NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
EMANUEL JOHNSON	:	
Appellant	:	No. 1704 EDA 2020

Appeal from the Order Entered August 11, 2020
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0000292-2018

BEFORE: NICHOLS, J., SULLIVAN, J., and PELLEGRINI, J.*

MEMORANDUM BY NICHOLS, J.: **FILED JUNE 28, 2022**

Appellant Emanuel Johnson appeals from the judgment of sentence imposed following his jury trial and conviction for attempted murder and related offenses. Appellant claims that the trial court erred in giving a flight instruction to the jury and by allowing the jury to review a trial witness's grand jury testimony during deliberations. Appellant also challenges the weight of the evidence supporting his convictions. We affirm.

We state the facts as set forth by the trial court:

> Appellant's underlying arrest stemmed from radio dispatched reports to law enforcement personnel of a shooting within the 3100 block of North 25th Street in Philadelphia, Pennsylvania on November 7, 2017 about 9:30 p.m. Summarily, eyewitness testimony that had been consistent with the retrieved recorded video feed from a nearby restaurant coupled with all other physical and testimonial evidence proved that on November 7, 2017 about 9:15 p.m. the victim, Fa'teem Glenn [(the victim)], walked out of

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* Retired Senior Judge assigned to the Superior Court.

his grandmother's rowhome, crossed the street and stood on the sidewalk in front of the Appellant's mother's home located at 3136 North 25th Street and was shot multiple times by Appellant.

The retrieved video depicting outside views, further portrayed two men, one of whom was identified by [an] eyewitness as Appellant, . . . exiting the rowhome at 3136 [North] 25th Street. Both men appeared to have been armed with guns. They were seen running directly toward [the victim] as numerous flashes appeared from shots as they were being fired. The video portrayed the victim responsively turning to run, crawling on the ground and then lying motionless as shots were continuously fired at him from at least one of the two pursuers at very close range. Both [assailants], still armed, were clearly observed standing over the victim as he lay on the street and sidewalk.

That same video demonstrated that after the shots finally ceased, one of the two males[,] who was identified as Appellant, had oddly turned and ran back and forth again to victim's body and then across the street and then turned direction again and ran into Appellant's mother's home at 3136 [North] 25th Street. The second male had also retreated to the same residence just before arrival of law enforcement. Those unusual recorded physical movements were later connected to Appellant's unsuccessful attempts to locate his dropped cellular phone during his flight before responding police officers had arrived. That phone was recovered at the scene by investigators and circumstantially and concretely linked to Appellant. Diagrams and photographs of the scene, ballistics evidence, and of the cellular phone retrieved from [North] 25th Street and from the vehicle that had transported the victim to the hospital were also admitted into evidence.

Expert analysis of the introduced fired cartridge casings and bullet fragments that had been collected at the scene and from the victim-transporting vehicle, determined that at least eight gunshots had been fired from the same .380 caliber semi-automatic firearm. Seven bullets had struck [the victim's] body, one in his chest, three in his back, one in his head, one in the hand[,] and one in the arm.

As shown on the video, unknown persons on that block had placed the victim in a private vehicle, a 2005 Chevy Impala, and transported him to the emergency room of Temple University Hospital where life-saving treatment and surgeries had been performed. [The victim's] significant injuries included a collapsed

lung, fractured vertebrae, hand and head damage. Temple University Hospital medical records supported the natural conclusion that the resulting wounds had been nearly fatal. Relevant physical evidence was collected for the transporting Chevy Impala following processing and photographing by investigators. The victim . . . refused to cooperate with any law enforcement authorities and did not testify at trial.

The retrieved video feed also depicted the relevant physical movements of eyewitness Anthony Banks. Upon arrival of uniformed police to the shooting scene, he was observed alighting from his porch which had been located on the opposite side of the street from Appellant's home and where [the victim] was shot. [Mr. Banks] walked toward the responding uniformed police officers, spoke to them and motioned toward the home where the perpetrators had just fled before their arrival. Those officers with whom Mr. Banks had interacted testified at trial. They consistently reported Mr. Banks's whispered clear prompt informational response, particularly during the time period when they had pretended to pedestrian live stop Anthony Banks by their vehicle and pat him down. They related that they had instructed Mr. Banks to walk of his own accord to a safe distance around the corner. From that location officers picked up Anthony Banks and transported him to investigative police headquarters.

