

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
Appellee :
: v. :
SHAWN CAMPBELL, :
Appellant : No. 2715 EDA 2011

Appeal from the Judgment of Sentence September 30, 2011,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0012520-2010

BEFORE: GANTMAN, DONOHUE and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED MAY 14, 2013

Shawn Campbell ("Campbell") appeals from the September 30, 2011 judgment of sentence entered by the Court of Common Pleas, Philadelphia County. Counsel for Campbell has filed an **Anders**¹ brief and a petition to withdraw as counsel. For the reasons that follow, we affirm and grant counsel's motion to withdraw.

The trial court summarized the facts as follows:

At approximately 2 a.m. on September 19, 2010, Braheem Ford [(‘Ford’)] drove his girlfriend home.^{[FN]4} N.T. 6/15/11 at 147-148. Ford parked his car in front of her residence and exited the car.^{[FN]5} [**Id.**] at 148. Ford, his girlfriend, and his nephew all were leaning against the car as Ford talked on his cell phone.^{[FN]6} Ford then observed [Campbell] walking toward him. [**Id.**] at 152-153. As [Campbell] approached, he was holding a cell

¹ **Anders v. California**, 386 U.S. 738 (1967); **Commonwealth v. McClendon**, 434 A.2d 1185 (1981).

*Retired Senior Judge assigned to the Superior Court.

phone. [Campbell] asked Ford how to take the case off the cell phone he was holding so he could take the battery out. Ford responded that he did not know. Ford then ended his cell phone call. [Campbell] then asked Ford how much he paid for his car and stated he needed one. [*Id.*] at 153-54. Becoming alarmed, Ford took the keys out of the car ignition, and placed them in his pocket. [Campbell] started to walk away. But then he turned back, pulled a black gun out of his waistband, and pointed the gun at Ford's chest. [*Id.*] at 153-58. [Campbell] further ordered Ford to give him the keys to his car. *Id.* Ford gave [Campbell] his keys, cell phone, and wallet. [*Id.*] at 157. After taking these items, [Campbell] ran away. [*Id.*] at 162.

Ford called the police, and Officer Jonathan Mangual arrived within two to three minutes. [*Id.*] at 164. Ford gave Officer Mangual a description of the robber^{[FN]7} and entered Officer Mangual's patrol car.^{[FN]8} N.T. 6/16/11 at 141. While [Officer] Mangual drove Southbound on Broad Street toward Huntingdon street, Ford yelled to Officer Mangual 'that's him, right there!' [*Id.*] at 143-45. They were approximately 20 feet away from [Campbell] as he was walking Southbound. Officer Mangual drove his patrol car next to [Campbell] so they could see his face, and asked Ford if he was sure [Campbell] was the man who robbed him. Ford said he was sure. [*Id.*] at 147. In response, Officer Mangual stopped his car, got out, and asked [Campbell] to stop.^{[FN]9} [*Id.*] at 146. Instead, [Campbell] clutched at his waistband area, turned around, and started running North on Broad Street.^{[FN]10}

Officer Mangual subsequently radioed central dispatch advising that a robbery victim had positively identified the robber ([Campbell]) who was running Northbound toward Broad and Cumberland Streets. [*Id.*] at 147-48. Officer Mangual turned his car around in an effort to cut off [Campbell], but [Campbell] then ran Southbound on Broad Street. [*Id.*] at 150. Meanwhile, two plainclothes officers,

Gregory Wallace and Andrew McCrea, arrived on scene and chased [Campbell] down an alley to a fenced-in area near a dumpster. [**Id.**] at 180-185, 222. As the officers were chasing [Campbell], Officer Wallace saw him pull a black handgun from his waistband and throw it to the ground. [**Id.**] at 182. Shortly thereafter, Wallace tackled and handcuffed [Campbell]. He also recovered the weapon.^{[FN]11} [**Id.**] 182-84. After arresting [Campbell], Officer McCrea recovered from [Campbell's] pockets the victim's car keys and wallet containing various IDs, credit cards and seventeen dollars.^{[FN]12} [**Id.**] at 223-25.

^{[FN]4} His girlfriend was Katisha Neal. Ford was also accompanied by his nephew, Ramir Handy. The events took place on the 1600 block of Huntingdon Street in Philadelphia.

^{[FN]5} The victim was driving a four door silver Honda Accord (N.T. 6/15/11 at 148, 160, 205).

