N.T., 1/6/2016, at 24). Appellant's girlfriend Crystal then yelled, "No, don't do that." (N.T., 1/6/2016, at 24). When Appellant came back out of his apartment, he had a silver gun. (N.T., 1/6/2016, at 24, 27).

Appellant approached Mr. Chapelle with the gun at his side while Mr. Chapelle was at his apartment door. (N.T., 1/6/2016, at 29). When Appellant was ten feet away from Mr. Chapelle, Appellant raised the gun, pointed it at Mr. Chapelle's chest and shot him in the left arm. (N.T., 1/6/2016, at 30-31). As Mr. Chapelle fell to the ground, Appellant advanced towards him and yelled, "If you tell anybody, if you call the cops, I'll kill you. I swear to God I'll kill your family." (N.T., 1/6/2016, at 29, 33). As Appellant stood over Mr. Chapelle, he heard another click from the gun but no shot was fired. (N.T., 1/6/2016, at 32, 34). Appellant left around the corner on the porch and Mr. Chapelle ran inside the home. (N.T., 1/6/2016, at 32). The police arrived within minutes and took a statement from Mr. Chapelle. (N.T., 1/6/2016, at 36). Afterward, Mr. Chapelle was transported to Temple Hospital. (N.T., 1/6/2016, at 36).

The first responding officer, Officer Matthew Lally, entered Appellant's home upon arrival. (N.T., 1/5/2016, at 17). During a search of the first floor of the apartment for other victims and Appellant, Officer Lally discovered a .380 FCC in the Appellant's toilet. (N.T., 1/5/2016, at 17). Detective James Sloan's investigation revealed a trail of blood leading from Mr. Chapelle's apartment entrance along the porch. (N.T., 1/6/2016, at 68). Detective Sloan also found a spent .380 cartridge on the corner of the porch. (N.T., 1/6/2016, at 68-9). That FCC was placed on

property receipt number 3130139. (N.T., 1/6/2016, at 71). After obtaining a search warrant and searching the home, Detective Sloan recovered nine .380 FCCs, eight in the Appellant's bedroom and one in the toilet. (N.T., 1/6/2016, at 70-1). The nine FCCs were placed on property receipt number 3130140. (N.T., 1/6/2016, at 71).

Tracey Brown is the next door neighbor to both Appellant and Mr. Chapelle and was present inside Appellant's apartment just before the altercation. (N.T., 1/6/2016, at 83). Ms. Brown, claimed to have seen a knife in Mr. Chapelle's hand. (N.T., 1/6/2016, at 87). Ms. Brown then went upstairs in her apartment which is adjacent to Appellant's apartment. (N.T., 1/6/2016, at 88). While inside her apartment, Ms. Brown heard one gunshot. (N.T., 1/6/2016, at 88). When asked about the knife, Ms. Brown could not identify where the knife came from, how Mr. Chapelle was holding it, or what he was doing with it. (N.T., 1/6/2016, at 95-6). When questioned by police that evening Ms. Brown did not mention that she had seen a knife. (N.T., 1/6/2016, at 97). The first time Ms. Brown mentions the knife is to Appellant's lawyers. (N.T., 1/6/2016, at 102). The record does not indicate that a knife was recovered during police investigation.

Upon taking the stand, Appellant claims that Mr. Chapelle emerged from his apartment to talk to Appellant. (N.T., 1/6/2016, at 107). Appellant claims that Mr. Chapelle initiated the conversation by accusing Appellant of making threats against Mr. Chapelle's daughter. (N.T., 1/6/2016, at 108). During the altercation, Appellant claims that Mr. Chapelle pushed him against the door to Appellant's apartment. (N.T., 1/6/2016, at 109-10). Appellant claims to have seen a knife. (N.T., 1/6/2016, at 110). Appellant claims that after pulling the knife, Mr. Chapelle charged after Appellant through the front door to his home. (N.T., 1/6/2016, at 113). According to Appellant, Mr. Chapelle struggled with Ms. Brown to get through the door while holding that knife

in his hand. (N.T., 1/6/2016, at 113). As Mr. Chapelle was trying to come through the door, Appellant grabbed his gun and fired a shot at Mr. Chapelle while Appellant was standing in his living room. (N.T., 1/6/2016, at 113-4). After firing the shot, Appellant claims to have hid the gun behind his mantle four feet above the floor and fled. (N.T., 1/6/2016, at 115). Upon investigation, Detective Sloan did not recover a gun from the apartment or any spent shell casings in the home.