Assigned detectives from the Northwest Detectives Division of the Philadelphia Police Department, testified that upon transportation from near the shooting scene, Anthony Banks presented himself to them in a clear and cogent manner. He provided to investigators a detailed written signed statement that unequivocally identified the shooter . . . as a person whom he had known as "Manny" from the neighborhood, who had acted in concert with his brother William Johnson. As those detectives testified at trial, Anthony Banks had positively identified Appellant from a fair photographic array as the shooter and commented "that's Manny. That is who did the shooting." The detectives reported that when Anthony Banks had been asked if he had been positive about his identification of Appellant as the shooter, he had demonstrated zero doubt and displayed no signs of inebriation. They further testified that, when he was shown a separate photographic array that had included a photograph of William Johnson, Mr. Banks had not selected anyone from that array. The photographic arrays and the detailed recorded responses as well as all witness statements were admitted into evidence.

In addition to obtaining confirming information that Emanuel Johnson[,] and his brother William Johnson[,] had lived at 3136 [North 25th] Street, investigators, following execution of a duly authorized search warrant, extracted data from cellular telephone that had been recovered from the shooting scene including T-Mobile Metro PCS toll records, subscriber information, and relevant photographs. Not only did this extraction confirm that it had been Appellant's phone that he had dropped just after the shooting, it had displayed "selfies" of the Appellant, his personal documents, his shopping history that included his relevant attempt to purchase an "out of stock" .380 semiautomatic Bersa firearm with a photograph of a gun akin to the kind and caliber used to shoot the victim.

At trial, detectives testified to attempts to locate and apprehend Appellant once warrants had been duly obtained. They finally located and arrested him on November 20, 2017, inside a friend's South Philadelphia residence, which was located a fair distance away from his usually occupied home at 3136 [North] 25th Street in the northwest section of Philadelphia. Upon arrest, his photograph was taken which also showed his tattooed arm with the name "Manny." His arrest photographs depicting the tattoo were admitted into evidence at trial.

Subsequent to [Appellant's] arrest, an indicting grand jury had been convened, during which Anthony Banks and others had testified. Before the grand jury, Anthony Banks unequivocally identified Appellant as the shooter of [the victim]. The transcript of Mr. Banks'[s] brief sworn testimony before the secret indicting grand jury on January 8, 2018 was admitted into evidence by agreement and utilized during trial by both the prosecutor and defense counsel. . . .

Just before trial began, per request of both attorneys, this court conducted an *in-camera* verbal colloquy of Anthony Banks during which he demonstrated competence, and a well-founded fear of retribution for testifying. Under oath he identified [] Appellant as one of the two perpetrators. When Mr. Banks began his sworn trial testimony before the jury, however, he initially recoiled from his prior identifications of Appellant as the shooter of [the victim]. Upon further examination, he testified that Appellant . . . had actually been the shooter of [the victim] and that he had been afraid to identify him due to threats made upon his life before trial. His physical behavior before the jury was consistent with someone who had been anxious. The cumulative physical evidence that had

> been introduced with the testimony of the other witnesses including investigators and responding law enforcement corroborated Anthony Banks'[s] identification of Appellant as the primary perpetrator.

Trial Ct. Op., 3/25/21, at 5-9 (formatting altered).

We add that at the charging conference, Appellant objected to the Commonwealth's request for a jury instruction on Appellant's flight as evidence of consciousness of guilt. N.T. Trial, 11/18/19, at 19-22. The trial court overruled the objection and read the flight instruction to the jury. ***Id.*** at 22, 108-10.

