J. S08007/13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMAL HATCHER,	:	No. 2932 EDA 2011
Appellant	:	

Appeal from the Judgment of Sentence, September 9, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0006133-2010

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 05, 2013**

Jamal Hatcher appeals from the judgment of sentence of September 9, 2011,[1] following his conviction of attempted murder and related offenses. After careful review, we affirm.[2]

The trial court has aptly summarized the facts of this matter as follows:

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[1] Appellant purports to appeal from the order dated September 30, 2011, denying post-sentence motions. However, appeal is properly taken from the judgment of sentence, not the order denying post-sentence motions. The order denying post-sentence motions acts merely to finalize the judgment of sentence for purposes of appeal. ***Commonwealth v. Stewart***, 867 A.2d 589, 590 n.1 (Pa.Super. 2005); ***Commonwealth v. Chamberlain***, 658 A.2d 395, 397 (Pa.Super. 1995). We have amended the caption accordingly.

[2] Appellant was tried together with his co-defendant and brother, Hasaan Hatcher, who filed an appeal at No. 729 EDA 2012. Hasaan Hatcher's appeal has been assigned to this same panel.

In March 2010, complainant Wayne Tynes began receiving phone calls from a collection agency regarding a delinquent Sprint cell phone account that was opened sometime in 2005 or 2006. (N.T. 05/04/11, pp. 38-39; N.T. 05/05/11, pp. 66-67). The account listed complainant's nineteen-year-old son, Lamar Span, as the account holder and carried his social security number.[Footnote 2] (N.T. 05/04/11, pp. 38-40; N.T. 05/05/11, pp. 63, 66). The collection agency also provided complainant with the address attached to the account as 7504 Fayette Street. (N.T. 05/04/11, pp. 38-40; N.T. 05/05/11, pp. 63, 66). Complainant did not believe that his son had opened this account because he has a cognitive disability. (N.T. 05/04/11, pp. 38-40; N.T. 05/05/11, p. 63). Lamar Span did have a prepaid cell phone in 2007, but he did not have a Sprint cell phone account. (N.T. 05/05/11, pp. 66-67).

After learning about this fraudulent account, complainant conducted an internet search of the address and phone number provided by the collection agency and discovered that Martha Hatcher lived at 7504 Fayette Street. (N.T. 05/04/11, pp. 38-40). Complainant's wife, Tamika Scott, knew Martha Hatcher as Hasaan Hatcher's mother. (N.T. 05/05/11, p. 68). Ms. Scott has known Hasaan Hatcher for approximately ten years and previously spent a lot of time with Hasaan Hatcher and his brother, Defendant. (N.T. 05/05/11, pp. 64-66, 113-114). In 2006, when complainant and his wife were separated, Ms. Scott started an intimate relationship with Hasaan Hatcher, which continued off and on through 2008. (N.T. 05/05/11, pp. 64, 114-116).

In addition to filing a formal complaint with the collection agency, complainant tried contacting Hasaan Hatcher at least five times. (N.T. 05/04/11, pp. 41-42; N.T. 05/05/11, p. 70). Although complainant left voicemail messages requesting a call back from Hasaan Hatcher, complainant never talked to Hasaan Hatcher over the telephone. (N.T. 05/04/11, pp. 41-42). Ms. Scott also tried

contacting Hasaan Hatcher. (N.T. 05/05/11, pp. 69-70). When she reached Hasaan Hatcher, she asked him why he opened a cell phone account using her son's information, and he denied doing so. (N.T. 05/05/11, pp. 69-70). Thereafter, complainant continued trying to contact Hasaan Hatcher over the telephone, but to no avail. (N.T. 05/05/11, pp. 69-70).

On April 1, 2010, complainant drove to 7504 Fayette Street with Ms. Scott because he wanted to talk to Hasaan Hatcher about the delinquent cell phone account. (N.T. 05/04/11, pp. 41-43; N.T. 05/05/11, pp. 70-71). Ms. Scott remained in the car. (N.T. 05/04/11, p. 42; N.T. 05/05/11, pp. 70-72). When complainant reached the porch, he approached Ms. Hatcher and asked for Hasaan Hatcher. (N.T. 05/04/11, pp. 41-43, 92). Hasaan Hatcher was not at the residence. (N.T. 05/04/11, pp. 41-43, 92). An argument between complainant and Ms. Hatcher then ensued. (N.T. 05/04/11, p. 42; N.T. 05/05/11, pp. 71-72). Before complainant left, he told Ms. Hatcher that he wanted Hasaan Hatcher to contact him about this cell phone account. (N.T. 05/04/11, pp. 42-43; N.T. 05/05/11, p. 72).

