NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. THEODORE AARON MCCRACKEN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3295 EDA 2012

Appeal from the Judgment of Sentence September 26, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-0004322-2011

BEFORE: ALLEN, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.: **FILED NOVEMBER 25, 2013**

Appellant, Theodore Aaron McCracken, appeals from the September 26, 2012 aggregate judgment of sentence of two and one-half to five years' imprisonment, to be followed by two years' probation, imposed after a jury found him guilty of access device fraud, identity theft, and theft by unlawful taking or disposition.[1] Contemporaneously with this appeal, counsel has requested leave to withdraw in accordance with ***Anders v. California***, 386 U.S. 738 (1967), and its progeny. After careful review, we grant counsel's

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 4106, 4120, and 3921, respectively.

petition to withdraw and affirm the judgment of sentence on the basis of the well-reasoned trial court opinion.[2]

The lengthy facts of this case were accurately summarized by the trial court in its July 12, 2013 opinion, and we need not reiterate them here. ***See*** Trial Court Opinion, 7/12/13, at 1-5. The procedural history of this case was summarized by the trial court as follows.

> The Commonwealth ultimately charged [Appellant] with the following on Bill of Information 4322-2011: Count One - Access Device Fraud/Unauthorized Use, Counts Two and Three - Identity Theft, and Count Four - Theft By Unlawful Taking or Disposition. After hearing and argument on [Appellant]'s Motion to Suppress, the [trial court] denied [Appellant]'s Motion and issued Findings of Fact and Conclusions of law from the bench.
>
> Before trial, [Appellant] decided to proceed *pro se*. As a result, the [trial c]ourt conducted the required ***Grazier*** hearing and appointed Public Defender, Seth Grant, Esquire, as stand-by counsel. ***See Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998). At the conclusion of [Appellant]'s three-day jury trial, the Commonwealth withdrew Count Three - Identity Theft, and the jury found [Appellant] guilty on the remaining three Counts: Access Device Fraud/Unauthorized Use, Identity Theft, and Theft By Unlawful Taking or Disposition. The [trial c]ourt ordered a Pre-Sentence Investigation (PSI) and after a thorough review of that report, the [trial c]ourt conducted a sentencing hearing on September 26, 2012.[12]

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[2] On August 30, 2013, the Commonwealth filed a letter indicating that it believes that Appellant's claims are devoid of merit and that it will not be filing a formal appellate brief in this matter.

> The Court ultimately sentenced [Appellant] to the following: Count One – imprisonment for not less than two and a half nor more than five years; and, Count Two – imprisonment for not less than two and a half nor more than five years, concurrent with Count One, with probation to run consecutive to the prison term.[13][,] [14]
>
> [12] In advance of sentencing, Commonwealth informed the [trial] court that, based on the jury's findings on the verdict sheet with regard to the specific amount of money taken by [Appellant], Counts III and IV required downgrading amendments be made to the previously submitted guidelines.
>
> [13] Based on the jury's finding as memorialized by its verdict, the Commonwealth agreed to downgrade Count Two from an F-2 to and F-3, and Count Four from an F-3 to an M-1, respectively.
>
> [14] The [trial c]ourt informed [Appellant] of his appellate rights.

Id. at 5-6 (citations to notes of testimony and some footnotes omitted).

On October 3, 2012, Appellant filed a timely *pro se* post-sentence motion. ***See*** Pa.R.Crim.P. 720(A)(1) (stating, "[e]xcept as provided in paragraphs (C) and (D), a written post-sentence motion shall be filed no later than 10 days after imposition of sentence[]"). Thereafter, on October 9 and 16, 2012, Appellant filed *pro se* motions to amend his post-sentence motion. The trial court denied Appellant's post-sentence motion and motions to amend post-sentence motion on October 16, 2012. On October 18, 2012, Appellant filed yet another *pro se* post-sentence motion purporting to correct typographical errors in his prior, 37-page filing. On November 14,

2012, the trial court again denied Appellant's post-sentence motion. On December 3, 2012, Appellant filed both a *pro se* notice of appeal, and a request that counsel be appointed. In accordance with Appellant's request, on December 10, 2012, the trial court appointed counsel from the Montgomery County Public Defender's Office to represent Appellant. By order entered January 17, 2013, this Court directed Appellant to show cause why his appeal should not be quashed as untimely. Counsel filed a timely response on Appellant's behalf on January 28, 2013, and this matter was deferred until appellate review.[3]

Thereafter, on August 20, 2013, Appellant's counsel filed a motion and brief to withdraw from representation in accordance with ***Anders***, ***supra*** and its progeny. On October 7, 2013, Appellant responded to counsel's motion by filing a *pro se* motion for change of appointed counsel. In said motion, Appellant argues "there is an irreconcilable personality conflict between [counsel] and [A]ppellant which has caused [counsel] to be disloyal to [A]pellant's cause and … file[] an ***Anders*** brief in retaliation…." Motion for Change of Appointed Counsel, 10/7/13, at ¶ 6. Appellant further avers he should be appointed a new attorney given that counsel is purportedly "of []Jewish descent[]." ***Id.*** at ¶¶ 8-9. On October 24, 2013, Appellant filed an amended motion for change of appointed counsel, reiterating similar claims.

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[3] We note that both Appellant and the trial court have complied with Pa.R.A.P. 1925.

In his ***Anders*** brief, counsel raises the following issues on Appellant's behalf.

> [1.] Did the Court of Common Pleas of Montgomery County enjoy subject matter jurisdiction to adjudicate the prosecution of the offense against Appellant that originated in the Republic of Camaroon?
>
> [2.] Did the trial court abuse its discretion when it denied Appellant's motion to suppress statements that he had provided to police?
>
> [3.] Are Appellant's convictions for access device fraud, identity theft, and theft supported by legally sufficient evidence of record?
>
> [4.] Did the trial court abuse its discretion when it denied Appellant's motion for a new trial on the basis that the guilty verdicts were against the weight of the evidence?
>
> [5.] Was Appellant denied his right to a fair trial as a result of prosecutorial misconduct and the refusal of the trial court to provide the jury with the requested jury instructions?

Anders Brief at 5.

Prior to addressing both counsel's request to withdraw and the merits of Appellant's arguments, we must first determine whether this Court has proper jurisdiction to hear this appeal. Pursuant to Pennsylvania Rule of Appellate Procedure 903, "the notice of appeal required by Rule 902 … shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa.R.A.P. 903(a). Generally, where a timely post-sentence motion

has been filed, as is the case here, an appeal may be filed within 30 days of the order denying said post-sentence motion. Pa.R.Crim.P. 720(A).

> Additionally, this Court can raise jurisdictional issues *sua sponte. …* **This Court "may not enlarge the time for filing a notice of appeal…." Pa.R.A.P. 105(b). Absent a breakdown in the operations of the court, [t]ime limitations on the taking of appeals are strictly construed and cannot be extended as a matter of grace.**

Commonwealth v. Valentine, 928 A.2d 346, 349 (Pa. Super. 2007) (some citations and internal quotation marks omitted; emphasis added).

Instantly, Appellant was sentenced on September 26, 2012, and his timely post-sentence motion was denied by the trial court on October 16, 2012. Thus, Appellant's *pro se* notice of appeal, deposited in prison mail on November 30, 2012, and docketed with the Clerk of Courts on December 3, 2012, is patently untimely.[4] However, the trial court acknowledged that it "inadvertently omitted certain *caveats*, required by Pa.R.Crim.P. 720(B)(4),[5]" in its October 16, 2012 order, and thus, deemed Appellant's

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[4] We note that Appellant's appeal is untimely, even with the application of the prisoner's mailbox rule. ***See Commonwealth v. Feliciano***, 69 A.3d 1270, 1274 (Pa. Super. 2013) (stating, "pursuant to the prisoner mailbox rule, direct appeals filed by *pro se* appellants are deemed filed on the date that the prisoner deposits the appeal with prison authorities or places it in a prison mailbox[]") (citation and internal quotation marks omitted).

[5] Rule 720(B)(4) provides, in relevant part, that, "[a]n order denying a post-sentence motion, whether issued by the judge ... or entered by the clerk of courts ..., **shall** include notice to the defendant of[,]" *inter alia,* "the right to appeal and the time limits in which the appeal must be filed." Pa.R.Crim.P.
(Footnote Continued Next Page)

appeal timely filed. ***See*** Trial Court Opinion, 7/12/13, at 6, n.15; Trial Court Order, 10/16/12. In light of this administrative breakdown in the court system, we agree. ***See Commonwealth v. Khalil***, 806 A.2d 415, 420 (Pa. Super. 2002) (holding that this Court may reach the merits of an untimely appeal in instances where untimeliness is caused by a breakdown in the court process), *appeal denied*, 818 A.2d 503 (Pa. 2003); ***Commonwealth v. Patterson***, 940 A.2d 493, 498-499 (Pa. Super. 2007) (stating that, "the trial court's failure to comply with Rule 720[(B)(4)] constitutes a breakdown that excuses the untimely filing of Appellant's notice of appeal[]") (citations omitted), *appeal denied*, 960 A.2d 838 (Pa. 2008).