During deliberations, the jury requested to view several exhibits, including Anthony Banks's statements to the police and his grand jury testimony, which the Commonwealth introduced as an exhibit at trial.[1] ***Id.*** at 138, 145. Appellant asked the trial court to instruct the jury to rely on its recollection of Banks's grand jury testimony, given that they did not go through the testimony "line by line" at trial. ***Id.*** at 145-46. The trial court decided to provide the jury with all of Banks's grand jury testimony, which consisted of pages three through nine of Exhibit C-45, and overruled Appellant's objection. ***Id.*** at 146-48.

Ultimately, the jury found Appellant guilty of attempted murder, aggravated assault, possession of firearm by prohibited person, and

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[1] The entire transcript of the grand jury proceeding was marked as Exhibit C-45. N.T. Trial, 11/13/19, at 124. That transcript, along with the Commonwealth's other exhibits, was admitted into evidence without an objection from Appellant. N.T. Trial, 11/15/19, at 79-80.

possession of instrument of crime, but acquitted him on the conspiracy charge.[2]

On February 10, 2020, the trial court sentenced Appellant to an aggregate term of thirty-two-and-a-half to sixty-five years' incarceration. Appellant filed a timely post-sentence motion on February 20, 2020, in which he argued, among other things, that the verdict was against the weight of the evidence because Banks's testimony was unreliable. After a hearing, the trial court denied Appellant's post-sentence motion on August 11, 2020.[3]

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[2] 18 Pa.C.S. §§ 2502, 2702(a)(1), 6105(a)(1), and 907(a), respectively.

[3] Generally, trial courts must rule on a post-sentence motion within 120 days of filing, otherwise it is deemed denied by operation of law. Pa.R.Crim.P. 720(B)(3)(a). In the instant case, while Appellant's post-sentence motion was pending, our Supreme Court declared a statewide judicial emergency and suspended most time computations related to court cases for the duration of the emergency. ***See In re: General Statewide Judicial Emergency***, 228 A.3d 1283, 1285 (Pa. 2020) (*per curiam*) (suspending all time calculations relevant to court cases from March 18, 2020 through April 3, 2020); ***see also In re: General Statewide Judicial Emergency***, 230 A.3d 1015 (Pa. 2020) (*per curiam*) (extending the judicial emergency to June 1, 2020). This Court has interpreted our Supreme Court's judicial emergency orders as tolling Rule 720's 120-day time limit. ***See Commonwealth v. Schwartz***, 1840 EDA 2020, 2021 WL 4433620, at *5 n.17 (Pa. Super. filed Sept. 27, 2021) (unpublished mem.); ***see also*** Pa.R.A.P. 126(b) (explaining that unpublished memorandum decisions of this Court filed after May 1, 2019, may be cited for their persuasive value).

Here, the clerk of courts did not enter an order denying Appellant's post-sentence motion by operation of law after Rule 720's mechanical run date of June 19, 2020. ***See*** Pa.R.Crim.P. 720(B)(3)(c) (requiring the clerk of courts to enter an order that the motion was deemed denied by operation of law). However, because the judicial emergency order tolled Rule 720's time limit for seventy-five days, we conclude that the trial court denied Appellant's post-

(Footnote Continued Next Page)

Appellant filed a timely notice of appeal.[4] Appellant subsequently filed a court-ordered Pa.R.A.P. 1925(b) statement.[5] The trial court issued a Rule 1925(a) opinion addressing Appellant's issues.

On appeal, Appellant raises the following issues for our review:

1. Did the trial court err and abuse its discretion when the court gave a flight instruction to the jury where the Commonwealth presented no evidence that [Appellant] fled from the authorities?

2. Did the trial court err and abuse its discretion when the court permitted the jury access to the eyewitness's entire grand jury testimony during deliberations, though the Commonwealth introduced at trial only portions of the testimony?

3. Were the verdicts against the weight of the evidence, where they were based on a witness who was behaving bizarrely, contradicted himself as well as the uncontroverted facts, and was suffering from an unspecified mental illness that he likely was not properly medicated for?

Appellant's Brief at 5 (formatting altered).