On April 2, 2010, between 9:00 and 9:45 a.m. complainant drove Ms. Scott to her place of employment at the Wine and Spirits store, 3215 North Broad Street, near Broad and Allegheny Streets. (N.T. 05/04/11, pp. 43-44; N.T. 05/05/11, pp. 10-11). At approximately 10:30 a.m., Hasaan Hatcher called the store and asked for Ms. Scott. (N.T. 05/05/11, pp. 19, 74-75). When Ms. Scott picked up the phone, Hasaan Hatcher said, "You brought that pussy to my house? .... You told that pussy my address." (N.T. 05/05/11, pp. 75-76). He then told her: "You getting fucked up. The store you in getting fucked up. You going to lose everything. Your house getting fucked up. You done." (N.T. 05/04/11, p. 44; N.T. 05/05/11, pp. 75-76). When the phone call ended, Ms. Scott was frantic, upset, and scared. (N.T. 05/04/11, p. 44; N.T. 05/05/11, pp. 44-45). She called complainant and told him

what happened. (N.T. 05/05/11, p. 78). Shortly thereafter, complainant returned to Ms. Scott's place of employment and parked directly in front of the Wine and Spirits store. (N.T. 05/04/11, pp. 44-45; N.T. 05/05/11, pp. 78-79). When he went inside the store, complainant tried to console his wife after she told him about the content of the phone call. (N.T. 05/04/11, p. 44; N.T. 05/05/11, p. 78). Complainant then left the store, sat inside his vehicle, and waited for Ms. Scott to finish her shift. (N.T. 05/04/11, pp. 44-45; N.T. 05/05/11, pp. 78-79).

As complainant sat on the passenger side of his vehicle, he saw a person's shadow circle toward him. (N.T. 05/04/11, p. 45). He then heard Hasaan Hatcher say: "I think that's him. I think that's him." (N.T. 05/04/11, pp. 45-46). Complainant got out of his car and approached Hasaan Hatcher. (N.T. 05/04/11, pp. 45-46). As complainant approached Hasaan Hatcher, Hasaan Hatcher lifted up his shirt and showed his gun. (N.T. 05/04/11, pp. 45-46). As complainant tried to turn around, Defendant got out of the car and said: "Watch out. I got him. I got him." (N.T. 05/04/11, p. 46). Defendant then fired his revolver approximately six times. (N.T. 05/04/11, pp. 46-47; N.T. 05/05/11, pp. 194-196). The first bullet passed complainant's head. (N.T. 05/04/11, p. 47). The second bullet hit complainant in the right leg. (N.T. 05/04/11, p. 47). As complainant tried to run away, he fell to the grou nd and was lying on his stomach. (N.T. 05/04/11, pp. 47-48). While complainant was lying on the ground, Defendant stood over complainant and shot him approximately four times in the back. (N.T. 05/04/11, p. 47). The two men then rode away in a gray Dodge Magnum with dents and scratches on the side. (N.T. 05/04/11, p. 46). The vehicle had been parked about two to three cars behind complainant's car. (N.T. 05/04/11, pp. 46-47).

Police Officer Eric Hidalgo was patrolling near 15th and Allegheny Streets when he heard four to five gunshots. (N.T. 05/05/11, p. 10). When he

approached Broad and Allegheny Streets, he saw people running away from the area. (N.T. 05/05/11, pp. 10-11). Ms. Zenola Davis, the store manager, flagged him down and told him that complainant had been shot. (N.T. 05/05/11, p. 11). Officer Hidalgo found complainant bleeding profusely as he stood near the checkout counter inside the store. (N.T. 05/05/11, p. 11). There was blood on complainant's shirt and a pool of blood on the floor. (N.T. 05/05/11, p. 11). When Ms. Scott stopped crying and screaming, Officer Hidalgo interviewed her. (N.T. 05/05/11, pp. 11-13). Based on Ms. Scott's interview, Officer Hidalgo prepared two police reports. (N.T. 05/05/11, pp. 13-20). The first police report detailed the shooting and identified Defendant as the shooter. (N.T. 05/05/11, pp. 16-17, 20). The report also indicated that complainant suffered injuries to his chest, arm and hip. (N.T. 05/05/11, p. 16). The second police report detailed the alleged terroristic threats that were made against Ms. Scott and identified Hasaan Hatcher as the perpetrator. (N.T. 05/05/11, pp. 13-20). Ms. Scott described Hasaan Hatcher as a "black male, mid 30s, 5,11." (N.T. 05/05/11, pp. 19-20).

Officer Hidalgo placed an alert over police radio that a man had been shot. (N.T. 05/05/11, p. 12). Two minutes later, responding police officers arrived and transported complainant to Temple University Hospital. (N.T. 05/04/11, pp. 49-50; N.T. 05/05/11, p. 12). At approximately 10:55 a.m., complainant was taken into emergency surgery, where he was treated for five gunshot wounds; two to his upper left extremity, one to his upper right flank, one to his upper right back, and one to his right leg. (NT. 05/04/11, pp. 49-50; N.T. 05/05/11, pp. 12, 18; N.T. 05/06/11, p. 76). In addition to repairing the brachial artery in complainant's left arm, doctors retrieved two bullets from his back. (N.T. 05/06/11, pp. 50-51, 76-77). Bullet fragments remain lodged in complainant's right shoulder, lung base region, and lower back. (N.T. 05/06/11, pp. 50-51, 77). On April 6, 2010, complainant was discharged from the hospital. (N.T. 05/06/11, p. 77). Complainant's left

arm is partially paralyzed, and he continues to suffer chronic back pain. (N.T. 5/04/11, p. 51). Due to his medical condition, he has been unable to return to work and undergoes physical therapy once a week. (N.T. 05/05/11, p. 51; N.T. 05/06/11, p. 77).