Accordingly, we now turn to counsel's request to withdraw. "When presented with an ***Anders*** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." ***Commonwealth v. Titus***, 816 A.2d 251, 254 (Pa. Super. 2003) (citation omitted). For cases where the briefing notice was issued after August 25, 2009, as is the case here, an ***Anders*** brief shall comply with the requirements set forth by our Supreme Court in ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009).

(Footnote Continued) ———————————

720(B)(4)(a) (emphasis added). "This requirement ensures adequate notice to the ... [appellant], which is important given the potential time lapse between the notice provided at sentencing and the resolution of the post-sentence motion." ***Id.***, Comment.

> [W]e hold that in the ***Anders*** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel 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.

Id. at 361. Additionally, counsel must furnish the appellant with a copy of the brief, advise him in writing of his right to retain new counsel or proceed *pro se*, and attach to the ***Anders*** petition a copy of the letter sent to appellant as required under ***Commonwealth v. Millisock***, 873 A.2d 748, 751 (Pa. Super. 2005). ***See Commonwealth v. Daniels***, 999 A.2d 590, 594 (Pa. Super. 2010) (holding that, "[w]hile the Supreme Court in ***Santiago*** set forth the new requirements for an ***Anders*** brief, … the holding did not abrogate the notice requirements set forth in ***Millisock*** that remain binding legal precedent") (footnote omitted). "After counsel has satisfied these requirements, we must conduct our own review of the trial court proceedings and independently determine whether the appeal is wholly frivolous." ***Titus***, ***supra*** at 254 (citation omitted).

In the instant matter, we conclude that counsel's extensive ***Anders*** brief complies with the requirements of ***Santiago***, ***supra***. First, counsel has provided a procedural and factual summary of the case with references to

the record. Second, counsel advances relevant portions of the record that arguably support Appellant's five distinct claims on appeal. Third, counsel states his conclusion that there are "no other issues of arguable merit that [he] could raise on [Appellant's] behalf[,]" and that the appeal is "frivolous." ***See Anders*** Brief at 66-67. Lastly, counsel has complied with the requirements set forth in ***Millisock***, ***supra***. As a result, we proceed to conduct an independent review to ascertain if the appeal is indeed wholly frivolous.

Instantly, counsel raises five distinct claims of trial court error on Appellant's behalf. ***See Anders*** Brief at 12-67. The trial court, in turn, has authored a comprehensive, 31-page opinion that sets forth its reasoning for rejecting each of the aforementioned claims. Specifically, the trial court first found that, contrary to Appellant's contentions that jurisdiction in this case properly lies in the Republic of Cameroon, Africa, "[it] had jurisdiction to adjudicate [Appellant's] charges." Trial Court Opinion, 7/12/13, at 10-11. The trial court next concluded that Appellant's motion to suppress various incriminating statements he made to police was properly denied, as Appellant essentially acknowledged during the suppression hearing that he made the unsolicited statements at issue, and "[t]he record aptly supports the [trial court's] factual findings and credibility determinations…." ***Id.*** at 13-15, *citing* N.T., 5/21/12, 38-40, 48-52, 55-56. Additionally, the trial court concluded that, based on the credible testimony of both the victim,

Eunice Jean McCracken, and Detective Raymond T. Royds, Jr., the Commonwealth produced sufficient evidence to support Appellant's convictions, and "the jury's verdict does not, in any way, shock one's sense of justice." ***Id.*** at 15-21, 23-25. Lastly, the trial court concluded that Appellant's contentions he was denied a fair trial because of prosecutorial misconduct and adverse evidentiary rulings that prevented him from introducing evidence to support his affirmative defenses are entirely devoid of merit. ***See id.*** at 25-29.

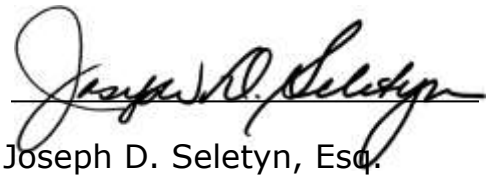
We have reviewed the record in its entirety and have considered the merit of Appellant's claims. Upon careful review of the certified record, including the applicable law, counsel's ***Anders*** brief, and Appellant's response thereto, and in light of this Court's scope and standard of review, we conclude that the trial court's conclusions were entirely proper. The well-reasoned opinion of the trial court provides a detailed analysis of the well-settled law of this Commonwealth as related to the facts of this case. The trial court then wholly refutes each of Appellant's arguments.

Based on the forgoing, we adopt the trial court's July 12, 2013 opinion as our own for purposes of this appellate review, and consequently, agree with counsel that Appellant's appeal is "wholly frivolous." ***Titus***, ***supra*** at

254. Accordingly, we grant counsel's petition to withdraw and affirm the trial court's September 26, 2012 judgment of sentence.[6]

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013

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[6] In light of our disposition, we deny Appellant's October 7, 2013 *pro se* motion for change of appointed counsel, and his October 24, 2013 *pro se* amended motion for change of appointed counsel.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA: NO. 4322-11
3295 EDA 2012

v.

THEODORE AARON MCCRACKEN

3295 EDA 2012

2013 JUL 12 AM 10:21

OFFICE OF JUDICIAL SUPPORT
MONTGOMERY COUNTY
PENNSYLVANIA

OPINION OF THE COURT

Branca, J. July 12, 2013

I. INTRODUCTION

Defendant, Theodore Aaron McCracken, appeals to the Superior Court from the judgment of sentence imposed by this Court on September 26, 2012.[1] Defendant claims that the Court committed a series of errors, all of which undermine his convictions. For the reasons that follow, Defendant's appeal is without merit.

II. STATEMENT OF THE CASE

A. Factual and Procedural History

On April 25, 2011, Defendant's 85-year old mother, Eunice Jean McCracken ("Ms. McCracken"), who resides at 15 Derry Drive, North Wales, Montgomery County, Pennsylvania, contacted the Upper Gwynedd Township Police to report that her identity had been stolen. [N.T. 5/22/12, at 45-46; 134]. Detective Raymond T. Royds, Jr. ("Det. Royds") of the Upper Gwynedd Township Police Department was assigned to investigate Ms. McCracken's case, and later arrested Defendant, who was approximately 58 years old at the time. [N.T. 5/22/12, at 133-34; 140; 162].

[1] By *Per Curiam* Order dated January 29, 2013, the Superior Court dismissed, as duplicative, Defendant's companion appeal 3495 EDA 2012.

Ms. McCracken reported an unauthorized Air France charge of $1,062.90 on March 30, 2011 on her AT&T credit card ("Credit Card"), and two unauthorized $700.00 withdrawals on April 18, 2011 from her Citizens Bank checking account ending in x1498 ("Bank Account") via PayPal activity on April 16, 2011.[2] [N.T. 5/22/12, at 53-54; 138].

March 30, 2011 Unauthorized Credit Card Charges

Ms. McCracken reported that, on March 30, 2011, she had received a telephone call from her Credit Card company to report unusual activity on her Credit Card. [N.T. 5/22/12, at 48]. That unusual activity turned out to be the unauthorized purchase of a single Air France plane ticket by Defendant, who resided with her in North Wales, in the amount of $1,062.90. [N.T. 5/22/12, at 47- 49]. Det. Royds testified that the records he received from Air France indicated Defendant as the passenger for the ticket purchased on March 30, 2011. [N.T. 5/22/12, at 136-38]. A flight manifesto further indicated that, on March 30, 2011, Defendant flew on Flight # 39 from Dulles International Airport, in Washington, D.C., to Charles De Gaulle Airport, in Paris, France. Then, on April 10, 2011, Defendant flew from Paris to Airport DLW in Douala, Cameroon.

Ms. McCracken reported that she had allowed Defendant to use her credit card, but ***only*** for business purposes to buy equipment that he needed for his heating and air conditioning business. [N.T. 5/22/12, at 47]. In addition, to help her son with his business endeavors, Mrs. McCracken had bought him a computer that he kept in his bedroom. [N.T. 5/22/12, at 48]. Ms. McCracken confirmed that Defendant was the only person who ever used the computer. [Id.]. Ms. McCracken elaborated that the March

[2] An "access device" is defined as "[a]ny card, including, but not limited to, a credit card, debit card and automated teller machine card, . . . account number, personal identification number or other means of account access that can be used alone or in conjunction with another access device to obtain money, . . . or that can be used to transfer funds." 18 Pa. C.S. § 4106(d).