At the beginning of the trial, defense counsel raised an objection to the use of photographs marked C1 A through J on the grounds that he had not seen them before and they had not been passed in discovery. (N.T., 1/6/2016, at 4-5). The discovery letter provided by the prosecutor indicated that the photos had been passed in discovery. (N.T., 1/6/2016, at 5). Upon inquiry from this Court, defense counsel said that his objection was not strenuous. (N.T., 1/6/2016, at 6). This Court offered defense counsel all the time he needed to prepare using the photographs. (N.T., 1/6/2016, at 6). After a recess, defense counsel thanked this Court and proceedings continued. (N.T., 1/6/2016, at 6). During the proceedings, defense counsel referenced material included in the discovery. (N.T., 1/6/2016, at 47).

DISCUSSION

Appellant argues that the evidence was insufficient as a matter of law because no reasonable factfinder could find that the Commonwealth proved Appellant was guilty of Aggravated Assault and PIC beyond a reasonable doubt.

In considering a challenge to the sufficiency of the evidence, the reviewing court must determine whether, viewing all the evidence at trial and the reasonable inferences therefrom in the light most favorable to the Commonwealth, the trier of fact could have found that each element of the offense charged was proven beyond a reasonable doubt. *Cmmw. v. Chine*, 40 A.3d 1239, 1242

(Pa. Super. 2012); *Cmmw. v. Marinelli*, 690 A.2d 203, 210-11 (Pa. 1997); *Cmmw. v. Gaskins*, 692 A.2d 224, 227 (Pa. Super. 1997). This standard is applicable whether the evidence presented is circumstantial or direct, provided the evidence links the accused to the crime beyond a reasonable doubt. *Cmmw v. Morales*, 669 A.2d 1003, 1005 (Pa. Super. 1996). Furthermore, questions of witness credibility and the weight to be afforded the evidence are within the sole province of the finder of fact, who is free to believe all, part, or none of the evidence. *Cmmw. v. Woods*, 638 A.2d 1013, 1015 (Pa. Super. 1994); *Cmmw. v. Mayfield*, 585 A.2d 1069 (Pa. Super. 1991). 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. *Chine*, supra at 1242.

"For a new trial to lie on a challenge that the verdict is against the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." *Cmmw. v Edwards*, 582 A.2d 1078, 1083 (Pa. Super. 1990); *Cmmw. v. Shaffer*, 722 A.2d 195, 200 (Pa. Super. 1998); *See also*, *Cmmw. v. Johnson*, 910 A.2d 60, 64 (Pa. Super. 2006). Furthermore, questions of witness credibility and the weight to be afforded the evidence are within the sole province of the finder of fact, who is free to believe all, part, or none of the evidence. *Cmmw. v. Woods*, 638 A.2d 1013, 1015; *Mayfield*, 585 A.2d 1069.

A. <u>The evidence was sufficient as a matter of law to convict Appellant of aggravated assault.</u>

Appellant has been found guilty on all elements of aggravated assault. A person is guilty of aggravated assault when he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa.C.S. §§ 2702(a)(1). Serious bodily injury is bodily

injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa.C.S. §§ 2301. A gunshot wound to a limb requiring medical attention satisfies the definition serious bodily injury. *Cmmw. v. Phillips*, 410 A.2d 832, 834 (Pa. Super. 1979), (Sustaining a conviction for aggravated assault where Appellant shot victim in the leg which required medical attention).