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sentence motion within 120 days of its filing. ***See Schwartz***, 2021 WL 4433620, at *5 n.17.

[4] Appellant timely filed his notice of his appeal within thirty days of the trial court's order denying his post-sentence motion. ***See*** Pa.R.A.P. 903(a).

[5] In his Rule 1925(b) statement, Appellant raised multiple issues that he does not include in his appellate brief. Therefore, we conclude that he has abandoned those issues on appeal. ***See Commonwealth v. Rodgers***, 605 A.2d 1228, 1239 (Pa. Super. 1992) (stating that "[w]e must deem an issue abandoned where it has been identified on appeal but not properly developed in the appellant's brief" (citation omitted)).

Flight Jury Instruction

Appellant argues that the trial court erred in giving a flight jury instruction to the jury because there was no evidence that Appellant knew he was wanted by police or that he had fled and/or concealed his whereabouts after the crime occurred. ***Id.*** at 23. Appellant also contends that "[t]he trial court's flight instruction erroneously corroborated [a] witness's version of events when the court told the jury that the video showed [Appellant] fleeing." ***Id.*** at 24. Therefore, Appellant concludes that the trial court abused its discretion by instructing the jury to consider flight as evidence of Appellant's consciousness of guilt.

Our review is governed by the following principles:

> We review a challenge to a jury instruction for an abuse of discretion or an error of law. We must consider the charge as a whole, rather than isolated fragments. We examine the entire instruction against the background of all evidence presented, to determine whether error was committed. A jury charge is erroneous if the charge as a whole is inadequate, unclear, or has a tendency to mislead or confuse the jury rather than clarify a material issue. Therefore, a charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said. Furthermore, our trial courts are invested with broad discretion in crafting jury instructions, and such instructions will be upheld so long as they clearly and accurately present the law to the jury for its consideration.

Commonwealth v. Rush, 162 A.3d 530, 540 (Pa. Super. 2017) (citations omitted and formatting altered). "A jury instruction is proper if supported by the evidence of record." ***Commonwealth v. Clark***, 961 A.2d 80, 92 (Pa. 2008) (citation omitted). Further, "[t]he law presumes that the jury will follow

the instructions of the court." ***See Commonwealth v. Spotz***, 896 A.2d 1191, 1224 (Pa. 2006) (citation omitted).

This Court has explained:

> A flight instruction is proper when: a person has reason to know he is wanted in connection with a crime, and proceeds to flee or conceal himself from the law enforcement authorities, such evasive conduct is evidence of guilt and may form a basis, in connection with other proof, from which guilt may be inferred.
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> A defendant's knowledge may be inferred from the circumstances attendant to his flight.

Commonwealth v. Thoeun Tha, 64 A.3d 704, 714 (Pa. Super. 2013) (citations omitted and formatting altered); ***see also Clark***, 961 A.2d at 92 (stating that because the evidence "establishe[d] that [the defendant] 'ran' from the deli after shooting the victim, we need not determine whether or to what extent a flight instruction must be supported by evidence other than an accused's departure from the scene of the crime"); ***Commonwealth v. Rios***, 684 A.2d 1025, 1034-35 (Pa. 1996) (explaining that a flight instruction was proper because the police could not locate the defendant at his residence, place of employment, or his brother's home in Philadelphia, and ultimately the defendant was apprehended at his girlfriend's residence in Lancaster).

Here, the trial court instructed the jury as follows:

> In this case there was evidence, including the testimony of Detective Robert Hassel, and Detective Albert Ford, as well as the initial officers, as well as the video display that tended to show that this defendant fled from the incident scene and or hid from police apprehension. The credibility, weight, and effect of this evidence is for you to decide.