30th Air France purchase was actually the ***second*** time Defendant had used her Credit Card, without her authorization or knowledge, to purchase a plane ticket from Air France. [N.T. 5/22/12, at 57; C-5]. On November 16, 2010—the first occasion—a $723.06 Air France charge had posted to Ms. McCracken's Credit Card and she canceled it. [N.T. 5/22/12, at 97; Ex. C-4]. After that incident, Ms. McCracken testified that she had explicitly warned Defendant that she could not afford such charges and that Defendant was only to use her Credit Card for business purposes. [N.T. 5/22/12, at 50-51; 57; 103-105]. Concerned about the consequences her son might suffer if she reported the second unauthorized Air France charge, and hoping to give Defendant one more chance, Ms. McCracken admitted that she did not immediately contact the police. [N.T.5/22/12, at 51-54]. In fact, despite her testimony about the financial harm she personally suffered as a consequence of her son's unauthorized charges, she had decided to shoulder the financial burden he had foisted upon her for the time being. [N.T. 5/22/12, at 99; 105].[3]

April 16,[4] 2011 Unauthorized Bank Account Withdrawals

In fact, it was not until almost three weeks later when Ms. McCracken went to deposit her Macy's paycheck at her bank—Citizens Bank in North Wales, Montgomery County—that she learned of two unauthorized $700.00 withdrawals, via PayPal,[5] which Defendant had made on April 16, 2011. [N.T. 5/22/12, at 52-54; Ex. C-2, C-3]. Ms. McCracken, who had never authorized, let alone provided any of her bank account information to Defendant, immediately contacted her bank and thereafter, reported these

[3] Ms. McCracken executed two Intent To Prosecute cards on April 25, 2011 and June 10, 2011, respectively. [N.T. 5/22/12, at 148].
[4] While the record reflects that Defendant accessed PayPal on April 16, 2011, the funds were apparently not withdrawn from Ms. McCracken's Bank Account until April 18, 2011. [Ex. C-2, C-3].
[5] Ms. McCracken had never registered for a PayPal account and denied having any knowledge whatsoever of PayPal, including ever granting Defendant permission to open a PayPal account in her name. [N.T. 5/22/12, at 56].

incidents to the Upper Gywnedd Police. [N.T. 5/22/12, at 54-56; 105-106]. As part of his investigation, Det. Royds sought and received certified records from PayPal, including more than a hundred pages of documents, detailing Defendant's PayPal activity. [N.T. 5/22/12, at 135]. Det. Royds, who reviewed the relevant PayPal records, testified that they indicated that the withdrawals were made by Defendant from an IP address, registered with an internet service provider, Cameroon Telecommunications, located in Cameroon. [N.T. 5/22/12, at 138].

Upon his return to the United States, Defendant was apprehended by law enforcement. On June 9, 2011, Det. Royds and his partner, Detective Jonathan Kelcy, ("Det. Kelcy") traveled to Queens County, New York to retrieve Defendant from the Queens County Criminal Court where he was being held. [N.T. 5/22/12, at 140]. Det. Royds testified that during transport, Defendant complained that his charges were "a bunch of bullshit," and that since the charges were only for $744.00, they should "only be misdemeanors." [N.T. 5/22/12, at 140-41].

Later at trial, Defendant admitted using his mother's Credit Card and accessing her Bank Account. [N.T. 5/22/12, 162; 167]. And despite his admission that he and his mother had some type of falling out and were not communicating, Defendant claimed he had her consent to use her Credit Card and her Bank Account because he was under duress as a result of some terrible state of conflagration in Cameroon. [N.T. 5/22/12, at 30-39; 61-65; 162-67].

At Defendant's sentencing hearing on September 26, 2012, Mrs. McCracken provided a victim impact statement, explaining that her son's criminal conduct had created a "very emotional, physical, exhausting, stressful, hurtful experience" for her.

[N.T. 9/26/12, at 8]. "My savings are gone. I am 86 years old. I am not going to be able to work much longer." [*Id.*]. When Ms. McCracken concluded her statement, the Court instructed Mrs. McCracken to step down from the witness stand at which point Defendant interrupted, asking "[d]o I get a chance to ask any questions?" [N.T. 9/26/12, at 9]. Defendant then proceeded to cross-examine Mrs. McCracken, who was visibly uncomfortable and referred to him in the third person when asked about his conduct. [Id.] While Defendant opted to exercise his right to allocution, he failed to utilize that opportunity to apologize to the victim in this case—his own mother. [N.T. 9/26/2012, at 13].

B. Procedural History

The Commonwealth ultimately charged Defendant with the following on Bill of Information 4322-2011: Count One-Access Device Fraud/Unauthorized Use,[6] Counts Two and Three- Identity Theft,[7] and Count Four-Theft By Unlawful Taking or Disposition.[8] After hearing and argument on Defendant's Motion to Suppress, the undersigned denied Defendant's Motion and issued Findings of Fact and Conclusions of law from the bench. [N.T. 5/21/12, at 53-56].

Before trial, Defendant decided to proceed *pro se.* As a result, the Court conducted the required *Grazier* hearing and appointed Public Defender, Seth Grant, Esquire, as stand-by counsel. *See Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998). At the conclusion of Defendant's three-day jury trial, the Commonwealth withdrew Count Three-Identity Theft, and the jury found Defendant guilty on the remaining three Counts:

[6] 18 Pa. C.S. § 4106(a)(1)(ii).
[7] 18 Pa. C.S. § 4120(a).
[8] 18 Pa. C.S. § 3921(a).

Access Device Fraud/Unauthorized Use,[9] Identity Theft,[10] and Theft By Unlawful Taking or Disposition.[11] [N.T. 5/22/12, at 111-13; 5/23/12 at 16-20; 9/26/12, at 4]. The Court ordered a Pre-Sentence Investigation (PSI) and after a thorough review of that report, the Court conducted a sentencing hearing on September 26, 2012. [N.T. 9/26/12, at 21].[12]

The Court ultimately sentenced Defendant to the following: Count One- imprisonment for not less than two and a half nor more than five years; and, Count Two- imprisonment for not less than two and a half nor more than five years, concurrent with Count One, with probation to run consecutive to the prison term.[13] [N.T. 9/26/11, at 23-28].[14] Thereafter, on October 3, 2012, Defendant filed a *pro se* Post-Sentence Motion, which the undersigned denied on October 16, 2012.[15] On December 3, 2012, Defendant filed both a *pro se* Notice of Appeal challenging the imposition of his sentence, and a request that the Court appoint counsel.[16] In accordance with Defendant's request, the Court appointed the Public Defender's Office to represent Defendant on appeal on December 10, 2012.[17]

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[9] 18 Pa. C.S. § 4106(a)(1)(ii).
[10] 18 Pa. C.S. § 4120(a).
[11] 18 Pa. C.S. § 3921(a).
[12] In advance of sentencing, Commonwealth informed the court that, based on the jury's findings on the verdict sheet with regard to the specific amount of money taken by Defendant, Counts III and IV required downgrading amendments be made to the previously submitted guidelines. [N.T. 9/26/11, at 2-6].
[13] Based on the jury's finding as memorialized by its verdict, the Commonwealth agreed to downgrade Count Two from an F-2 to and F-3, and Count Four from an F-3 to an M-1, respectively. [N.T. 9/26/12, at 2-6].
[14] The Court informed Defendant of his appellate rights. [N.T. 9/26/12, at 24-25].
[15] The Court acknowledges having inadvertently omitted certain *caveats*, required by Pa. R. Crim. P. 720(B)(4), and will thus deem timely Defendant's otherwise untimely Notice of Appeal. *See Commonwealth v. Patterson*, 940 A.2d 493, 498-500 (Pa. Super. Ct. 2007) (Failure to include certain Pa. R. Crim. P. 720(B)(4)(a) notices in court's order denying defendant's post-sentence motion constituted a 'breakdown,' excusing defendant's untimely appeal.).
[16] The record in this case was delayed by errors in the Notes of Testimony, which required correction. [See N.T. 5/21/12, filed on 6/4/13].
[17] As aptly demonstrated by a litany of *pro se* filings, Defendant vacillated for a period of months in the Spring of 2013 between wanting to proceed *pro se* or with the aid of court-appointed counsel. While Defendant ultimately opted to proceed with counsel, the record in this case is somewhat delayed as a consequence of Defendant's indecision and the Court's review and scheduling of the mandated *Grazier* hearing to resolve the matter. *See Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998).