A defendant causes serious bodily injury intentionally when he or she acts intentionally with respect to a material element of an offense:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

18 Pa.C.S.A. § 302. The intent to cause serious bodily injury supporting conviction for aggravated assault may be proven by direct or circumstantial evidence. *Cmmw. v. Martuscelli*, 54 A.3d 940, 948 (Pa. Super. 2012). The intent to commit aggravated assault is established when the accused intentionally acts in a manner which constitutes a substantial or significant step toward perpetrating serious bodily injury upon another. *Cmmw v. Lopez*, 654 A.2d 1150, 1154 (Pa. Super. 1995). When examining whether evidence established intent to cause serious bodily injury, so as to support a conviction for aggravated assault, such an inquiry must be determined on a case-by-case basis. *Cmmw. v. Bruce*, 916 A.2d 657, 661 (Pa. Super. 2007), appeal denied 932 A.2d 74. Evidence that Appellant fired a gun at the victim is sufficient to establish specific intent to cause serious bodily harm. *Cmmw. v. Rogers*, 615 A.2d 55, 64 (Pa. Super. 1992), *Cmmw. v. Woods*, 710 A.2d 626 (Pa. Super. 1998).

There is no question of fact as to whether Appellant used a gun to shoot Mr. Chapelle in the left arm. The testimony of both Mr. Chapelle and Appellant is consistent on the matter. (N.T., 1/6/2016, at 30-31, 113-14). The issue in this matter turns on how the shooting occurred. The court finds the credible testimony of Mr. Chapelle, which is corroborated by the physical evidence in this case, persuasive and sufficient to convict Appellant of aggravated assault. While standing at his door, Mr. Chapelle sustained serious bodily injury when he was shot in his left arm, causing him to bleed and require immediate emergency medical care. He was immediately transported to Temple Hospital once law enforcement arrived on the scene. (N.T., 1/6/2016, at 30-36). Therefore, consistent with the ruling in *Phillips*, Mr. Chapelle sustained serious bodily injury when Appellant shot him.

Appellant caused Mr. Chapelle's serious bodily injury intentionally. After beginning a fight with Mr. Chapelle, Appellant went inside his home and retrieved a gun which he then took out of his home. (N.T., 1/6/2016, at 24). He turned the corner and, while ten feet away from Mr. Chapelle, raised his gun, pointed it at Mr. Chapelle's chest and fired the gun. (N.T., 1/6/2016, at 29-31). The spent .380 FCC which Detective Sloan recovered was found in the location on the porch where Mr. Chapelle had stated Appellant was standing when he was shot. (N.T., 1/6/2016, at 68-69). The trail of blood was photographed at the entrance of Mr. Chapelle's apartment, the location Mr. Chapelle testified he was when Appellant shot him. (N.T., 1/6/2016, at 68). The physical evidence is consistent with the testimony that Appellant shot Mr. Chapelle while Mr. Chapelle was at his front doorstep. Moreover, the law is satisfied that a defendant who takes steps to retrieve a loaded gun from his home, point it at an individual and pull the trigger has taken substantial steps towards the commission of aggravated assault. Nonetheless, after shooting Mr. Chapelle, Appellant

approached him and threatened, "If you tell anybody, if you call the cops, I'll kill you. I swear to God I'll kill your family." (N.T., 1/6/2016, at 29, 33). Appellant formed the intent to cause serious bodily injury when he intentionally shot Mr. Chapelle in front of Mr. Chapelle's door step.

The court finds the testimony regarding allegations that Mr. Chapelle had a knife and charged towards Appellant in Appellant's home incredible and uncorroborated. Questions of witness credibility and the weight to be afforded the evidence are within the sole province of the finder of fact, who is free to believe all, part, or none of the evidence. *Woods*, 638 A.2d 1013, 1015; *Mayfield*, 585 A.2d 1069.