> Now, generally speaking when a crime or crimes have been committed and a person thinks he is accused of -- may be accused of committing it and conceals himself for some form or fashion, that flight or concealment is a circumstance or conduct is a circumstance tending to prove that the defendant is conscious of their guilt. Such flight or concealment does not necessarily show consciousness of guilt in every case.
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> A person may flee or hide for some other motive and they may do so. Whether the evidence of flight or concealment from the scene or thereafter until apprehension should be looked [at] as tending to prove guilt in this case, depending upon the facts and circumstances as presented, and especially upon any motivations that may have appropriated the flight or concealment, you may not find the defendant guilty solely on the basis of flight or concealment.

N.T. Trial, 11/18/19, at 108-10.

In its Rule 1925(a) opinion, the trial court explained:

> A fair review of all direct and circumstantial evidence viewed in light of the verdict winner, however, fairly gave rise to this standard instruction [on flight]. The factfinder's potential conclusion from all evidence presented was that Appellant had fled on foot away from the shooting scene to avoid detection by quickly responding law enforcement. The video vividly demonstrated his flight. The need to flee was greater than his desire to search for and retrieve his dropped cell phone. His flight had apparently continued because he had successfully evaded warranted arrest until final apprehension twenty days after the shooting in a South Philadelphia residence a fair distance from his known home in Northwest Philadelphia.

Trial Ct. Op. at 17.

Based on our review of the record, we discern no abuse of discretion by the trial court. ***See Rush***, 162 A.3d at 540. As noted by the trial court, the Commonwealth presented video evidence that it purported to depict Appellant's flight from the scene of the shooting, which took place across the

street from Appellant's primary residence. ***See*** N.T. Trial, 11/14/19, at 21-22, 26-28; Commonwealth Exhibit C-23a. Further, Detective Hassel and Detective Ford both testified that they were unable to locate Appellant at either of his two addresses, and ultimately apprehended him at his girlfriend's residence in South Philadelphia. ***See*** N.T. Trial, 11/13/19, at 90-91; N.T. Trial, 11/14/19, at 96-97, 100. Further, on this record, given the circumstances of Appellant's flight from the scene of the shooting, it was reasonable to infer that Appellant knew that he was wanted in connection with the shooting. ***See Thoeun Tha***, 64 A.3d at 714. Therefore, the trial court did not err by instructing the jury to consider Appellant's flight as evidence of his consciousness of guilt. ***See id.***; ***Clark***, 961 A.2d at 92; ***Rios***, 684 A.2d at 1034-35.

To the extent that Appellant argues that the flight charge improperly bolstered Banks's testimony by indicating that Appellant was the individual depicted in the video, we must read the trial court's instructions as a whole, not in isolated fragments. ***See Rush***, 162 A.3d at 540. The trial court instructed the jury that the "credibility, weight, and effect" of the video evidence was for the jury to decide. ***See*** N.T. Trial, 11/18/19, at 109. Further the trial court instructed the jury to rely on its own recollection of the evidence rather than the judge's statements about the evidence. ***See id.*** at 98. Lastly, the trial court correctly instructed the jury that it could not find Appellant guilty "solely on the basis of flight or concealment." ***See id.*** at 110. Therefore, Appellant is not entitled to relief on this claim.

Providing Grand Jury Testimony to the Jury

In his second issue, Appellant argues that the trial court abused its discretion by allowing the jury to review Banks's grand jury testimony during deliberations. Appellant's Brief at 25-29. In support, Appellant asserts that the full transcript was never admitted into evidence and that although "only parts of the witness's grand jury testimony were utilized during [] direct and cross-examinations, the court sent back the entire transcript" for the jury to review. ***Id.*** at 27-28 (citing N.T. Trial, 11/18/19, at 146). Appellant contends that the trial court erred by allowing the jury to review that testimony because it improperly bolstered Banks's credibility and overemphasized certain evidence. ***Id.*** at 26, 28.

"Whether an exhibit should be allowed to go out with the jury during its deliberation is within the sound discretion of the trial judge[]" and this Court will not overturn that decision absent an abuse of discretion. ***Commonwealth v. Barnett***, 50 A.3d 176, 194 (Pa. Super. 2012) (citations omitted).