III. ISSUES PRESENTED

On December 20, 2012, Defendant filed a timely Pa. R.A.P. 1925(b) Statement ("1925(b) Statement") setting forth the following for appellate review:

1. Appellant McCracken insists that the learned trial court committed reversible legal error when it denied his motion to dismiss the charges stemming from the 16 April 2011 cash withdrawals made in Cameroon, Africa, on the basis of a lack of jurisdiction in that:

    a. Appellant's conduct in making two (2) $700.00 withdrawals on 16 April 2011 in Cameroon, Africa, did not constitute an offence in Pennsylvania in that the provisions of the Pennsylvania Crimes Code do not have extra-territorial application where the entire conduct charged occurs outside of the territory of the Commonwealth. See 18 Pa. C.S. § 102 (relating to territorial applicability); and

    b. Section 3921(a) of the crimes Code, 18 Pa. C.S. § 3921(a) has no venue provision, unlike either the Identity Theft statute or the Access Device statute, and the violations of that statute based upon Appellant's conduct in Cameroon, Africa, should have been dismissed as raised in Appellant's motion for writ of *habeas corpus*.

2. Appellant McCracken insists that the learned trial court abused its discretion and committed reversible legal error when it denied Appellant McCracken's motion to suppress statements that he had previously made to law enforcement personnel.

3. Appellant McCracken insists that the learned trial court abused its discretion when it denied his post-sentence motion for a new trial on the basis that the guilty verdicts were against the weight of the evidence because:

    a. Appellant was charged with theft from his mother as a result of a charge in the amount of $1,062.00 occurring on 30 March 2011, which charge was for an airline ticket to Cameroon, Africa, to visit Appellant's injured wife, and two withdrawals in the amount of $700.00 each on 16 April 2011;

    b. The Commonwealth improperly joined those three (3) events, arguing, pursuant to ***Commonwealth v. Pustilik***, 9 Phila. Co. Rep. 35 (Pa. C.P. 1982), that those three (3) occurrences, occurring two (2) weeks apart and more than five thousand miles (5,000) apart, were part of a single criminal scheme or episode;

    c. The learned trial court improperly joined those distinct and disparate events over Appellant McCracken's objections;

d. The Commonwealth's complaining witness, Eunice Jean McCracken, admitted at trial that she had given Appellant McCracken her Citibank credit card and had authorized him to make purchases on said card for use with respect to Appellant's heating, ventilation, and air conditioning (HVAC) business;

e. Appellant McCracken provided record from PayPal, an online payment service, showing a pattern of payment from the PayPal account to Ms. McCracken's Citizens Bank account;

f. The Commonwealth's complaining witness, Ms. McCracken, conceded that she had allowed Appellant McCracken to use her credit card for personal expenses in the past and that Appellant had repaid her for those purchases; and

g. Appellant McCracken presented the affirmative defence that he planned on re-paying the funds to his mother, as was the course of conduct that the two of them had previously established, and further that his actions were the result of significant duress, i.e., the news that his wife in Cameroon, Africa, had been seriously injured in a hit-and-run motor vehicle crash and was subsequently raped, which affirmative defences the Commonwealth failed to disprove.

4. Appellant McCracken further insists that the learned trial court abused its discretion when it denied Appellant's post-sentence motion for an arrest of judgment and for entry of a judgement of acquittal in that:

a. There is legally insufficient evidence to support the guilty verdicts with respect to the offences of Identity Theft, Access Device Fraud, and Theft by Unlawful Taking;

b. The testimony of the Commonwealth's complaining witness, Eunice Jean McCracken, was contradictory and inconsistent with respect to the scope of use that she allowed Appellant with respect to her Credit credit card;

c. Ms. McCracken had testified that Appellant had previously used her Credit credit card for personal expenses and had previously repaid her for such charges;

d. Appellant McCracken's affirmative defences of lack of intent to defraud and duress were not disproven by the Commonwealth;

e. The Commonwealth's complaining witness, Eunice Jean McCracken, conceded that it was her normal practice to assist her son financially in times of emergency and had actually provided Appellant with the account number for her Citizens Bank account;

f. The learned trial court improperly denied Appellant [*sic*] to establish that the Commonwealth's complaining witness, Eunice Jean McCracken, owed Appellant money;

g. Appellant McCracken provided records from PayPal, an online payment service, showing a pattern of payments from the PayPal account to Ms. McCracken's Citizens Bank account;

5. Appellant McCracken insists that he was denied a fair and impartial trial and should be granted a new trial in that:

a. The learned trial court refused to give the jury nineteen (19) suggested jury instructions provided by Appellant McCracken on issues such as the intent to defraud; intent to return money defence; jurisdiction; consent; duress, and mistake;

b. The learned trial court committed reversible legal error and prejudiced Appellant's defence when it sustained Commonwealth objections to Appellant's questions of the Commonwealth's complaining witness as to whether she owed Appellant money; that she would allow Appellant access to her Citizens Bank account in times of emergencies; which severely hampered Appellant's affirmative defences;

c. Assistant District Attorney Bunn engaged in repeated prosecutorial misconduct during closing argument by repeatedly calling Appellant McCracken a "liar," N.T. 23 May 12, pp. 216-225, thereby improperly impressing upon the jury his opinion of Appellant's credibility, which only served to prejudice the jury against Appellant and exceeded the scope and bounds of proper closing argument. ***See Commonwealth v. Russell***, 456 Pa. 559, 322 A.2d 127 (1974); ***Commonwealth v. Lipscomb***, 455 Pa. 525, 317 A.2d 205 (1974); ***Commonwealth v. Valle***, 240 Pa. Super. 411, 362 A.2d 1021 (1976); and

d. The Assistant District Attorney engaged in further prosecutorial misconduct when he vouched for the credibility of the Commonwealth's own witnesses while opinion [*sic*] that the defence witnesses were not worthy of belief, N.T., 23 May 12, p. 216, which only further served to inflame the jury against Appellant. ***See Commonwealth v. Harwell***, 458 Pa. 406, 327 A.2d 27 (1974) (prosecutor, in closing argument, my [*sic*] not express opinions regarding defendant's guilt, credibility or trial strategy).

IV. DISCUSSION

Despite the prolixity of Defendant's seven-page 1925(b) Statement, the Court will address the issues as it gleans them.

A. The Court Properly Denied Defendant's Motion To Dismiss.

First, Defendant claims that the trial court erred when it denied his Motion To Dismiss the charges stemming from his April 16, 2011 cash withdrawals in Cameroon, Africa. More specifically, Defendant claims the Court lacked jurisdiction to dispose of his charges because the Pennsylvania Crimes Code does not have extra-territorial application where the entire conduct charged occurs outside of the territory of the Commonwealth.

Preliminarily, the Court notes that Defendant, who opted of his own volition to proceed *pro se* throughout the pre-trial and trial phases, filed no less than eighteen *pro se* motions in the five months preceding his trial, several of which were titled as Motions to Dismiss.[18] Despite Defendant's first contention of error, the Court had jurisdiction to properly adjudicate Defendant's charges.

Jurisdiction, which is purely a question of law, is subject to *de novo* review. *Commonwealth v. Hemingway*, 13 A.3d 491, 496 (Pa. Super. Ct. 2011). As set forth

[18] *See e.g.*, Pro Se Petition For Habeas Corpus, filed 1/19/12, Amended Pro Se Omnibus Pre-Trial Motion, filed 1/20/12, Pro Se Motion For Second Preliminary Hearing, filed 1/30/12, Amended Pro Se Motion To Stay Proceedings: Jury Selection And To Dismiss Array of Jurors, filed 1/30/12, Pro Se Petition For Writ Of Habeas Corpus, filed 2/7/12, Pro Se Motion To Downgrade Each Identity Theft Charge, filed 2/7/12, Pro Se Motion To Dismiss Based On Selective Prosecution And Prosecutorial Vindictiveness, filed 2/7/12, Amended Pro Se Petition For Writ Of Habeas To Dismiss Four Criminal Charges, 2/7/12, Pro Se Motion To Reduce Bail, filed 3/1/12, Pro Se Motion To Withdraw, filed 3/1/12, Pro Se Supplement To Amended Omnibus Pretial Motion, filed 3/8/12, Pro Se Motion For Access To Law Library And Termination Of Standby Counsel, filed 3/21/12 , Pro Se Motion To Consolidate Omnibus Pretrial Motion/Motion To Dismiss Informations, filed 3/27/12, Pro Se Motion To Dismiss, filed 5/11/12, Pro Se Motion To Dismiss One (1) Count Of Identity Theft, filed 5/18/12, Pro Se Motion To Amend/Supplement Amended Petition For Habeas Corpus, filed 5/18/12, Supplemental Pro Se Motion To Dismiss Based Upon Selective Prosecution And Vindictiveness, filed 5/18/12, Pro Se Motion To Dismiss Based Upon Statue [sic] Of Limitations, filed 5/18/12; [*see also*, N.T. 5/21/12, at 4].

below, pursuant to 18 Pa. C.S. § 102(a)(4),which governs the territorial applicability of the Pennsylvania Crimes Code, this Court has jurisdiction to dispose of Defendant's charges:

> [A] person may be convicted under the law of this Commonwealth of an offense committed by his own conduct . . . if . . . [the] conduct occurring within this Commonwealth establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which is also an offense under that law of this Commonwealth.