Appellant claims that he shot Mr. Chapelle while Mr. Chapelle was coming after him through Appellant's front door with a knife. The court is not persuaded by this testimony. Next door neighbor, Ms. Brown testified that she saw a knife in Mr. Chapelle's hand at the time leading up to the shooting. (N.T., 1/6/2016, at 87). Despite being questioned by the police that very same evening, Ms. Brown does not indicate that she saw a knife. (N.T., 1/6/2016, at 102). Additionally, during the police investigation, no knife was recovered. Appellant claims that Mr. Chapelle had a knife in his hand when charging through the door. While standing inside his apartment, Appellant claims that he shot Mr. Chapelle. (N.T., 1/6/2016, at 110-13). The court finds this version of events unsubstantiated and incredible. During the police investigation, neither blood nor spent FCC's were found inside Appellant's apartment. At no point was a knife ever recovered from a crime scene. Appellant's version of events is supported only by Appellant's testimony.

Appellant's credibility is diminished by evidence demonstrating consciousness of guilt. After the shooting Appellant fled the crime scene and would not be arrested for three weeks. Additionally, Officer Lally discovered a .380 FCC in the toilet of Appellant's apartment. (N.T.,

1/5/2016, at 17). This is not evidence of a man justified in acting in self-defense, it is demonstrative of an individual who committed a crime and fled the scene to avoid responsibility for his actions. The evidence viewed in totality gives the court doubt that Appellant's uncorroborated testimony is incredible. Therefore, there was sufficient evidence to convict Appellant of aggravated assault.

B. <u>The evidence was insufficient as a matter of law to find that Appellant acted in self-defense.</u>

After determining that Appellant's testimony was incredible, this discussion becomes brief. The evidence to find that Appellant was justified in shooting Mr. Chapelle is insufficient. The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. 18 Pa.C.S.A. §505. The Commonwealth sustains its burden of proving beyond reasonable doubt that Appellant's actions were not justifiable self-defense if it establishes at least one of the following: 1) defendant did not reasonably believe that he was in danger of death or serious bodily injury; 2) defendant provoked or continued the use of force; or 3) defendant had a duty to retreat and the retreat was possible with complete safety. *Cmmw. v. Smith*, 97 A.3d 782, 787 (Pa. Super. 2014). The requirement that a defendant have a reasonable belief that he is in imminent danger, as the basis for a claim of self-defense, encompasses two aspects, one subjective and one objective: first, the defendant must have acted out of an honest, bona fide belief that he was in imminent danger, which involves consideration of the defendant's subjective state of mind; and second, the defendant's belief that he needed to defend himself with deadly force, if it existed, must be reasonable in light of the facts as they appeared to the defendant, a consideration that involves an objective analysis. *Id.*

Appellant did not have an objective reasonable belief that that he needed to defend himself

with deadly force. Rather than standing on his porch and waiting for Mr. Chapelle to come after him, Appellant retreated into his apartment, retrieved a loaded gun and pursued Mr. Chapelle back to his apartment door. (N.T., 1/6/2016, at 29-31). In this case, Appellant is not the recipient of violent aggression but the instigator. Additionally, after shooting Mr. Chapelle, Appellant, instead of retreating from the man who has just fallen victim to a gunshot, approached Mr. Chapelle and threatened to kill him and his family if he says anything. (N.T., 1/6/2016, at 29, 33). Following an objective analysis in analyzing the facts as they appeared to Appellant, there can be no question that a man who pursues someone, shoots him in front of their own doorstep and then threatens to kill them does not have a reasonable belief that he is in danger of death or serious bodily injury. The Commonwealth has disproven justification beyond a reasonable doubt. Therefore, the evidence was insufficient to support a finding that Appellant acted in self-defense.

C. <u>The evidence was sufficient to support a verdict that Appellant is guilty of PIC.</u>

Appellant has been found guilty on all elements of PIC. A person is guilty of PIC if he possesses a firearm or other weapon concealed upon his person with intent to employ it criminally. 18 Pa.C.S.A. § 907(b). The test for establishing sufficiency is whether the evidence, and all reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth, as verdict winner, are sufficient to establish all elements of the offenses beyond a reasonable doubt. *Cmmw. v. Williams*, 615 A.2d 716, 719 (Pa. 1992).