^{[FN]6} Ford was leaning on his driver's side front door. (N.T. 6/16/11 at 24).

^{[FN]7} Ford described the suspect to Officer Mangual as a black male wearing a blue Adidas hoodie with stripes on the sleeves, blue jeans and black Prada sneakers. He also reported to the officer that the suspect took Ford's phone, wallet with I.D.s, credit cards, and seventeen dollars in U.S. currency. He informed the officer that the suspect had pointed a gun at him. N.T. 6/16/11 at 141.

^{[FN]8} Officer Mangual described the robber to police central dispatch. [**Id.**] at 141-42.

^{[FN]9} When Ford identified [Campbell] as the robber, [Campbell] was wearing the clothes that matched the original description: a blue Adidas hoodie with stripes on the sleeves, blue jeans and black Prada sneakers.

[FN]10 [Campbell] had been walking Southbound before he turned around and started running North on Broad Street.

[FN]11 When Wallace recovered the gun, it had six live rounds in it. One round was in the firing position. [***Id.***] at 189. After examining the gun, firearms expert Officer Kelly Walker determined the gun was inoperable. She was unable to test-fire the gun. N.T. 6/17/11 at 19-20.

[FN]12 The black leather wallet contained various ID's, credit cards, and seventeen dollars. [Campbell] also had a cell phone on his person at the time of arrest. Officers asked Ford if it was the phone that had been stolen, but it was not. N.T. 6/16/11 at 211. [Campbell] testified that after officers searched him at Curran-Fromhold Correctional Facility, an additional \$221 U.S. currency was recovered from his person. N.T. 6/17/11 at 58-59.

Trial Court Opinion, 3/3/2012, at 2-4.

The Commonwealth charged Campbell with Robbery (18 Pa.C.S.A. § 3701) and possession of an instrument of a crime ("PIC") (18 Pa.C.S.A. § 907). On June 21, 2011, following trial, the jury found Campbell guilty of robbery but was unable to come to a unanimous decision regarding the PIC charge, resulting in a mistrial on the PIC charge. On September 30, 2011, the trial court sentenced Campbell to serve the mandatory minimum sentence of five to ten years of imprisonment pursuant to 42 Pa.C.S.A. § 9712 and six months of probation.

Campbell filed a timely notice of appeal on October 7, 2011, followed by a court ordered Pa.R.A.P. 1925(b) statement. The trial court filed its Rule 1925(a) opinion on March 1, 2012. On July 30, 2012, counsel for Campbell

filed with this Court a petition to withdraw as counsel and an **Anders** brief. Campbell filed an answer in response to counsel's petition to withdraw on August 15, 2012. Therein, Campbell asserted the following: (1) that he did not receive a complete copy of the petition to withdraw and the **Anders** brief; (2) that counsel never conferred with Campbell regarding the issues to be presented on appeal; (3) that counsel failed to raise issues as requested by Campbell; (4) that Campbell wishes to raise additional issues before this Court; and (5) that we deny counsel's request to withdraw and appoint new counsel. **See** Campbell's Answer, 8/15/2012, at 1-2.

On January 4, 2012, in response to Campbell's *pro se* answer to counsel's petition to withdraw, this Court denied Campbell's request for the appointment of new counsel. However, we directed Campbell to file an appellate brief raising his additional issues that this Court would consider in the process of our **Anders** review. On February 19, 2013, Campbell filed another motion with this Court requesting an extension of time to file his brief. We granted Campbell's request in an order dated February 25, 2013 giving Campbell 45 days from the date of the order to file his appellate brief. Because Campbell has failed to respond within the time allotted by the February 22, 2013 order, we proceed to our review of the instant appeal.

"When faced with a purported **Anders** brief, we may not review the merits of any possible underlying issues without first examining counsel's request to withdraw." **Commonwealth v. Wimbush**, 951 A.2d 379, 382

(Pa. Super. 2008) (citation omitted). In a proper **Anders** brief, 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 believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Commonwealth v. Santiago, 602 Pa. 159, 178-79, 978 A.2d 349, 361 (2009). "**Anders** counsel must also provide a copy of the **Anders** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention." **Wimbush**, 951 A.2d at 382.

In the petition to withdraw, counsel states that he "has made a conscientious examination of the record and has determined the appeal to be wholly frivolous." Petition to Withdraw, 7/30/2012, at ¶ 1. Counsel also avers that he has "notified [Campbell] of the request to withdraw, furnished [him] with a copy of the [**Anders**] brief [...], and advised [him] of his right to retain new counsel, proceed *pro se* or raise any additional points that he may deem worthy of consideration." **Id.** at ¶ 2. The attached letter to Campbell and proof of service, confirm counsel's averments in this regard.