In this case, Defendant's deceptive conduct, including, but not limited to, accessing his mother's confidential Bank Account information and utilizing it to create a PayPal account, and using her Credit Card to purchase an Air France ticket—all without her authorization—suffice to establish the requisite complicity to commit each enumerated crime with which he was charged. *See* 18 Pa C.S. § 102(a)(4); [N.T. 5/22/12, at 54-56; 105-106; 135-38].

The fact that Defendant was in Cameroon when he made two $700.00 withdrawals from his mother's Bank Account does not divest this Court of jurisdiction to adjudicate the charges levied against him by the Commonwealth. The record reflects that before his departure Defendant took the necessary steps including, but not limited to stealing his mother's Bank Account information and setting up a PayPal account, to ensure access to his mother's Bank Account, located in Montgomery County. Accordingly, Defendant's claim of error fails.

B. The Trial Court Properly Denied Defendant's Motion To Suppress.

Next, Defendant claims that the Court erred as a matter of law and abused its discretion by denying his Motion to Suppress, which asserted that the police transporting

him from New York to Montgomery County had induced him to make certain incriminating statements. Despite Defendant's assertion, the Court appropriately found that the statements Defendant sought to suppress were spontaneous, and thus not subject to suppression. [N.T. 5/21/12, at 54].

The appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is "whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct." *Com. v. Ligons*, 971 A.2d 1125, 1148 (Pa. 2009) (citing *Com. v. Eichinger*, 915 A.2d 1122, 1134 (Pa. 2007)). Furthermore, where a defendant challenges an adverse ruling of the suppression court, the reviewing court will consider only the evidence of the Commonwealth and whatever defense evidence remains un-contradicted in the record. *Id.* The reviewing court is bound by the factual determinations of the suppression court which are supported by the record and may reverse only if the legal conclusions drawn from those facts are erroneous. *Id.*

It is well-settled that:

> not every statement made by an individual during a police encounter constitutes an interrogation. *Miranda* rights are required only prior to a custodial interrogation. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [his] freedom of action in any significant way. Furthermore, volunteered or spontaneous utterances by an individual are admissible without the administration of *Miranda* warnings. When a defendant gives a statement without police interrogation, we consider the statement to be volunteered and not subject to suppression . . . . Interrogation is police conduct calculated to, expected to, or likely to evoke admission.

Commonwealth v. Page, 59 A.3d 1118, 1131 (Pa. Super. Ct. 2013). Our Supreme Court has routinely held that statements made in custodial settings need not be suppressed

where suspects spontaneously 'blurt out' certain comments or incriminate themselves in the course of 'small talk.' *See Page*, 59 A.3d at 1131-32 (Pa. Super. Ct. 2013) (internal quotations and citations omitted); *Commonwealth v. Sepulveda*, 855 A.2d 783, 796-97 (Pa. 2004).

In this case, Det. Royds testified that, on June 9, 2011, he and his partner, Detective Jonathan Kelcy, traveled to Queens County, New York to retrieve Defendant from the Queens County Criminal Court where he was being held. [N.T. 5/21/12, at 37, 45; 5/22/12, at 140]. After taking custody of Defendant, Det. Royds provided him with a copy of the Criminal Complaint which had been filed against him to provide him with a basis for his arrest. [N.T. 5/21/12, at 42-43]. Having been informed by the sitting Judge in Queens County Criminal Court that Defendant was represented by counsel, Det. Royds confirmed that he did not initiate any conversation with Defendant. [N.T. 5/21/12, 38-40]. Nonetheless, Defendant made the following un-solicited statements, as memorialized by Det. Royds during transport from New York to Pennsylvania:

> Mr. McCracken advised he was going to sue me for false arrest and that these charges were, quote, a bunch of bullshit and that they would only—they should only be misdemeanors. A little after that at 1305 hours we turned the air conditioner up to max per his request. At 1417 hours Mr. McCracken just started laughing. I asked him if he was alright, and he replied that he thought I [*sic*] was seeing double. And then at 1501 hours – and I know that because it was right before pulling into District Justice Murray's parking lot, Mr. McCracken said that it was only two withdrawals for $744 each that occurred on two separate days and that they should only be misdemeanors. I just thought it was funny because we were dealing with the issue of $700, not $744.

[N.T. 5/21/12, at 39].

At the hearing on Defendant's Motion to Suppress, Defendant took the witness stand and the following discourse ensued:

MR. MCCRACKEN: When I was put into the vehicle, I was given a criminal complaint. . . . As I read the report, certain questions came up and I may have asked a question of the police officer—I may have asked a question. But they were not spontaneous statements. They were [*sic*] a question regarding his criminal complaint that he had given to me. And it was – he mentioned spontaneous statements. They were not spontaneous, they were regarding his criminal complaint which he had initiated, he had given to me.

• • •

THE COURT: If I understand your position, Mr. McCracken, and correct me if I'm wrong, it sounds like to me that you're saying to me that the detective gave you the criminal complaint and that was a precipitating factor that the detective gave you that in order to elicit statements from you. Is that your position?

MR. MCCRACKEN: Absolutely.

THE COURT: Okay. So, he didn't question you per se, initiate any questioning of you, but he gave you the complaint, and you believe he gave you that so it would elicit some response from you; is that accurate?

MR. MCCRACKEN: That is correct. He also made—during the course of the trip he asked me if there's any questions while we were driving down the Jersey Turnpike.

[N.T. 5/21/12, at 48-52].

For its part, the Court found "no significant dispute" between Det. Royds's testimony and that elicited from Defendant, in that he had essentially admitted making the unsolicited statements at issue. [N.T. 5/21/12, at 55-56]. To the extent the Court found differences in the testimony, it found Det. Royds credible and determined that Det. Royds did not initiate any questioning of Defendant, and instead, Defendant's statements during transport were spontaneous. [N.T. 5/21/12, at 54-56]; *See Page*, 59 A.3d at 1131-32 (Pa. Super. Ct. 2013).

Concluding that Det. Royds had fully complied with the Court's instructions to him, and that he had only given Defendant a copy of his criminal complaint to inform

Defendant, the Court denied Defendant's Motion to Suppress. [N.T. 5/21/12, 56]. The record aptly supports the undersigned's factual findings and credibility determinations, and, therefore, the Court properly denied Defendant's Motion to Suppress.

C. The Commonwealth Produced Sufficient Evidence To Support Defendant's Convictions.

The trial Court acted well within its discretion when it denied Defendant's Post-Sentence motion for arrest of judgment and acquittal on the convictions of Identity Theft, Access Device Fraud, and Theft By Unlawful Taking because the Commonwealth proved the elements required of each of the crimes beyond a reasonable doubt. The evidence presented by the Commonwealth, including testimony by the victim, Ms. McCracken, and Det. Royds, was more than sufficient to support the convictions at issue.

Upon a motion for arrest of judgment, the trial court is "limited to ascertaining the absence or presence of that quantum of evidence necessary to establish the elements of the crime." *See Commonwealth v. Marquez*, 980 A.2d 145, 147-48 (Pa. Super. Ct. 2009) (quoting *Commonwealth v. Melechoi*, 658 A.2d 1385, 1387 (Pa. Super. Ct. 1995)). Similarly, a motion for judgment of acquittal "challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge." *Commonwealth v. Andrulewicz*, 911 A.2d 162, 165 (Pa. Super. Ct. 2006).

Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Pettyjohn*, 64 A.3d 1074-75 (Pa. Super. Ct. 2013); *Commonwealth v. Morgan*, 913 A.2d 906, 910 (Pa. Super. Ct. 2006). Only

where the evidence offered to support the verdict is in contradiction to the physical laws of nature, will that evidence be deemed insufficient as a matter of law. *Id.* Furthermore, when reviewing a sufficiency claim, the Court is "obliged to determine whether the evidence presented at trial and all reasonable inferences derived therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner, are sufficient to satisfy all elements of the offense beyond a reasonable doubt." *Commonwealth v. Johnson*, 42 A.3d 1017, 1025 (Pa. 2012). "The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." *Commonwealth v. Coleman*, 19 A.3d 1111, 1117 (Pa. Super. Ct. 2011). Finally, any doubts concerning a defendant's guilt must be resolved by the fact-finder, "unless the evidence is so weak and inconclusive that as a matter of law no probability of fact could be drawn" from it. *Commonwealth v. Sanchez*, 907 A.2d 477, 491 (Pa. 2006) (internal citation omitted). Appellate courts are, therefore, justifiably reluctant to substitute their judgments for those of the fact-finder. *Id.*

i. Identity Theft

Pursuant to 18 Pa. C.S. Section 4120(a), a person commits identity theft "if he possesses or uses, through any means, identifying information of another person without the consent of that other person to further any unlawful purpose." At trial, Ms. McCracken testified that, on March 30, 2011, Defendant used her Credit Card, without her consent, to purchase an Air France plane ticket. [N.T. 5/22/12, at 49]. In addition, Ms. McCracken and Det. Royds both testified that, on April 18, 2011, Defendant made two unauthorized $700.00 withdraws, from Ms. McCracken's Bank Account. [N.T. 5/22/12, 49-54; 106; 134-39; Ex. C-2, C-3]. The evidence introduced by the

Commonwealth established that, in or around 2007, Defendant created a PayPal account, linked to Ms. McCracken's Bank Account, without her knowledge or consent. [N.T. 5/22/12, at 56, 135; 177-80]. During the course of his investigation, Det. Royds received PayPal records indicating that the two $700.00 withdraws were initiated by Defendant on April 16, 2011, from Cameroon. [N.T. 5/22/12, at 138].

In addition, Det. Royds had an Air France flight manifesto, confirming that Defendant had flown to Cameroon on April 10, 2011. [N.T. 5/22/12, at 136-38]. As previously indicated, the only defenses Defendant asserted for making the Bank Account withdrawals was that he was acting under duress and intended to pay his mother back. [N.T. 5/22/12, at 30-39; 61-65; 140-41; 162-67]. Ms. McCracken, for her part denied ever providing Defendant with access to her Bank Account. In addition, she testified Defendant never paid her back all the money he owed her from using her Credit Card. [N.T. 5/22/12, at 54-56; 77-84; 105-106; 135]. The record, therefore, contained adequate evidence to contradict Defendant's asserted defenses.

As demonstrated, the Commonwealth provided sufficient evidence of record to establish that Defendant used both his mother's Credit Card and Bank Account information without her consent. *See* 18 Pa. C.S. § 4120(a). Therefore, the trial court properly denied Defendant's Post-Sentence Motion with regard to his judgment of sentence for Identity Theft.

ii. Access Device Fraud

Pursuant to 18 Pa. C.S. Section 4106(a)(1)(ii), a person commits access device fraud if he "uses an access device to obtain or in an attempt to obtain property or services

with knowledge that the access device was issued to another person who has not authorized its use."

All of the evidence presented above, regarding Defendant's unauthorized Bank Account withdrawals, is equally applicable and sufficient to convict him of Access Device Fraud. *See* 18 Pa. C.S. § 4106(a)(1)(ii). In addition, Ms. McCracken testified that, on March 30, 2011, Defendant used her Credit Card, without her consent, to purchase an Air France plane ticket. [N.T. 5/22/12, at 49]. Det. Royds, for his part, testified that Defendant was identified as the passenger on that Air France ticket and that the flight manifesto confirmed that Defendant traveled from the U.S., to France, and ultimately, to Cameroon on the dates in question. [N.T. 5/22/12, at 136-38]. Ms. McCracken testified unequivocally that she had never granted Defendant permission to use her Credit Card for non-business purposes— let alone an Air France plane ticket. [N.T. 5/22/12, at 49].

Despite Defendant's claim, the 86-year old Ms. McCracken testified consistently and unequivocally that Defendant was only permitted to use her Credit Card for business purposes. [N.T. 5/22/12, at 47-51; 57; 103-105]. Moreover, the fact that she cancelled her Credit Card as soon as she learned of the Air France charge is further evidence that she never authorized Defendant to make such a purchase. [N.T. 5/22/12, at 49-50]. Defendant's bald assertion that he lacked the intent to steal from his mother or defraud her proved unavailing to the jury. Here, Defendant mustered insufficient evidence of record to convince the jury that he had permission to use the Credit Card for non-business purposes; nor, that he intended to repay all that he owed his mother for any

unauthorized/non-business charges.[19] [N.T. 5/22/12, at 61-65; 77-84]. Most importantly, he failed to provide any evidence of record to establish that his mother consented to his use of the Credit Card to purchase a $1,062.90 Air France ticket. [N.T. 5/22/12, at 49].[20]

Viewing the evidence in the light most favorable to the Commonwealth, it presented sufficient evidence of record to establish that Defendant committed access device fraud when he used both his mother's Credit Card without her authorization to purchase a $1,062.90 Air France ticket. *See* 18 Pa. C.S. § 4106(a)(1)(ii). Therefore, the trial court properly denied Defendant's Post-Sentence Motion with regard to his judgment of sentence for Access Device Fraud.

iii. Theft By Unlawful Taking

Pursuant to 18 Pa. C.S. Section 3921(a), a person is guilty of theft if he "unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." The evidence previously discussed and set forth by the Commonwealth to establish the material elements of Identity Theft and Access Device Fraud also amply supports the above-referenced elements of Theft By Unlawful Taking.

Furthermore, as indicated by its verdict, the jury valued the property stolen by Defendant at less than $2,000.00. That finding is supported by the evidence in three different scenarios, *i.e.*, that the jury found Defendant guilty of one of the following: the

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[19] The Commonwealth charged Defendant with Access Device Fraud under 18 Pa. C.S. § ***4106(a)(1)(ii)***, for which no enumerated defenses exist. Therefore, any claim by Defendant that he intended to repay his mother for the Air France ticket is irrelevant. *See* 18 Pa. C.S. § 4106(a.1)(b) ("It is a defense to a prosecution under subsection ***(a)(1)(iv)*** if the actor proves by a preponderance of the evidence that he had the intent and ability to meet all obligations to the issuer arising out of his use of the access device.") (Emphasis added.)

[20] Defendant attempted to argue that because he had, on occasion, used the Credit Card to purchase cigarettes, which he defined as a non-business expense, and his mother had not objected, that she had in effect consented to use of the Credit Card for non-business purchases. The jury apparently found Defendant's syllogism untenable.

Credit Card charge, the Bank Account withdrawals, or the Credit Card charge and one of the Bank Account withdrawals. Therefore, all of the following defenses asserted by Defendant, including that he had consent to use the Credit Card, he customarily re-paid his mother back for sums charged, or that he was acting under duress and would customarily have permission to rely upon his mother in such circumstances, do not in any way render the jury's verdict unsound. Given its verdict and specifically its valuation of the property taken, the jury obviously found Defendant guilty of one of the aforesaid scenarios, all of which were amply supported by the evidence.

In addition, Defendant's contention that the Commonwealth improperly aggregated the $1062.90 Credit Card charge, with the two $700.00 Bank Account withdrawals, is meritless. First, such aggregation is expressly permitted by the applicable statutory framework. *See* 18 Pa. C.S. § 4120(b).[21] The crimes at issue in this case are related, in that they were perpetrated within approximately a two week time span, in pursuit of one course of conduct—namely Defendant's excursion to Cameroon. [N.T. 5/21/12, at 24]. Accordingly, the Commonwealth had a sufficient basis to aggregate the above-referenced sums.

In the end, however, the jury ultimately found Defendant guilty of stealing property with a value of *less than* $2,000.00. As a result, at sentencing, consistent with the jury's finding, and the applicable statutory grading authority, the Commonwealth

[21] "Each time a person possesses or uses identifying information in violation of subsection (a) constitutes a separate offense under this section. However, the total values involved in offenses under this section committed pursuant to one scheme or course of conduct, whether from the same victim or several victims, may be aggregated in determining the grade of the offense."

appropriately downgraded Defendant's Identity Theft charge from an F-2 to an F-3 and his Theft By Unlawful Taking charge from an F-3 to an M-1. [N.T. 9/26/12, at 2-6]. The undersigned sentenced accordingly to the downgraded charges. Therefore, while the Commonwealth initially pursued an F-3 Theft By Unlawful Taking charge, its decision to downgrade that charge to an M-1, and the undersigned's corresponding sentence, were consistent with the jury's finding, in accordance with the law, and effectively moots Defendant's aggregation claim on appeal.

The Commonwealth set forth sufficient evidence, including Defendant's two unauthorized $700.00 withdraws from the Bank Account, and his unauthorized use of the Credit Card, to establish his guilt of Theft By Unlawful Taking. *See* 18 Pa. C.S. § 3921(a). As a result, the trial court properly denied Defendant's Post-Sentence Motion with regard to his judgment of sentence for Theft By Unlawful Taking.