Detectives Grace and Suchinsky were assigned to investigate this shooting. (N.T. 05/05/11, pp. 224, 233). Detective Grace interviewed Ms. Scott and Ms. Davis inside the Wine and Spirits store. (N.T. 05/04/11, pp. 185-187; N.T. 05/05/11, pp. 233-235). Ms. Scott told Detective Grace that she saw Defendant shoot her husband. (N.T. 05/04/11, p. 188). She also told Detective Grace that she knew him personally because of her past relationship with Hasaan Hatcher. (N.T. 05/04/11, p. 188). Sometime after this interview, Detective Grace showed Ms. Scott a photographic array that included a photograph of Defendant. (N.T. 05/04/11, pp. 189-190, 204). Ms. Scott identified Defendant as the shooter and circled his photograph. (N.T. 05/04/11, pp. 189-190, 204). Ms. Scott also provided police with the address of 7504 Fayette Street. (N.T. 05/04/11, p. 207).

Detective Suchinsky interviewed three eyewitnesses to the shooting and subsequent getaway: Brian Collins, Ismael Rodriguez, and Macy Suarez. (N.T. 05/04/11, pp. 166-172; N.T. 05/05/11, pp. 34, 233-235). Mr. Collins saw the shooting and heard about six gunshots while he sat inside his co-worker's vehicle parked directly across from the Wine and Spirits store. (N.T. 05/04/11, pp. 164-172). He was waiting for his co-worker to return from inside Temple University Hospital. (N.T. 05/04/11, pp. 164-172; N.T. 05/05/11, p. 235). At approximately 11:15 a.m., Detective Suchinsky interviewed Mr. Collins, who gave a signed statement, wherein he provided a description of the shooter. (N.T. 05/04/11, pp. 175-177; N.T. 05/05/11, p. 235). The only distinct feature that Mr. Collins remembered was that the shooter had a beard. (N.T. 05/04/11, p. 177). Mr. Collins was shown a photographic array,

but he was unable to identify anyone. (N.T. 05/04/11, p. 177).

Detective Suchinsky next interviewed Mr. Rodriguez. (N.T. 05/05/11, p. 234). Mr. Rodriguez heard about six gunshots and observed the shooting from his rearview mirror as he was driving southbound toward Center City. (N.T. 05/05/11, pp. 30-34). Mr. Rodriguez also saw the shooter jump inside the Dodge Magnum and flee the scene. (N.T. 05/05/11, pp. 31-32). Mr. Rodriguez described the shooter as being over 6 feet tall, 250 to 260 pounds, dark complexion with a big beard, wearing a white T-shirt, light blue jeans, and a baseball cap. (N.T. 05/05/11, pp. 35-38). After the shooting, Mr. Rodriguez parked his car at the corner and waited for police to arrive. (N.T. 05/05/11, p. 34). When police arrived, Mr. Rodriguez provided a signed statement of his observations. (N.T. 05/05/11, pp. 34-37).

Ms. Suarez parked on the 3200 block of North Broad Street and sat inside her car waiting for her mother to exit the PNC Bank located next to the Wine and Spirits store. (N.T. 05/05/11, pp. 145, 237-238). As Ms. Suarez waited for her mother, she observed a car park behind her. (N.T. 05/05/11, pp. 145-146). The driver got out of the car, approached a black male and began to argue with him. (N.T. 05/05/11, pp. 146, 151). She then saw a man exit from the passenger side of the car. (N.T. 05/05/11, pp. 146, 151). She saw the victim pull out a knife. (N.T. 05/05/11, p. 152). The driver then said, "I got something for you" and went back to his car. (N.T. 05/05/11, p. 152). The passenger also went back to the car. (N.T. 05/05/11, p. 152). Ms. Suarez then took her seat belt off and moved to the passenger side of the vehicle. (N.T. 05/05/11, pp. 152, 170). When she noticed that the driver had a gun in his hand, she ducked her head down. (N.T. 05/05/11, pp. 152-154). While she was hiding, she heard about three to four gunshots. (N.T. 05/05/11, pp. 152-154). When Ms. Suarez looked up, she saw complainant collapse next to her car. (N.T. 05/05/11, p. 153). The two men drove away in a

Dodge Magnum. (N.T. 05/05/11, pp. 154-155). When the men left, she ran inside the PNC Bank to get her mother. (N.T. 05/05/11, p. 185). When Ms. Suarez came out of the bank, she noticed that police had secured the scene. (N.T. 05/05/11, p. 185).

At approximately 12:15 p.m., Detective Suchinsky interviewed Ms. Suarez. (N.T. 05/05/11, p. 165). In her signed statement, she described the passenger as a black male with a beard, wearing a white T-shirt, blue jeans, and having a thin build. (N.T. 05/05/11, pp. 164-166, 170-171). She described the driver as heavy set with a beard, wearing a white T-shirt and blue jeans. (N.T. 05/05/11, p. 170). At approximately 12:20 p.m., Detective Suchinsky showed Ms. Suarez a photographic array. (N.T. 05/05/11, p. 160). After identifying Defendant as the shooter, Ms. Suarez circled his photograph and signed her name. (N.T. 05/05/11, pp. 159-160, 172). At trial, Ms. Suarez identified Defendant as the shooter and Hasaan Hatcher as the driver of the Dodge Magnum. (N.T. 05/05/11, pp. 146-147, 152-153, 186-187).