With respect to our review of the **Anders** brief, counsel sets forth his explanation for why this appeal is frivolous and satisfies the requirements of a proper **Anders** brief as discussed above. Finding the technical requirements of **Anders** fulfilled, we proceed to our review of the merits of Campbell's appeal, and, for the reasons that follow, we conclude this appeal is wholly frivolous.

In the **Anders** brief, counsel raises the following three issues for our review:

- [I]. Was the evidence sufficient to prove robbery, graded as a first degree felony?
- [II]. Was the mandatory minimum sentence imposed a legal sentence?
- [III]. Did the lower court err by denying the mistrial motion following the prosecutor's opening statement?

Anders Brief at 2.

The first issue in the **Anders** Brief challenges the sufficiency of the evidence.

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

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

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa. Super. 2011), *appeal denied*, 613 Pa. 642, 32 A.3d 1275 (2011).

In relevant part, the Pennsylvania Crimes Code defines robbery as follows:

(a) Offense defined.—

(1) a person is guilty of robbery if, in the course of committing a theft, he:

* * *

(ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury[.]

18 Pa.C.S.A. § 3701(a)(1)(ii).² Serious bodily injury means “[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” 18 Pa.C.S.A. § 2301. This Court has stated:

² Robbery under subsection (a)(1)(ii) is a felony of the first degree. 18 Pa.C.S.A. § 3701(b).

'[T]he Commonwealth need not prove a verbal utterance or threat to sustain a conviction under subsection 3701(a)(1)(ii).' **Commonwealth v. Alford**, 880 A.2d 666, 676 (Pa.Super.2005), *appeal denied*, 586 Pa. 720, 890 A.2d 1055 (2005) (quoting **Commonwealth v. Hopkins**, 747 A.2d 910, 914 (Pa.Super.2000)). 'It is sufficient if the evidence demonstrates aggressive actions that threatened the victim's safety. For the purposes of subsection 3701(a)(1)(ii), the proper focus is on the nature of the threat posed by an assailant and whether he reasonably placed a victim in fear of immediate serious bodily injury.' **Alford, supra** (quoting **Hopkins, supra**) (internal quotation marks omitted). **See also Commonwealth v. Duffey**, 519 Pa. 348, 548 A.2d 1178 (1988) (holding sufficient evidence supported robbery conviction where defendant confessed to holding victim at knifepoint while taking her money and watch).

Hansley, 24 A.3d 410, 416-17.

Here, Ford testified that Campbell approached him while he, his girlfriend and his cousin were leaning against his Honda Accord. N.T., 6/15/2011, at 148-150. Ford recalled Campbell asking him questions about how to remove the cell phone cover from Campbell's cell phone and how much Ford had paid for his car. **Id.** at 153. At that point, Ford grew suspicious and removed his keys from the ignition of the car and placed them in his pocket. **Id.** at 154-55. Campbell started to walk away but turned around and walked back towards Ford. **Id.** 155. Ford then watched Campbell pull out a black revolver, point it at Ford's chest, and demand Ford's car keys. **Id.** at 156-159, 161. Ford testified that when Campbell pointed the gun at him, he felt "[s]cared. Sacred out of [his] mind." **Id.** at

161. Ford handed Campbell his car keys, wallet, and cell phone, and Campbell took off running. **Id.** at 157, 162. Viewing this evidence in the light most favorable to the Commonwealth as verdict winner, we can conclude that there is sufficient evidence to support Campbell's robbery conviction. The evidence shows that in the course of committing a theft, *i.e.*, demanding and taking Ford's car keys, Campbell threatened Ford by pointing a gun at his chest, thereby placing him in fear of serious bodily injury. **See Hansley**, 24 A.3d at 417 (finding the evidence sufficient to uphold appellant's conviction for robbery pursuant to Section 3701(a)(1)(ii), when appellant placed DVD's in his pants and proceeded to leave the store without paying and, upon apprehension, pulled a knife and pointed it at the victim's stomach); 18 Pa.C.S.A. § 3701(a)(1)(ii). Thus, no relief is due.