D. Weight Of The Evidence Supported Defendant's Convictions.

Next, Defendant asserts that the Court abused its discretion when it denied his motion for a new trial on the basis that the guilty verdicts were against the weight of the evidence. As previously discussed and incorporated herein, the Commonwealth's evidence amply supported the jury's verdict. That evidence included the testimony of Ms. McCracken and Det. Royds, which was apparently found credible by the jury and supports all of the charges with which Defendant was convicted.

Unlike a challenge to the sufficiency of the evidence, a challenge directed at the weight of the evidence requires a credibility assessment of the testimony presented by the Commonwealth. *See Commonwealth v. Morris*, 958 A.2d 569, 577 (Pa. Super. Ct. 2008). As it is solely within the province of the jury to weigh evidence and make

credibility determinations, any doubts concerning a defendant's guilt must be resolved by the fact-finder, unless the evidence is so weak and inconclusive that, as a matter of law, "no probability of fact could be drawn from the evidence." *Id.* Thus, in matters of credibility determinations, appellate courts are justifiably reluctant to substitute their judgments for those of a fact-finder. *Commonwealth v. Sanchez*, 907 A.2d 477, 491(Pa. 2006).

A new trial should not be granted because of a "mere conflict in the testimony." *Commonwealth v. Brown*, 48 A.3d 426, 432 (Pa. Super. Ct. 2012). Instead, the request for a new trial based on the argument that the verdict was against the weight of the evidence will only be granted when the verdict is so contrary to the evidence as to "shock one's sense of justice." *Commonwealth v. Johnson*, 910 A.2d 60, 64 (Pa. Super. Ct. 2006). Furthermore, where the trial court has already denied a defendant's post-sentence motion which asserts a weight of the evidence claim, "the appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence, but is limited, instead, to a review of "whether the trial court palpably abused its discretion in ruling on the weight claim." *Id.* The jury, as the fact finder, was free to believe all, part, or none of the evidence presented by the eyewitness testimony. *Commonwealth v. James*, 46 A.3d 776, 779 (Pa. Super. Ct. 2012) ("[I]t is the responsibility of the trier of fact to assess the credibility of the witness and weigh all of the evidence presented.").

Contrary to the Defendant's assertion that the verdict was against the weight of the evidence, the jury found the testimony of Ms. McCracken and Det. Royds' more credible than that provided from Defendant. In addition to testifying that she had never

authorized her son to use her Credit Card or Bank Account in the manner at issue, Ms. McCracken testified that, at 86 years old, she still worked fulltime and had a sales position at the Macy's Children's Department in the Plymouth Meeting Mall. [N.T. 5/22/12, at 46; N.T. 9/26/12, at 8].

Contrasting the testimony of Ms. McCracken and Det. Royds, with that provided by Defendant, the jury's verdict does not, in any way, shock one's sense of justice. *See Johnson*, 910 A.2d at 64. Examining the following excerpts from Defendant at trial, this Court concludes that the jury's credibility determinations were sound and reasonable:

> So I was stuck in Africa. I'm on the – it's on the equator. . . when I got there it was about a hundred degrees every day. And there's, at nighttime the mosquitoes-- . . .Cameroon, Africa is on the equator, it's the hottest point in the world. The mosquito pop—the place is infested with mosquitos and malaria is everywhere. I have been there twice and I haven't gotten malaria. . . . And also, there's other diseases, as well. Yellow fever, I had a vaccination for yellow fever. . . [N.T. 5/22/12, at 35-37].

At another point in trial, Defendant recalled details of his trip saying:

> After I was these six days, those six days, the ATM machine would not work. And the money that I had in my pockets was limited resources. And we, my wife and I felt that we didn't have the money to go to a hotel, so we tried to work out negotiations and stay at somebody's house. And that was pretty rough because we were in a compound and all the facilities were outside. You had to shower outside, you had to go to the bathroom outside. It's like an outside type of thing. . . . And I just—they have power outages there where on a previous occasion when I stayed at my wife's, Sundays was [*sic*] a complete power outages. There was no electric at all on Sundays. So, there was a power outage at one of these cyber cafes, and I just felt that it was – that I should try to make a transfer, because I had $700 in my Wachovia account which was in Lansdale, and I figured I could transfer money out of my mother's account, $700 out of her account, which was accessible through the PayPal thing. . . . Because I am 5,000 miles from home. I don't have any kind of resources. . . [N.T. 5/22/12, at 164-68].

Finally, during his closing, Defendant made the following plea the jury:

> And she [Mrs. McCracken] talks about—they talk about business and personal. If I'm stuck in Cameroon 5,000 miles from home, it's a business, it's certainly a business decision as well as a personal decision to get to a stable place where I can resume my work and finances and get income again. To be over there and get malaria, which is incurable, and it relapses all the time would be devastating. Plus, I have thyroid cancer. I have a thyroid condition. And at a hundred degrees every day, it just – I had to take throat lozenges every day. And the water was just pouring out of me. I had to use laxatives every day. And this is what the conditions were and why I went and just tapped into the computer. [N.T. 5/22/12, at 205].

Not only was Defendant's discourse lacking any credible ratiocination, but he also refused to accept any responsibility for his actions. Frequently, Defendant introduced irrelevant and far-fetched conspiracy theories in an attempt to excuse his own conduct, including the following tirade against the Commonwealth during Defendant's closing argument:

> I saw her [Ms. McCracken] every day. If she wanted more information about the business she could have asked. She seemed satisfied, and that was it. She never made any written terms, and there was only fleeting comments about the account at the end of the month. There was no explicit terms which would indicate that there was anything but general consent. . . .You know, I am just being stuck with all of this. And I'm at my most vulnerable position here, and Mr. Bunn [the Assistant District Attorney assigned to prosecute this case] has taken full advantage of it. [N.T. 5/22/12, at 212-13].[22]

Given the verdict, the jury apparently found Defendant's pleas and alleged affirmative defenses unconvincing—a result which does not at all shock one's sense of

[22] I was acting under extreme distress, I was in Africa, and my money set aside for the four weeks in Africa was shut off by Wachovia/Wells Fargo Bank employees. . . . More recently I learned through Channel 3 CBS News at 11p.m. on July 15th, 2012, that Wachovia had reached a multimillion dollar settlement with the U.S. Justice Department. IN a stipulated agreement, they concluded that Wells Fargo and Wachovia had been engaging in discriminatory bank practices against minorities. Cameroon is a minority county, and this corroborated my testimony during the trial that Wachovia Bank employees denied me access to my money through the ATM there, which left me destitute and stranded and in fear of survival. Had the jury heard that litigation was pending against Wachovia/Wells Fargo, corroborating my testimony that I was left destitute, stranded, I would have been—that would have been substantive evidence for acquittal." [N.T. 9/26/12, at 14-15].

justice. *See Johnson*, 910 A.2d at 64. The verdict may well have been a product of Defendant's insistence on representing himself, repeated reference to himself in the third person, or his failure to acknowledge any wrongdoing whatsoever. [N.T. 5/22/12, at 61-65]. This Court concludes that the jury's verdict was supported by the weight of the evidence. Accordingly, the trial court properly denied the Defendant's Post-Sentence Motion.

E. Defendant Was Permitted A Fair And Impartial Trial

Finally, Defendant asserts that he was denied a fair and impartial trial.[23] More specifically, Defendant asserts a litany of complaints, including the following: failure of the court to admit alleged evidence that victim owed Defendant money and permitted Defendant access to her Bank Account in times of emergencies, give requested jury instructions; and prosecutorial misconduct. The Court, having concluded that none of these underlying bases have merit, Defendant failed to establish he is entitled to a new trial.

Defendant first contends the Court unfairly denied him an opportunity to lay the necessary evidentiary foundation for his requested instructions. "As a general rule, questions concerning the admissibility of evidence are committed to the sound discretion of the trial judge, whose rulings will not be disturbed absent an abuse of that discretion." *Commonwealth v. Kennedy*, 959 A.2d 916, 923 (Pa. 2008); *Commonwealth v. Chamberlain*, 30 A.3d 381, 415 n.12 (Pa. 2011) (citing *Commonwealth v. Reed*, 990 A.2d 1158, (Pa. 2010)).

[23] Interestingly, this is not the first time Defendant has asserted that he was denied fair and impartial treatment. Before trial even commenced Defendant accused Assistant District Attorney Steven Bunn, Esquire, ("ADA Bunn") of denying him a "fair and impartial consideration." [N.T.5/21/12, at 29].