When Detective Timothy Hartman processed the crime scene, he observed a blood trail from the street to the front entrance of the Wine and Spirits store. (N.T. 05/05/11, pp. 190-191, 200-201, 205). Detective Hartman recovered a knife and a silver bullet fragment from the middle of the street. (N.T. 05/04/11, pp. 198, 203-204; N.T. 05/05/11, pp. 190-194, 197, 200, 202). Detective Hartman also discovered that a black Nissan Altima that was parked directly across the street had been struck by a bullet. (N.T. 05/04/11, pp. 198-200; N.T. 05/05/11, pp. 194, 198). The bullet went through the rear passenger window and into the rear side air bag of the vehicle. (N.T. 05/05/11, pp. 194, 198-199). Because no fired cartridge casings were found at the scene, police concluded that the shooter used a revolver instead of a semiautomatic weapon. (N.T. 05/05/11, pp. 194-196). In addition to recovering a knife and ballistics evidence from the crime scene,

police recovered live streaming video from inside the Wine and Spirits store. (N.T. 05/04/11, pp. 204-205). They also retrieved still photographs that were taken from a camera inside an automatic teller machine operated by the nearby PNC Bank. (N.T. 05/04/11, pp. 200, 204-205; N.T. 05/05/11, pp. 237-238).

After conducting his investigation, Detective Grace prepared a search warrant for 7504 Fayette Street and an arrest warrant for Defendant. (N.T. 05/04/11, pp. 204, 206-207). On April 2, 2010, police executed the search warrant. (N.T. 05/04/11, pp. 207-208). Although no one was present at this residence, police recovered paperwork and a photograph proving it to be a residence of Defendant. (N.T. 05/04/11, p. 208). When Ms. Hatcher returned to her residence, Detective Grace informed her that Defendant was a suspect in a shooting and provided her with his contact information. (N.T. 05/04/11, pp. 208-209).

On April 3, 2010, Detective Grace interviewed complainant at the hospital. (N.T. 05/04/11, p. 210). Complainant was unable to identify anyone in the photographic array that Detective Grace showed him. (N.T. 05/04/11, p. 210). Complainant informed Detective Grace that Hasaan Hatcher was the first to approach him outside the Wine and Spirits store. (N.T. 05/04/11, p. 211). Based upon complainant's interview, Hasaan Hatcher was identified as a participant in the shooting. (N.T. 05/04/11, pp. 211-212). On April 6, 2010, police arrested Hasaan Hatcher at 309 West Roosevelt Boulevard. (N.T. 05/04/11, p. 212). Police Officer Daniel Gilmore recovered a 2006 gray Dodge Magnum with Pennsylvania license GTN-3055 around the corner, in front of 4818 North 4th Street. (N.T. 05/05/11, pp. 210, 213-214). The vehicle was towed to the police impound lot. (N.T. 05/04/11, pp. 213-215; N.T. 05/05/11, pp. 210-212). The front passenger side and rear passenger side of the vehicle were damaged. (N.T. 05/05/11, pp. 217-219). Inside the vehicle, police found paperwork, a

> 3XL sweatshirt, boots, and a pair of work glasses. (N.T. 05/05/11, pp. 220-224). The paperwork included a letter from First Premier Bank listing Hasaan Hatcher's name and address as 309 West Roosevelt Boulevard, Philadelphia, PA 19120; a receipt from T-Mobile; the vehicle title listing Hasaan Hatcher and Martha Hatcher as co-purchasers, the vehicle identification number and an address of 7504 Fayette Street, Philadelphia, PA 19150. (N.T. 05/04/11, p. 215; N.T. 05/05/11, pp. 222-223). Approximately a week later, at or around April 13, 2010, defendant was arrested. (N.T. 05/04/11, pp. 213-215).
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> [Footnote 2] Lamar's last name is not the same as complainant's last name because complainant changed his last name from "Span" to "Tynes" when he obtained his identification card and social security card. (N.T. 05/04/11, p. 37).

Trial court opinion, 8/13/12 at 1-8.

Following a jury trial, on May 10, 2011, appellant was found guilty of attempted murder, aggravated assault, criminal conspiracy, possession of an instrument of crime ("PIC"), and three violations of the Uniform Firearms Act ("VUFA"). On September 9, 2011, appellant received an aggregate sentence of 30 to 60 years' imprisonment. Post-sentence motions were denied, and this timely appeal followed.[3]

[3] Post-sentence motions were denied on September 30, 2011, and appellant filed his notice of appeal on Monday, October 31, 2011. The 30th day of the appeal period fell on Sunday, October 30, 2011, and is excluded from the computation of time. 1 Pa.C.S.A. § 1908. Therefore, appellant's appeal is timely filed.

On November 17, 2011, appellant was ordered to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A.; appellant failed to comply, and the trial court filed a Rule 1925(a) opinion on March 14, 2012, finding all issues to be waived pursuant to ***Commonwealth v. Lord***, 553 Pa. 415, 719 A.2d 306 (1998), and its progeny. On July 9, 2012, this court granted appellant's petition to remand and directed the trial court to file a supplemental trial court opinion addressing the issues raised in appellant's Rule 1925(b) statement, filed March 21, 2012. ***See Commonwealth v. Burton***, 973 A.2d 428 (Pa.Super. 2009) (***en banc***) (untimely filing of a Rule 1925(b) statement, resulting in waiver of all issues raised on appeal, is ***per se*** ineffectiveness of counsel and necessitates remand). On August 13, 2012, the trial court filed a supplemental Rule 1925(a) opinion and returned the certified record to this court.

Appellant has raised the following issues for this court's review:

> [1.] Did the trial court err when it denied Defendant/Appellant's motion for a mistrial based upon the fact that a current attorney, and former Assistant District Attorney, called as a witness by the Commonwealth testified that he previously handled the cases against Defendant/Appellant and his co-defendant/ brother, and was assigned to the District Attorney's "Repeat Offenders Unit, which is, basically, our version of the career criminal unit where [sic] handling defendants who've been identified as particularly dangerous?"