Mr. Chapelle's testimony that Appellant pointed and fired a silver gun at him is sufficient to prove possession of a firearm. "To prove possession of a firearm, the Commonwealth must establish that an individual either had actual physical possession of the weapon or had the power of control over the weapon with the intention to exercise that control." *Cmmw. v. Carter*, 450 A.2d

142, 144 (Pa. 1982). Possession may be proven by circumstantial evidence. *Id.* The Superior Court in *Antidormi* determined through witness testimony that the defendant possessed a firearm. *Cmmw. v. Antidormi*, 84 A.3d 736, 757 (Pa. Super. 2014). In *Antidormi*, the testimony of one witness established that the defendant possessed a firearm. *Id.* Mr. Chapelle testified that he saw Appellant hold a gun at his side until it was fired ten feet away from him at his front door. (N.T., 1/6/2016, at 29-31). Evidence that Appellant had the gun in his hand establishes actual physical possession of the weapon. Appellant also admits to possessing and firing the firearm. (N.T., 1/6/2016, at 113-4). Since eyewitness testimony is sufficient to find actual physical possession of a firearm, the court finds that Mr. Chapelle's testimony that Appellant had a firearm, that he used the firearm and could describe the firearm satisfies that element.

Appellant used the firearm with intent to employ it criminally when he fired it at Mr. Chapelle. Intent to employ a firearm criminally is satisfied when the evidence establishes that the firearm was used in furtherance of a criminal objective. *Cmmw. v. Harley*, 418 A.2d 1354, 1357 (Pa. Super. 1980). Firing a gun at an individual is evidence that the firearm was used with intent to employ it criminally. *Cmmw. v. Woodbury*, 477 A.2d 890, 892 (Pa. Super. 1984), *Cmmw. v. Jeter*, 418 A.2d 625 (Pa. Super. 1980). The credible testimony by Mr. Chapelle indicated that Appellant fired a gun at him from ten feet away. (N.T., 1/6/2016, at 30-31). After shooting Mr. Chapelle in the arm Appellant advances and states, "If you tell anybody, if you call the cops, I'll kill you. I swear to God I'll kill your family." (N.T., 1/6/2016, at 29, 33). This evidence is sufficient to establish criminal intent because Appellant fired the gun at Mr. Chapelle.

Issues regarding witness credibility have been discussed above and are repeated in full to the extent that the court accepts Mr. Chapelle's testimony and rejects Appellant's testimony

regarding the conviction for PIC. Therefore, the evidence is sufficient to support a finding that Appellant is guilty of PIC.

D. Appellant's conviction for aggravated assault was not against the weight of the evidence.

Appellant's conviction for aggravated assault was not against the weight of the evidence. "For a new trial to lie on a challenge that the verdict is against the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." *Edwards*, 582 A.2d at 1083; *Shaffer*, 722 A.2d at 200; *See also*, *Johnson*, 910 A.2d at 64.

Appellant offers nothing in support of this claim not already raised in his claim challenging the sufficiency of the evidence. As this Court has already stated, the defense's version of events failed to show he acted in self-defense when he shot the victim, and thus, the verdict was in no way against the weight of the evidence.

E. Appellant's conviction for PIC was not against the weight of the evidence.

Appellant's conviction for PIC was not against the weight of evidence. The verdict does not shock the consciousness of the court. "For a new trial to lie on a challenge that the verdict is against the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." *Edwards*, 582 A.2d at 1083; *Shaffer*, 722 A.2d at 200 (Pa. Super.1998); *See also*, *Johnson*, 910 A.2d at 64. A conviction for PIC is not against the weight of the evidence when evidence is presented that the defendant possessed a firearm and fired it at the victim. *Cmmw. v. Rivera*, 983 A.2d 1211, 1226 (Pa. 2009). In *Rivera,* the defendant shot and killed a police officer with a gun. *Id.* The court concluded that evidence at trial showed that the defendant possessed the firearm and shot and killed the officer. *Id.* The court held that sustaining a conviction for PIC on the evidence did not "shock one's sense of justice, and the trial court did

not abuse its discretion by denying relief on Appellant's challenge to the weight of the evidence supporting the conviction for possessing an instrument of crime." *Id.*