In this case, the Court appropriately precluded Defendant from introducing inadmissible evidence of his alleged affirmative defenses—consent, justification, duress, *etc.*[24] Defendant sought time and time again to elicit testimony from his mother to substantiate these defenses. What the record does generally reflect, however, is that Defendant repeatedly introduced extraneous information regarding his alleged affirmative defenses. For his part, over objection by the Commonwealth and against the Court's directive, Defendant made lengthy and gratuitous references to his alleged affirmative defenses throughout the course of his trial. *Supra.* The Court correctly determined that the prejudicial effect of admitting such evidence was outweighed by any probative value.[25]

Next, Defendant claims that the Court erred in not giving certain jury instructions, requested by Defendant, including the following: "intent to defraud; intent to return money defence; jurisdiction; consent; duress, and mistake" is devoid of merit. [Def.'s 1925(b), at ¶ 5(a)]. As addressed below, however, the record in this case lacks the evidence required for such instructions.

The appellate court's scope of review in examining a trial court's refusal to give an instruction is to determine whether the court committed a clear abuse of discretion or error of law controlling the outcome of the case. *See Commonwealth v. Chambers*, 980 A.2d 35, 50 (Pa. 2009) (internal quotation omitted); *Commonwealth v. Sasse*, 921 A.2d 1229, 1238 (Pa. Super. Ct. 2007). Only where a defendant has properly raised, and the record supports it, will a trial court instruct a jury on a proposed defense. *Id.*

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[24] Initially, the Court notes that Defendant, by failing to properly cite to the record, has complicated precision of the Court's review.
[25] *See* Pa. R. E. 403.

Defendant's affirmative defense instructions were all inextricably intertwined with the credibility determinations, which are left solely to the discretion of jury. [N.T. 5/22/12, at 197]. For example, with regard to Defendant's asserted 'no intent to defraud' defense, the Court patiently explained to Defendant, "[y]our criminal intent is a fact determination that, again, you can argue to the jury. And based on whatever evidence you think supports that lack of criminal intent, and that's just a matter of arguing that the Commonwealth has not proved their elements beyond a reasonable doubt. There's no separate charge to that effect." [Id.]. Furthermore, despite Defendant's claim, the Court correctly determined that the record lacked the necessary evidence to merit such instructions. [N.T. 5/22/12, at 127-33; 188-197]. As the record lacked the required evidence to support Defendant's requested affirmative defenses, the Court appropriately his requests for instructions. *See Sasse*, 921 A.2d at 1238.

Defendant, not surprisingly given his previous dogged pursuit of issues already repeatedly decided by the Court, has framed his argument that the Court lacks jurisdiction to adjudicate his claims, in the context of its jury instructions. The Court need not address again Defendant's claim that the Court lacked jurisdiction to adjudicate his charges, as it previously addressed that contention. *Supra*; *see* 18 Pa. C.S. § 102(a)(4); [N.T. 5/22/12, at 54-56; 105-106; 135-38]. Similarly, any claim that it was required to charge the jury that it lacked jurisdiction to adjudicate Defendant's case is unavailing. Having failed to establish viable grounds for a relief, the Court properly denied Defendant's request for a new trial

Defendant's final contention of error is based on prosecutorial misconduct. More specifically, Defendant claims that the Commonwealth's prosecutor, ADA Bunn engaged in prosecutorial misconduct during the Commonwealth's closing argument, by improperly impressing upon the jury his opinion of Defendant's credibility.

To preserve a claim of prosecutorial misconduct for appellate review a defendant must both make an objection and move for a mistrial. *Commonwealth v. Sasse,* 921 A.2d 1229, 1238 (Pa. Super. Ct. 2007) (Any allegation of prosecutorial misconduct must be raised contemporaneously to the prosecution's allegedly improper comments.); *see also Commonwealth v. Chamberlain*, 30 A.3d 381 (Pa. 2011). In this case, while Defendant objected to certain comments by ADA Bunn, the record does not reflect that he moved for a mistrial. [N.T. 5/22/12, at 213-32]. In addition, Defendant has provided inaccurate citations to the record which further undermine his claim. [Def.'s 1925(b) Statement, at ¶ 5(c), (d) ("N.T., 23 May 12, pp.216-225")]. No such notes of testimony exist. The parties presented their closing arguments on Tuesday, May 22, 2012, and the jury rendered its verdict the following morning on Wednesday, May 23, 2012. [N.T. 5/23/12, at 1-22].

Moreover, even if Defendant had properly preserved the issue of misconduct, the record reflects that ADA Bunn's comments wholly appropriate.[26] First, prosecutors are entitled to great discretion and wide latitude in presenting their closing remarks. *Commonwealth v. Hogentogler*, 53 A.3d 866, 878 (Pa. 2012). That latitude includes arguing to the jury certain inferences that can be

[26] For his part, Defendant repeatedly attacked the victim's credibility. [N.T. 5/22/12, at 204-207, 211-13].

reasonably be drawn from the evidence. *Commonwealth v. Noel*, 53 A.3d 848, 858 (Pa. Super. Ct. 2012). In this case, ADA Bunn did not, as Defendant claims, call Defendant a "liar." Instead, ADA Bunn merely argued that the 86-year old victim in this case, Mrs. McCracken, had "no motive" to lie. [N.T. 5/22/12, at 215-16, 218]. Then, ADA Bunn merely suggested that the jury could reasonably draw an inference from the evidence presented by the Commonwealth in this case, that Defendant did possess such a motive.[27] Additionally, any comments made by the prosecutor regarding Defendant's deceitful conduct were fully supported by the evidence, did not prevent the jury from weighing and rendering a true verdict, and were, therefore, appropriate.

Finally, as alluded to previously, this is not the first time Defendant has taken aim at ADA Bunn. Based on the record excerpted below, Defendant's final contention of error may be a result of the personal animus he feels towards ADA Bunn. Before trial even commenced, Defendant manufactured grounds to claim that ADA Bunn deprived him a fair and impartial trial. [N.T. 5/21/12, at 29]. During pre-trial arguments, Defendant made the following obscure allegations against ADA Bunn:

DEFENDANT: Motion to dismiss based upon selective prosecution and prosecutorial vindictiveness in violation of the Equal Protection Clause of the 5th and 4th amendments--

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[27] *See Commonwealth v. Hanible*, 30 A.3d 426, 469-70 (Pa. 2011) (Holding that prosecutor's closing remark, which referenced certain testimony as a "lie" was not improper, as it was a reasonable response to prior attack on the credibility of that witness by the defense.) Furthermore, such comments in no way sought to alleviate the Commonwealth's burden of proof with regard to establishing the material elements of the crimes charged. *See Id.* 30 A.3d, at 470-71.

> And also I would like to make a motion to have the district attorney recused because I did file – I did make a request for a polygraph, which he denied. His investigator that investigated this case made numerous derogatory remarks to me, showing animosity towards me for being French. For being associated with the Latin people, the Latin Kings. The prosecutor here, I believe, is –shows animosity towards me and has denied me fair and impartial consideration. Especially with regard to the polygraph. Simply because I feel that ***he is Jewish*** and he is – and I feel that there's a disproportionate number of Jews in the Montgomery County District Attorney's office and he is retaliating toward me because the French people conducted mass deportation during the Second World War.
>
> . . .
>
> MR. BUNN: Your Honor . . . if I can just respond to set the record clear . . . . Number 1, I didn't even know what Mr. McCracken's ethnic background was before this case. I don't know anything about the claims of Jewish people striking back against the French or any of that. ***I'm not Jewish myself.*** I just wanted to state for the record that this was a case driven by the victim reporting a crime to the police. . . . not for any vendetta we have against the defendant.

[N.T. 5/21/12, at 29-32]

Trial having now concluded, and the jury having convicted Defendant, he now attempts once again to discredit the ADA's superior advocacy and hard work all in an effort to usurp the jury's verdict.[28] If anything, his repeated ungrounded, baseless discriminatory allegations against ADA Bunn raise an inference of his own vindictiveness, and skewed sense of reality. Having failed preserve a claim of prosecutorial misconduct claim, Defendant has set forth no meritorious grounds for the award of a new trial.[29]

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[28] The undersigned has only the highest respect for the Commonwealth's prosecutor. In its experience, ADA Bunn has always been a well-researched, thorough, diligent advocate and shown superior judgment and candor towards the Court.

[29] Given Defendant's lack of specificity and failure to cite to the record, the Court is precluded from addressing any remaining claims of error.

V. CONCLUSION

Accordingly, the trial court respectfully requests that the judgment of sentence imposed on Defendant, Theodore Aaron McCracken, on September 26, 2012, be **AFFIRMED**.

BY THE COURT:

THOMAS C. BRANCA, J

Copies of the above Opinion
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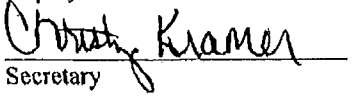

Secretary