> [2.] Was the jury's verdict against the weight of the evidence?
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> [3.] With respect to the sentence imposed upon Defendant/Appellant by the trial court, did that court abuse its discretion by imposing an aggregate sentence of not less than 30, nor more than sixty, years of incarceration upon the 30 year-old Defendant/Appellant where:
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> (a) the trial court imposed sentences which are unreasonable under the circumstances of the case and outside of the sentencing guidelines on the charges of aggravated assault, criminal conspiracy, [PIC], and §§ 6105, 6106, and 6108 of the Crimes Code; and,
>
> (b) the trial court imposed a sentence which is within the sentencing guidelines applying the deadly weapon (used) enhancement matrix on the charge of attempted murder and, under the circumstances of the case the application of the guidelines is clearly unreasonable?

Appellant's brief at 5-6 (footnotes omitted).[4]

In his first issue on appeal, appellant argues that the trial court erred in denying his motion for mistrial after former ADA Matthew Glazer testified

[4] Additional issues raised in appellant's Rule 1925(b) statement have been abandoned on appeal. In his brief, appellant acknowledges that two of the issues relate to trial court error and were not preserved in the trial court; and a third, whether trial counsel had a conflict of interest, is more appropriately brought in a post-conviction petition as a counsel ineffectiveness claim. (Appellant's brief at 5 n.1.)

that he was formerly assigned to the Repeat Felony Offenders Unit of the district attorney's office, thereby implying that appellant was a repeat felony offender. The trial court gave a curative instruction to the jury which appellant maintains was insufficient.

ADA Glazer testified that he was an assistant district attorney for the City of Philadelphia for approximately five years. (Notes of testimony, 5/6/11 at 26.) The prosecuting attorney asked ADA Glazer about his progression through the district attorney's office, and he responded by testifying regarding various units in which he had served:

> . . . After that I proceeded to the Major Trials Unit to handle a variety of cases, you know, larger drug cases, violent cases, robberies, assaults, and such. After that I progressed to the Repeat Offender Unit, which is, basically, our version of the career criminal unit where [sic] handling defendants who've been identified as particularly dangerous.

Id.

At that point, defense counsel objected and moved to strike, and a sidebar was held outside the presence of the jury. (***Id.*** at 27.) Counsel moved for mistrial which was denied. (***Id.*** at 28-29.) However, the trial court granted the request for a cautionary instruction, which was as follows: "Ladies and gentlemen, you may not consider the fact that Mr. Glazer was at one time in the Repeat Offender Unit as evidence of anything other than his progression through the District Attorney's Office. You may not consider the

fact that Mr. Glazer was in the Repeat Offender Unit as evidence against these defendants in any way." (***Id.*** at 35.)

> When the statement at issue relates to a reference to past criminal behavior, '[t]he nature of the reference and whether the remark was intentionally elicited by the Commonwealth are considerations relevant to the determination of whether a mistrial is required.' ***Commonwealth v. Kerrigan***, 920 A.2d 190, 199 (Pa.Super.2007), ***appeal denied***, 594 Pa. 676, 932 A.2d 1286 (2007). A singular, passing reference to prior criminal activity is usually not sufficient to show that the trial court abused its discretion in denying the defendant's motion for a mistrial. ***Id.***; ***Commonwealth v. Allen***, 448 Pa. 177, 181, 292 A.2d 373, 375 (1972). When the trial court provides cautionary instructions to the jury in the event the defense raises a motion for mistrial, '[t]he law presumes that the jury will follow the instructions of the court.' ***Commonwealth v. Brown***, 567 Pa. 272, 289, 786 A.2d 961, 971 (2001) (citation omitted), ***cert. denied***, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003).

Commonwealth v. Parker, 957 A.2d 311, 319 (Pa.Super. 2008), ***appeal denied***, 600 Pa. 755, 966 A.2d 571 (2009).

Instantly, ADA Glazer did not specifically reference past criminal behavior, he merely testified that, in addition to other units within the district attorney's office, he had served in the Repeat Offenders Unit. Indeed, as the trial court observed, it was unclear from his testimony whether the case even originated while he was assigned to the Repeat Offenders Unit. (Notes of testimony, 5/6/11 at 28.) When testimony resumed, ADA Glazer clarified that when he was assigned to handle this particular case, he was working in Northwest Division. (***Id.*** at 35.) In

addition, the allegedly prejudicial remark was not intentionally elicited by the Commonwealth; the prosecuting attorney was merely questioning the witness about his progression through the various units of the district attorney's office.[5]

Moreover, in an abundance of caution, the trial court granted the request for a cautionary instruction which we find was sufficient to cure any possible taint caused by ADA Glazer's remarks. "A trial court may remove taint caused by improper testimony through curative instructions." ***Commonwealth v. Bracey***, 831 A.2d 678, 682 (Pa.Super. 2003), ***appeal denied***, 577 Pa. 685, 844 A.2d 551 (2004) (citations omitted). Appellant now argues that the instruction was insufficient and was "poorly crafted." (Appellant's brief at 26-27.) However, at trial, both defense counsel indicated several times that they had no objection to the instruction as given. (Notes of testimony, 5/6/11 at 32-33.) In fact, the instruction was actually drafted by counsel for appellant. (***Id.*** at 32.) If appellant was dissatisfied with the trial court's cautionary instruction, he should have