The evidence presented at trial indicates that Appellant possessed a firearm that he used to shoot Mr. Chapelle in his left arm at a distance of ten feet. (N.T., 1/6/2016, at 30-31). There is no question from the record that Appellant shot and hit Mr. Chapelle; Appellant admitted as much on the stand. (N.T., 1/6/2016, at 113-4). Appellant claims that the shooting was in self-defense. The physical evidence does not corroborate Appellant's version of events, rather Detective Sloan's recovery of the spent .380 FCC and blood trail supports Mr. Chapelle's testimony that he was shot while standing outside his apartment. (N.T., 1/6/2016, at 68). Finding Appellant guilty with the evidence provided does not shock one's sense of justice. The evidence must be tenuous, vague, or uncertain. *Edwards*, 582 A.2d at 107. This standard is simply not supported by the record. Therefore, Appellant's conviction of PIC was not against the weight of evidence.

F. <u>This Court did not err in permitting the introduction of photographs marked as Commonwealth Exhibit C1 A through J.</u>

Appellant claims that photographs of the crime scene that were provided at trial were in violation of Pa.R.Crim.P. Rule 573. As a result, Appellant claims this as a basis for new trial. The rule requires the Commonwealth to disclose any tangible objects, including documents, photographs, fingerprints, or other tangible evidence. Pa.R.Crim.P. Rule 573. Further, this rule provides that:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

Pa.R.Crim.P. Rule 573(F). This rule gives the trial court broad discretion in formulating remedies

for a failure to comply with discovery requirements. *Id.* In many cases, ordering a continuance is an adequate remedy. This is so where the undisclosed statement or other evidence is admissible and the defendant's only prejudice is surprise. E.g., *Cmmw. v. Parente,* 440 A.2d 549 (Pa. 1982); *Cmmw v Bey,* 439 A.2d 1175 (Pa. 1982).

This Court exercised its broad discretion allowed under the rules of Criminal Procedure to offer a just remedy under the circumstances in Appellant's case. If defense counsel did, in fact, fail to receive the Commonwealth's discovery, despite the discovery sheet indicating otherwise, the only prejudice possibly experienced is surprise on the part of defense counsel. Out of an abundance of caution, this Court offered defense counsel as much time as he needed to review the photographs and prepare accordingly before continuing proceedings. (N.T., 1/6/2016, at 6).

> THE COURT: Mr. Parkinson, you've worked at the DA's office, I've worked there, Whitney works there, right? Things happen and it's too voluminous to say think that mistakes don't happen. So do I think that mistakenly someone checked the box, I can't imagine it was purposefully. Is it that bad it's going to kill you?
>
> MR. PARKINSON: It's not a strenuous objection.
>
> THE COURT: Right. I hear you. It's overruled. And I'll give you whatever time you need to look at it.
>
> MR. PARKINSON: Thank you, Judge.
>
> ---
>
> (Short Recess)
>
> ---
>
> MR. PARKINSON: Thank you.

(N.T., 1/6/2016, at 6). After granting defense counsel all the time necessary to fix any prejudice felt, defense counsel thanked the court and proceedings continued. Defense counsel proceeded to reference and question a witness about material in the discovery. (N.T., 1/6/2016, at 6). The facts indicate that any prejudice experienced was adequately fixed by the court's remedy. As the court

is granted broad discretion to decide remedies, demanding a new trial based on an inadequate remedy is legally baseless.

CONCLUSION

For the foregoing reasons, there is sufficient evidence to find Appellant guilty of all offenses. Accordingly, this Court's decisions should be affirmed.

BY THE COURT:

Diana L. Anhalt

DIANA L. ANHALT, J.

DATE: August 9, 2017