Our review is informed by Pa.R.Crim.P. 646, which states:

> (A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (C).
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> * * *
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> (C) During deliberations, the jury shall not be permitted to have:
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> (1) a transcript of any trial testimony;
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> (2) a copy of any written or otherwise recorded confession by the defendant;

> (3) a copy of the information or indictment; and
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> (4) except as provided in paragraph (B), written jury instructions.

Pa.R.Crim.P. 646 (A), (C).

"The underlying reason for excluding certain items from the jury's deliberations is to prevent placing undue emphasis or credibility on the material, and de-emphasizing or discrediting other items not in the room with the jury." ***Barnett***, 50 A.3d at 194 (citations omitted). Our appellate courts "have rarely found that materials given to juries during deliberations constitute reversible error. In the cases that have found reversible error, however, the prejudicial effect of the evidence in question was severe and readily apparent." ***Id.*** at 194.

In ***Commonwealth v. Parker***, 104 A.3d 17 (Pa. Super. 2014), this Court examined whether the trial court erred by allowing the jury to review a written statement from the Commonwealth's key witness during deliberations. ***Parker***, 104 A.3d at 25-27. In that case, after the witness failed to identify the defendant as the shooter at trial, the Commonwealth introduced a prior inconsistent statement by the witness in which he identified the defendant as the shooter. ***Id.*** at 26. The statement was used as substantive evidence and for purposes of impeachment. During deliberations, the jury asked to review the witness's prior police statement, and the trial court provided it to the jury over the defendant's objection. ***Id.***

On appeal, the ***Parker*** Court concluded that the trial court did not abuse its discretion by providing the witness's prior inconsistent statement to the jury. ***Id.*** at 27. Specifically, the Court explained:

> [The defendant] did not object when Commonwealth's Exhibit 40 was entered into evidence. The jury's request for the [witness's prior] statement showed that it was weighing whether to believe his testimony at trial or his prior inconsistent testimony. His testimony at trial was easy to understand [as] it was elicited through the traditional question and answer format. However, [the witness's] prior inconsistent statement was entered into evidence with the assistant district attorney reading both the question and the answer and then asking [the witness] if she had read the statement correctly. Thus, the jury may have been seeking to read the statement in a typical question and answer format. This did not place undue weight on the statement, rather it gave the statement the same weight as [the witness's trial] testimony. For these reasons, we conclude the trial court did not abuse its discretion in permitting [the witness'] statement to go out with the jury.

Id. at 27; ***cf. Commonwealth v. Russell***, 322 A.2d 127, 131 (Pa. 1974) (concluding that the trial court abused its discretion by allowing the jury to review an exhibit during deliberations that had been introduced "solely for the purpose of impeachment," because there was a danger that the jury would treat the statement as substantive evidence).

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

> At trial, [Banks's] grand jury transcript [was] admitted without objection into evidence by motion of the Commonwealth. At trial, the stated objection by defense counsel in reference to permitting the jury to view the transcript of Anthony Banks'[s] grand jury testimony, which had been included within the admitted Commonwealth Exhibit C-45, was that as follows: "It really is his testimony. I'm not sure we went through—we didn't go through line by line all the grand jury testimony . . . . we skipped around."

> This court in response noted that each counsel had referenced Mr. Bank[s's] grand jury testimony and restricted the jury's view to pages 3 through 9 of the exhibit which contained only the brief testimony of Anthony Banks.
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> Appellate courts within this Commonwealth have held that such exhibits were then permissible for a jury to have under subsection (A) of Rule 646. ***See*** [***Parker***, 104 A.3d at 26] (concluding trial court acted within its discretion in permitting witness's prior inconsistent statement to be sent back with jury during deliberations, in murder prosecution in which witness testified that he was present when victim was shot but that witness did not see the shooter in courtroom at trial, while witness's prior statement asserted that defendant was the shooter). In the instant matter, the salient fact that the jury had requested review of this data signaled their perceived need to assist deliberative efforts. As such that request was respected by this court. Thus, it well remained within the trial court's discretion to grant the jury's request to review these statements as an aid to assist it in its deliberations.