[5] We note with disapproval that appellant has chosen to impugn the character of Attorney Glazer by arguing that he intentionally prejudiced appellant and his co-defendant. (Appellant's brief at 21.) Appellant accuses Attorney Glazer of improper motive and of choosing to ignore his duty as an officer of the court to uphold the Constitution. (***Id.***) According to appellant, "Rather than wearing the blindfold of justice, or the unbiased hat of 'officer of the court,' Attorney Glazer took his testimony in [appellant]'s case as a final opportunity to wield the sword of the prosecutor which he had brandished for the five years previous." (***Id.*** at 23.) We find appellant's arguments in this regard to be highly inappropriate and wholly unsupported by the record.

lodged an objection. To preserve an issue relating to jury instructions, an appellant is required to make a specific, timely objection before the jury retires to deliberate. ***Commonwealth v. Gooding***, 818 A.2d 546, 552 (Pa.Super. 2003), ***appeal denied***, 575 Pa. 691, 835 A.2d 709 (2003) (citation omitted). Because he failed to do so, appellant cannot be heard to complain now on appeal about the nature of the instruction.

Furthermore, as the Commonwealth notes, ADA Glazer was called as a fact witness to testify in relation to the charges of retaliation and witness intimidation, of which appellant was acquitted. (Commonwealth's brief at 9.) Therefore, it is difficult to see how appellant was actually prejudiced. The trial court did not err in denying appellant's motion for mistrial.

In his second issue on appeal, appellant contends that the jury's verdict was against the weight of the evidence. Challenges to the weight of the evidence are addressed by Pa.R.Crim.P., Rule 607, 42 Pa.C.S.A., which provides, in relevant part:

> (A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial: (1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion.

Pa.R.Crim.P. 607(A).

After reviewing the record, it is clear that appellant has not complied with Rule 607. Accordingly, the issue is waived. ***See***, ***e.g.***, ***Commonwealth v. O'Bidos***, 849 A.2d 243, 252 (Pa.Super. 2004), ***appeal***

denied, 580 Pa. 696, 860 A.2d 123 (2004) (citations omitted) (weight of the evidence claims must be raised via oral, written, or post-sentence motions in the trial court for the issue to be preserved for appeal). Appellant did file a post-sentence motion challenging the appropriateness of his sentence; however, our review of the record reveals no motion for a new trial, oral or otherwise, based on a claim that the verdict was against the weight of the evidence.

Appellant argues the fact that he raised the issue in his Rule 1925(b) statement and the trial court addressed it in its supplemental Rule 1925(a) opinion preserves the issue for appeal. (Appellant's brief at 28 n.5; trial court opinion, 8/13/12 at 16-17.) Appellant is mistaken. A weight claim must be raised initially by a motion to the trial court. ***Commonwealth v. Mack***, 850 A.2d 690, 694 (Pa.Super. 2004). As our supreme court explained in ***Commonwealth v. Sherwood***, 603 Pa. 92, 110, 982 A.2d 483, 494 (2009), ***cert. denied***, 130 S.Ct. 2415, 176 L.Ed.2d 932, 78 USLW 3642 (2010):

> Regarding Appellant's weight of the evidence claim we note that Appellant did not make a motion raising a weight of the evidence claim before the trial court as the Pennsylvania Rules of Criminal Procedure require. ***See*** Pa.R.Crim.P. 607(A). The fact that Appellant included an issue challenging the verdict on weight of the evidence grounds in his 1925(b) statement and the trial court addressed Appellant's weight claim in its Pa.R.A.P 1925(a) opinion did not preserve his weight of the evidence claim for appellate review in the absence of an earlier motion. Pa.R.Crim.P. 607(A); ***Steiner v. Markel***, 600 Pa.

> 515, 968 A.2d 1253, 1257 (2009) (holding that inclusion of an issue in a 1925(b) statement that has not been previously preserved does not entitle litigant to appellate review of the unpreserved claim); ***Mack***, 850 A.2d at 694 (holding weight claim waived by noncompliance with Pa.R.Crim.P. 607, even if the trial court addresses it on the merits); ***Commonwealth v. Burkett***, 830 A.2d 1034, 1037 (Pa.Super.2003) (same). ***See also Commonwealth v. Little***, 879 A.2d 293, 300–301 (Pa.Super.2005), ***appeal denied***, 586 Pa. 724, 890 A.2d 1057 (2005); ***Commonwealth v. Washington***, 825 A.2d 1264, 1265 (Pa.Super.2003). Appellant's failure to challenge the weight of the evidence before the trial court deprived that court of an opportunity to exercise discretion on the question of whether to grant a new trial. Because "appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence," ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 753 (2000), this Court has nothing to review on appeal.

Id. (footnote omitted). Therefore, appellant's weight of the evidence claim is waived on appeal.

Finally, appellant challenges the discretionary aspects of his sentence, claiming that it was excessive. "A challenge to the discretionary aspects of a sentence requires the claimant to set forth in his brief a separate, concise statement of the reasons relied upon for the allowance of appeal as to that challenge." ***Commonwealth v. Griffin***, 804 A.2d 1, 7 (Pa.Super. 2002), ***appeal denied***, 582 Pa. 671, 868 A.2d 1198 (2005), ***cert. denied***, 545 U.S. 1148 (2005), citing ***Commonwealth v. Eby***, 784 A.2d 204, 206 n.2 (Pa.Super. 2001), in turn citing Pa.R.A.P. 2119(f) and ***Commonwealth v.***

Tuladziecki, 513 Pa. 508, 522 A.2d 17 (1987). Appellant has complied with this requirement. (Appellant's brief at 39-41.)