The second issue in the **Anders** Brief questions the legality of his sentence based upon the imposition of a mandatory minimum sentence pursuant to 42 Pa.C.S.A. § 9712. **Commonwealth v. Stokes**, 38 A.3d 846, 857 (Pa. Super. 2011) (stating a challenge to the trial court's imposition of a mandatory minimum sentence sounds in legality of sentence). A challenge to the legality of a sentence is a question of law over which our standard of review is *de novo* and our scope of review is plenary. **Commonwealth v. McKibben**, 977 A.2d 1188, 1191 (Pa. Super. 2009).

Section 9712, in relevant part, provides:

(a) Mandatory Sentence.—Except as provided under section 9716 (relating to two or more mandatory minimum sentences applicable), any person who is convicted in any court of this Commonwealth of a crime of violence as defined in section 9714(g) (relating to sentences for second and subsequent offenses), shall, if the person visibly possessed a firearm or a replica of a firearm, ***whether or not the firearm or replica was loaded or functional***, that placed the victim in reasonable fear of death or serious bodily injury, during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary. Such persons shall not be eligible for parole, probation, work release or furlough.

(b) Proof at sentencing.—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

* * *

(e) Definitions.—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Firearm." Any weapon, including a starter gun, which will or is ***designed*** to or may readily be converted to expel a projective by the action of an explosive or the expansion of gas therein.

42 Pa.C.S.A. § 9712(a), (b), (e) (emphasis added). Thus, for Section 9721 to apply, the defendant must be (1) convicted of a crime of violence as defined by Section 9714(g) and must have (2) in his possession a visible firearm that placed the victim in reasonable fear of serious bodily injury during the commission of the offense.

With respect to the first element, the jury clearly convicted Campbell of a crime of violence as defined by Section 9714(g). The definition of a “crime of violence,” as set forth in Section 9714(g), includes, *inter alia*, “robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery)[.]” 42 Pa.C.S.A. § 9714(g). Because the jury found Campbell guilty of the offense of robbery pursuant to 18 Pa.C.S.A. § 3702(a)(1)(ii), he was convicted of a crime of violence.

Regarding the second element, Campbell had a visible firearm in his possession that reasonably placed Ford in fear of serious bodily injury during the commission of the crime of violence. More specifically, the record shows that during the commission of the robbery, Ford watched Campbell pull a black revolver and point it at his chest, scaring him out of his mind. N.T., 6/15/2011, at 156-159, 161.

Furthermore, as counsel and the trial court point out, it is of no moment that the firearm, a 45 caliber Sturm-Ruger, was inoperable due to corrosion and rust in certain operating parts of the gun and missing screws. N.T., 6/16/2011, 20-21, 23. Although Campbell’s gun was inoperable,

Section 9712(a) specifically contemplates that the mandatory minimum sentence may apply when the firearm does not function. 42 Pa.C.S.A. 9712(a) (stating “if the person visibly possessed a firearm or a replica of a firearm, **whether or not the firearm or replica was loaded or functional**”). Furthermore, section 9712(e) defines a firearm as “[a]ny weapon [...] which will or is **designed to** [...] expel a projectile by the action of an explosive [...] .” 42 Pa.C.S.A. § 9712(e) (emphasis added); **see Commonwealth v. Zortman**, 611 Pa. 22, 23 A.3d 519, (2011) (holding that the definition of a firearm in Section 9712, which also applies to Section 9712.1, does not require that the firearm be operable).

Thus, the record supports the trial court’s conclusion that it was required to sentence Campbell to a mandatory minimum sentence of five years pursuant to Section 9712.

The final issue in the **Anders** Brief asserts that the trial court erred by denying Campbell’s request for a mistrial following the Commonwealth’s opening statement. When reviewing the denial of a mistrial, the following standard governs our review:

The denial of a motion for a mistrial is assessed on appellate review according to an abuse of discretion standard. The central tasks confronting the trial court upon the making of the motion were to determine whether misconduct or prejudicial error actually occurred, and if so, to assess the degree of any resulting prejudice.

Commonwealth v. Kerrigan, 920 A.2d 190, 199 (Pa. Super. 2007)
(citation omitted).

In its opening statement, the Commonwealth began by outlining the facts of the case followed by a discussion of the witnesses and evidence it intended to present in support of its case. N.T., 6/15/2011, at 125-130.