Trial Ct. Op. at 14-15 (some citations omitted and formatting altered).

Based on our review of the record, we discern no abuse of discretion by the trial court. ***See Barnett***, 50 A.3d at 195. As noted by the trial court, Appellant did not object when Banks's grand jury testimony was admitted as substantive evidence at trial.[6] ***See Parker***, 104 A.3d at 27; ***cf. Russell***, 322 A.2d at 131. Additionally, the record reflects that the trial court provided the jury with several other exhibits to review, including other prior statements by Banks. Further, like in ***Parker***, Banks's trial testimony was straightforward and presented in the typical question and answer format, while the grand jury

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[6] To the extent that Appellant argues that the grand jury transcript was not admitted into evidence, his claim is belied by the record. ***See*** N.T. Trial, 11/15/19, at 79-80 (Commonwealth moved for the admission of the exhibits used during the Commonwealth's case in chief, and the trial court admitted those exhibits into evidence).

testimony was broken into sections and read into the record by counsel. ***See Parker***, 104 A.3d at 27. Therefore, the jury's ability to review Banks's grand jury testimony did not place "undue weight" on that evidence. ***See id.*** (concluding that by giving the witness's prior statement to the jury, it "gave the statement the same weight as [the witness's] testimony" at trial). Under these circumstances, the trial court did not abuse its discretion by providing Banks's grand jury testimony to the jury during deliberations. ***See Barnett***, 50 A.3d at 194. Therefore, Appellant is not entitled to relief on this claim. ***See id.*** at 194-95; ***see also Parker***, 104 A.3d at 26-27.

Weight of the Evidence

In his final claim, Appellant argues that the verdict is against the weight of the evidence. Appellant's Brief at 29-35. Appellant asserts that Anthony Banks's testimony was "so inconsistent and so contrary to the incontrovertible physical evidence that it shocks one's sense of justice." ***Id.*** at 29. Appellant claims that Banks stated he was confused, contradicted himself several times during his trial testimony, and that his testimony was inconsistent with the video of the shooting and the testimony of other witnesses. ***Id.*** at 31-32. Banks admitted that he had smoked about fifty dollars' worth of crack cocaine on the night of the shooting. ***Id.*** at 32-34. Banks also testified that he was "mentally disturbed", and that he had not taken his medication on the day of his testimony. ***Id.*** at 34 (citing N.T. Trial, 11/13/19, at 156). Appellant concludes that because Banks was the only witness to link Appellant to the

shooting, Appellant's conviction based on Banks's testimony shocks one's sense of justice.[7]

This Court has explained:

> The weight of the evidence is a matter exclusively for the finder of fact, who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. A new trial is not warranted because of a mere conflict in the testimony and must have a stronger foundation than a reassessment of the credibility of witnesses. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.
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> On appeal, our purview is extremely limited and is confined to whether the trial court abused its discretion in finding that the jury verdict did not shock its conscience. Thus, appellate review of a weight claim consists of a review of the trial court's exercise of discretion, not a review of the underlying question of whether the verdict is against the weight of the evidence. An appellate court may not reverse a verdict unless it is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. Gonzalez, 109 A.3d 711, 723 (Pa. Super. 2015) (citations and quotation marks omitted).

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[7] Appellant also notes that at the conclusion of his testimony, Banks addressed an unidentified individual in the courtroom. Appellant's Brief at 33. Appellant argues that the trial court erred in not considering Appellant's behavior after he testified when denying his post-sentence motion challenging the weight of the evidence. ***Id.*** Because Appellant did not include this claim in his post-sentence motion, it is waived. ***See Commonwealth v. Santiago***, 980 A.2d 659, 666 n.6 (Pa. Super. 2009) (stating that "[a] new and different theory of relief may not be successfully advanced for the first time on appeal" (citations omitted and formatting altered)); ***see also*** Pa.R.A.P 302(a) (stating that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal").