> This Court may reach the merits of an appeal challenging the discretionary aspects of a sentence only if it appears that a substantial question exists as to whether the sentence imposed is not appropriate under the Sentencing Code. 'A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the code or is contrary to the fundamental norms which underlie the sentencing process. A claim that the sentencing court imposed an unreasonable sentence by sentencing outside the guideline ranges presents a "substantial question" for our review.'

Griffin, ***supra***, quoting ***Eby***, ***supra***.

Appellant complains that on six of the seven charges, he was sentenced outside the aggravated range of the sentencing guidelines. With respect to the remaining charge, attempted murder, with the deadly weapon enhancement, appellant's sentence was within the standard range, albeit also the statutory maximum. (Appellant's brief at 40.) The gist of appellant's argument seems to be that because the trial court applied the deadly weapon enhancement to the charge of attempted murder, it was an abuse of discretion to sentence him outside the guidelines on the other charges. Appellant argues that this is particularly so for the VUFA and PIC charges, since possession of a firearm is an element of those charges. (***Id.***) According to appellant, the trial court's sentencing scheme "results in the possession of a single firearm being not doubly or even triply counted

against the Appellant, but quadruply as Appellant received consecutive sentences on the charges of attempted murder, PIC, and §§ 6105 and 6108 of the Uniform Firearms Act." (***Id.***) Appellant contends that the trial court's repeated consideration of the use of a firearm during the commission of the crime to justify increased sentences was inconsistent with the Sentencing Code. (***Id.*** at 40-41.)

"Where the appellant asserts that the trial court failed to state sufficiently its reasons for imposing sentence outside the sentencing guidelines, we will conclude that the appellant has stated a substantial question for our review." ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa.Super. 1999) (***en banc***), citing ***Commonwealth v. Wagner***, 702 A.2d 1084, 1086 (Pa.Super. 1997). Therefore, appellant has presented at least a colorable claim that a substantial question exists, and we may conduct a substantive review of appellant's arguments concerning the discretionary aspects of his sentence to ascertain whether relief is warranted. ***Griffin***, ***supra***.

> The matter of sentencing is vested within the sound discretion of the trial court; we only reverse the court's determination upon an abuse of discretion. To demonstrate that the trial court has abused its discretion, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. Moreover, 42 Pa.C.S.A. § 9721(b) provides that the trial court must disclose, on the record, its reasons for imposing the sentence.

Commonwealth v. Hanson, 856 A.2d 1254, 1257 (Pa.Super. 2004) (citations and internal quotation marks omitted). "[T]he sentencing judge must state of record the factual basis and specific reasons which compelled him or her to deviate from the guideline ranges. When evaluating a claim of this type, it is necessary to remember that the sentencing guidelines are advisory only." ***Griffin***, ***supra*** at 8, citing ***Eby***, ***supra***.

The guidelines are "advisory guideposts" only, that recommend rather than require a particular sentence; they are not mandatory, and the trial courts retain broad discretion in sentencing. ***Commonwealth v. Walls***, 592 Pa. 557, 570, 926 A.2d 957, 964-965 (2007) (citations omitted). We may vacate a sentence outside the guidelines only where the sentencing court abused its discretion in imposing a sentence that is "unreasonable." ***Id.*** at 567-568, 926 A.2d at 963, citing 42 Pa.C.S.A. § 9781(c), (d).

The trial court gave ample reasons, on the record, for its upward deviation from the applicable guideline ranges. The court noted that the shooting occurred on a crowded street in downtown Philadelphia during daylight hours. Appellant put dozens of innocent bystanders in harm's way with his actions. In addition, the trial court properly considered the "ugly" nature of the crime, in which appellant repeatedly shot the victim in the back as he lay wounded, face down on the sidewalk. (Notes of testimony, 9/9/11 at 25.) The trial court heard from the prosecuting attorney, who noted that appellant committed this crime within months of completing parole for

armed robbery. (***Id.*** at 11.) Appellant also refused to take any responsibility for his actions. (***Id.*** at 13.)

We observe that the trial court had the benefit of a pre-sentence investigation report and a mental health evaluation. (***Id.*** at 24.) "Our Supreme Court has ruled that where pre-sentence reports exist, the presumption will stand that the sentencing judge was both aware of and appropriately weighed all relevant information contained therein." ***Griffin***, 804 A.2d at 8, citing ***Commonwealth v. Devers***, 519 Pa. 88, 101-102, 546 A.2d 12, 18 (1988); ***see also Commonwealth v. Fullin***, 892 A.2d 843, 849-50 (Pa.Super. 2006) (stating "[w]here the sentencing judge had the benefit of a pre-sentence report, it will be presumed that he was aware of relevant information regarding appellant's character and weighed those considerations along with the mitigating statutory factors.").

Again, the crux of appellant's argument seems to be that the trial court abused its discretion by relying on the fact that appellant used a firearm in the commission of the crime, where the attempted murder conviction already carried a deadly weapon enhancement, and possession of a firearm was a statutory element of some of the charges, ***i.e.***, the PIC and VUFA charges. (Appellant's brief at 43.) Appellant complains that he is basically being punished multiple times for the same conduct. (***Id.***) We disagree. As described above, the trial court was relying on aggravating factors other than appellant's use of a firearm, including the brutal nature of

the offense. Appellant has cited no authority for the proposition that the trial court cannot sentence outside the guidelines on weapons charges where a deadly weapon enhancement has already been applied on another offense, such as attempted murder. Furthermore, where appellant argues that the trial court abused its discretion by making some of the sentences consecutive rather than concurrent, he has failed to raise a substantial question for our review.