Thereafter, the Commonwealth stated:

Now, as [the trial court] indicated to you, he will instruct you on the law at the end of this trial, so I'm not going to go into too much detail but I just want to tell you a few things. Robbery is basically what everyone thinks it is. It's taking something of someone else by force. You don't have to necessarily make a threat, say give me your money or I'm going to kill you. You can look at the defendant's actions. You can look at what they do. And you have to consider what [Ford] felt while the defendant was pointing that gun at his chest. And ***the defendant doesn't actually have to have the intent to kill [Ford] that night.*** His actions alone are sufficient.

And for the possession of instrument of crime, it's pretty simple once you break it down. Because possession, you just have to have control of something. And that instrument of crime, it can be anything but in this case it's the gun. And the final thing, the defendant just had to use it in some criminal manner. And here, he used it to rob [] Ford that night.

* * *

At the end of this trial, I'm going to stand before you and ask each of you to use your common sense. I'm going to ask you to use your common sense to see that this defendant robbed [] Ford that night and that what ought to be done is the defendant ought to

be found guilty of robbery and possession of an instrument of crime. Thank you, ladies and gentlemen.

Id. at 130-32 (emphasis added).

Campbell's counsel then gave an opening statement, the jurors exited the courtroom, and Campbell's counsel requested a mistrial. **Id.** 139-140.

Counsel explained:

In [the] opening the [Commonwealth] mentioned that there was a weapon involved. We know that he is not charged with possession of a gun. And in [the Commonwealth's] opening [it] said you don't have to necessarily have an intent to kill. There is no such element involved in the robbery charge or the PIC charge, and to suggest that, Your Honor, is so prejudicial to my client and takes this case out of the context of a robbery and possession of an instrument of crime and puts it into a whole more threatening and serious element. Coupled with that, now that I'm aware that they intend to present the weapon when he is not charged with possession of a weapon, Your Honor, I'm asking for a mistrial for those reasons.

Id.

The trial court denied Campbell's request for a mistrial and reasoned that although the Commonwealth's statements regarding the intent to kill were unnecessary considering the charges against Campbell, the statements were not so unfairly prejudicial as to warrant a mistrial. **Id.** at 141. The trial court also pointed out that the Commonwealth's statement regarding the intent to kill was true, since an intent to kill is not an element of the

crime of robbery. **Id.** We agree with the trial court that Campbell was not so unfairly prejudiced as to warrant a mistrial.

“A prosecutor’s comments do not constitute reversible error unless their unavoidable effect is to prejudice the jury, giving it a fixed bias and hostility toward the defendant, so it cannot objectively weight the evidence and render a true verdict.” **Commonwealth v. Wholaver**, 605 Pa. 325, 366, 989 A.2d 883, 908 (2010) (citation omitted). “The purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved; but it is not evidence.” **Commonwealth v. Parker**, 591 Pa. 526, 537, 919 A.2d 943, 950 (2007) (citation omitted). The prosecution and defense are “afforded reasonable latitude in presenting opening arguments to the jury.” **Id.** (citation omitted). “Even if an opening argument is somehow improper, relief will be granted only where the unavoidable effect is to so prejudice the finders of fact as to render them incapable of objective judgment.” **Commonwealth v. Spatz**, 587 Pa. 1, 53, 896 A.2d 1191, 1222 (2006) (citation omitted).

From our review of the Commonwealth’s opening statement, we cannot conclude that the Commonwealth was insinuating that the intent to kill was an element of either robbery or PIC, as the Commonwealth specifically said, “the defendant **doesn't** actually have to have the intent to kill [Ford] that night.” N.T., 6/15/2011, at 130 (emphasis added). While we

agree that the intent to kill has no relevance to either crime, we fail to see how this reference would prejudice Campbell to an extent that the jury could not objectively weigh the evidence and render a true verdict. We would also point out that the Commonwealth prefaced its statement by telling the jury that the trial court would instruct the jurors on the law to be applied at the end of the trial. **Id.** at 130. Moreover, the trial court did just that by instructing the jury on the law to apply and the elements of each offense. **See** N.T. 6/20/2011, beginning at 80. “[T]he jury is presumed to follow the trial court’s instructions.” **Commonwealth v. Keaton**, __ Pa. __, __, 45 A.3d 1050, 1075 (2012). We accordingly find no abuse of discretion in the trial court’s decision to deny a mistrial.

We have also conducted an independent review of the record, and we conclude that Campbell cannot raise any non-frivolous issues in this appeal.

Judgment of sentence affirmed. Motion to withdraw granted.

Judgment Entered.



Prothonotary

Date: 5/14/2013