When a weight claim "is predicated on the credibility of trial testimony, our review of the trial court's decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review." ***Commonwealth v. Gibbs***, 981 A.2d 274, 282 (Pa. Super. 2009) (citation omitted).

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

> Appellant contended that the guilty verdicts were against the weight of the evidence due to conflicting testimony presented by Anthony Banks. The jury had been duly advised as to the manner in which conflicting testimony should be handled. Moreover, the jury verdicts did not shock its sense of justice as required however because the cumulative evidence consistently corroborated the testimony and previous statements provided by Anthony Banks that he had seen Appellant, whom he knew as his neighbor "Manny"[,] shoot [the victim]. While his trial court testimony differed initially from his previous accounts, the Commonwealth discredited his recantation by impeaching him with his original police statements following the shooting, his later statements and photograph recognition and with his grand jury testimony.
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> The jury as factfinder was entitled to disregard his early recantations and believe his pretrial identifications of Appellant as the person who shot [the victim]. Anthony Banks also revealed that he had been terrorized by members of Appellant's family. He vividly exhibited his fear of retribution. He was also certainly mindful of potential effects upon other members of his family including his sister who was called by the defense to discredit him. He was well aware that the two families had been tied to each other most unsafely. This was why he secretly pointed out the perpetrators on the street to the responding police officers.
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> Appellant's argument is premised upon discounting entirely the statements of the detectives and police officers, and most significantly, the statements of Anthony Banks obtained by police.

> The jury's verdict demonstrates it credited the individual initial identifications of Appellant to police over his recantations. "It is well settled that the jury is free to believe all, part, or none of the evidence to determine the credibility of witnesses." ***Commonwealth v. Houser***, 18 A.3d 1128, 1136 (Pa. 2011); ***see also Commonwealth v. Hanible***, 836 A.2d 36, 39 (Pa. 2003) (holding the jury was free to evaluate both the witness's statement to police as well as his testimony at trial recanting that statement, and was free to believe all, part, or none of the evidence). There was no abuse of discretion in the trial court's determination that the verdict was not against the weight of the evidence.
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> Appellant has argued his belief that Mr. Banks[']s respective statements that had been provided to multiple police personnel and his grand jury testimony and his later trial testimony had been unreliable and incredible to the jury. The jury had been properly charged with weighing the evidence and passing upon the credibility of all witnesses; reviewing courts may not substitute their judgment for that of the jury.
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> * * *
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> The cumulative evidence that had been presented by the Commonwealth of Pennsylvania was credible, convincing and compelling. Nothing presented in this trial remotely suggested that the jury's guilty verdicts had been entered contrary to, nor is it against the weight of, the evidence. The conclusions and verdict reached by the finders of fact were logically based on common sense inferences sufficient to eviscerate any possible conclusion that the convictions had been based on surmise or conjecture. None of the verdicts shocked anyone[']s sense of fairness or justice. To the contrary, corroborating forms of testimonial evidence from the investigators and physical evidence buttressed the proof of Appellant's complicity. Thus, no trial court error in the form of denial of post-sentence motions had been committed. Since no error had been committed, no appellate remedy is warranted.

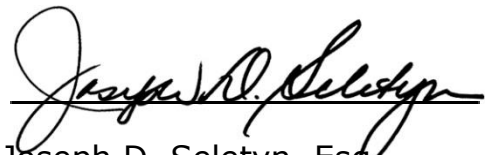
Trial Ct. Op. at 27-29.

Based on our review of the record, we discern no abuse of discretion by the trial court in rejecting Appellant's weight claim. ***See Gonzalez***, 109 A.3d

at 723. The jury, as fact-finder, was entitled to make credibility determinations concerning Banks's trial testimony and prior inconsistent statements, and weigh these along with the other evidence presented at trial. ***See id.***; ***see also Gibbs***, 981 A.2d at 282. Further, to the extent Appellant invites this Court to re-weigh trial evidence, we decline to do so because it is not within the scope of our appellate review. ***See Gibbs***, 981 A.2d at 282. Accordingly, Appellant is not entitled to relief. For these reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/28/2022