"In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." ***Commonwealth v. Perry***, 883 A.2d 599, 603 (Pa.Super. 2005) (citations omitted).

> Long standing precedent of this Court recognizes that 42 Pa.C.S.A. section 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. ***Commonwealth v. Graham***, 541 Pa. 173, 184, 661 A.2d 1367, 1373 (1995). . . . Any challenge to the exercise of this discretion ordinarily does not raise a substantial question. ***Commonwealth v. Johnson***, 873 A.2d 704, 709 n.2 (Pa.Super. 2005); ***see also Commonwealth v. Hoag***, 445 Pa.Super. 455, 665 A.2d 1212, 1214 (Pa.Super. 1995) (explaining that a defendant is not entitled to a "volume discount" for his or her crimes).

Commonwealth v. Mastromarino, 2 A.3d 581, 586-587 (Pa.Super. 2010), ***appeal denied***, 609 Pa. 685, 14 A.3d 825 (2011), quoting ***Commonwealth v. Gonzalez-Dejusus***, 994 A.2d 595, 599 (Pa.Super. 2010). "[T]he key to

resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Id.*** at 587, quoting ***Gonzalez-Dejusus***, ***supra***.

Here, appellant does not raise a substantial question for our review regarding the sentencing court's decision to run some of his sentences consecutively. The aggregate sentence of 30 to 60 years' imprisonment is neither grossly disparate to appellant's conduct nor does it "viscerally appear as patently 'unreasonable.'" ***Id.*** at 589, quoting ***Gonzalez-Dejusus***, ***supra***. Rather, appellant appears to be seeking a "volume discount" for his crimes on the basis that they occurred close in time and place and involved the same firearm.

Appellant cites ***Commonwealth v. Carmichael***, 707 A.2d 1159 (Pa.Super. 1998), for the proposition that where there are sentences for crimes arising from the same transaction, the deadly weapon enhancement can be applied only once, to the highest graded offense. ***Id.*** at 1161-1162. However, the statute has since been amended to permit the enhancement to apply to multiple offenses occurring at the same transaction. ***See*** 204 Pa.Code § 303.10(a)(4) ("The Deadly Weapon Enhancement shall apply to each conviction offense for which a deadly weapon is possessed or used."). At any rate, the trial court only applied the deadly weapon enhancement once, to the attempted murder conviction; nor could the trial court have

applied the enhancement to appellant's convictions of PIC and VUFA, as those are offenses for which possession of a deadly weapon is an element of the statutory definition. 204 Pa.Code § 303.10(a)(3).

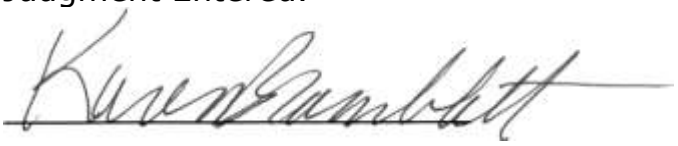
Although framed as a discretionary sentencing claim, appellant's argument in this regard seems more akin to a merger claim. (***See*** appellant's brief at 43 ("imposing consecutive sentences equal to the statutory maximum for charges related to the possession *of that same weapon* renders the sentencing scheme clearly unreasonable") (emphasis in original).) Appellant appears to be arguing that he was unfairly punished multiple times for the same conduct, ***i.e.***, possession of a firearm. However, we observe that appellant's firearms offenses did not merge for sentencing purposes. ***See Commonwealth v. Taggart***, 997 A.2d 1189 (Pa.Super. 2010), ***appeal denied***, 610 Pa. 578, 17 A.3d 1254 (2011) (persons not to carry firearms, 18 Pa.C.S.A. § 6105, and carrying a firearm without a license, 18 Pa.C.S.A. § 6106, do not merge for sentencing purposes because each offense contains an element the other does not); ***Commonwealth v. Baldwin***, 604 Pa. 34, 985 A.2d 830 (2009) (Section 6106, carrying a firearm without a license, and Section 6108, carrying a firearm on the public streets or public property of Philadelphia, do not merge and the trial court did not err in imposing consecutive sentences). Nor did appellant's conviction of PIC merge with his VUFA convictions. ***See Commonwealth v. Kull***, 405 A.2d 1300 (Pa.Super. 1979) (Section 6106 of the UFA and PIC do

not merge; both require possession of the firearm but Section 6106 requires lack of a license and PIC does not require that important essential additional element, but does require intent to employ the instrument criminally), overruled on other grounds by ***Commonwealth v. Campbell***, 505 A.2d 262 (Pa.Super. 1986), ***appeal denied***, 517 Pa. 602, 536 A.2d 1327 (1987). Furthermore, as the trial court observes, it could have imposed consecutive sentences on each conviction, resulting in a maximum aggregate sentence of 117 years' imprisonment. (Trial court opinion, 8/13/12 at 14-15.)

We find the trial court put sufficient reasons on the record to support appellant's sentence of 30 to 60 years' incarceration. Appellant's discretionary sentencing claim fails.

Judgment of sentence affirmed.

Judgment Entered.



Prothonotary

Date: 6/5/2013