NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CORNELL RICHARDS, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 733 EDA 2013

Appeal from the Judgment of Sentence January 30, 2013
In the Court of Common Pleas of Delaware County
Criminal Division No(s).: CP-23-CR-0003093-2012

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CORNELL RICHARDS, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 735 EDA 2013

Appeal from the Judgment of Sentence January 30, 2013
In the Court of Common Pleas of Delaware County
Criminal Division No(s).: CP-23-CR-0005615-2012

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CORNELL RICHARDS, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 737 EDA 2013

Appeal from the Judgment of Sentence January 30, 2013
In the Court of Common Pleas of Delaware County
Criminal Division No(s).: CP-23-CR-0005616-2012

BEFORE: BOWES, PANELLA, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED DECEMBER 10, 2013**

Appellant, Cornell Richards, appeals from the judgments of sentence entered in the Delaware County Court of Common Pleas following a consolidated nonjury trial on charges listed in three criminal cases. Concomitant with this appeal, counsel for Appellant has filed a petition to withdraw and an ***Anders***[1] brief indicating that Appellant wishes to challenge the sufficiency of the evidence underlying his conviction for intimidation of a witness or victim, graded as a second-degree misdemeanor.[2] We affirm and grant counsel's petition to withdraw.

The underlying three criminal cases involved the same complainant, Appellant's former girlfriend. In CR-3093-2012, the Commonwealth charged Appellant with, *inter alia*, simple assault and criminal mischief[3] after police officers responded to a domestic dispute on January 24, 2012. In CR-5616-

* Former Justice specially assigned to the Superior Court.

[1] ***Anders v. California***, 386 U.S. 738 (1967); ***see also Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009).

[2] 18 Pa.C.S. § 4952(a)(3).

[3] 18 Pa.C.S. §§ 2701(a)(1), 3304(a)(1).

2012, Appellant was charged with, *inter alia*, simple assault, theft by unlawful taking, and robbery[4] after an officer observed a domestic dispute on April 28, 2012.[5] In CR-5615-2012, Appellant was charged with, *inter alia*, intimidation of a witness or victim after the complainant, on July 2, 2012, told officers that Appellant called and sent her text messages asking her to drop the charges against him.

Appellant obtained private counsel, Kevin Wray, Esq. ("trial counsel") and proceeded to a consolidated nonjury trial on November 20, 2012. The following day, the trial court found him guilty in CR-3093-2012 of simple assault, in CR-5616-2012 of simple assault, theft by unlawful taking, and robbery, and in CR-5615-2012 of intimidation of a witness or victim, which the court graded as a second-degree misdemeanor.[6] On January 30, 2013, the court sentenced Appellant to six to twenty-four months' imprisonment for robbery,[7] a consecutive six to twenty-four months' imprisonment for intimidation of a witness or victim, and a consecutive two years' probation

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[4] 18 Pa.C.S. §§ 3701(a)(1)(v), 3921(a).

[5] By the time of the second incident, the complainant discovered that she was pregnant with Appellant's child and had also contracted a sexually transmitted disease from him.

[6] The trial court found Appellant not guilty of the charge of criminal mischief in CR-3093-2012. The remaining charges against Appellant in the three cases were dismissed prior to trial.

[7] The trial court merged the simple assault and theft into the count of robbery in CR-5616-2012.

for simple assault. The aggregate sentence for the three cases was one to four years' imprisonment followed by two years' probation.

Appellant, acting *pro se*, sent to the trial court motions to reconsider the sentences on February 4, 2013, although the court did not grant trial counsel leave to withdraw.[8] No counseled post-sentence motions were filed on behalf of Appellant. However, the court denied the *pro se* post-sentence motions on February 14th. Counsel from the Office of the Public Defender entered an appearance on February 28th and, that same day, filed the instant notices of appeal in each of the three underlying cases. Another attorney from the Office of the Public Defender ("present counsel") entered his appearance and filed a Pa.R.A.P. 1925(c)(4) statement of intent to file an

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[8] Instantly, the trial court properly forwarded Appellant's *pro se* motions to the clerk of the courts. ***See*** Pa.R.Crim.P. 576(A)(5). However, because the record does not show that the court granted trial counsel leave to withdraw, Appellant was represented by counsel when he delivered his *pro se* motions to the court. ***See*** Pa.R.Crim.P. 120(A)(4). Accordingly, Pa.R.Crim.P. 576(A)(4) required that the clerk of courts accept Appellant's *pro se* motions, time stamp them, place them in the files, and forward time stamped copies to trial counsel. ***See*** Pa.R.Crim.P. 576(A)(4). Furthermore, the prohibition on "hybrid representation" precluded the trial court from ruling on the merits of Appellant's *pro se* motions. ***See Commonwealth v. Nischan***, 928 A.2d 349, 355 (Pa. Super. 2007) (describing counseled defendant's *pro se* post-sentence motion as "a nullity, having no legal effect").

Nevertheless, Appellant's *pro se* post-sentence motions have no bearing on our jurisdiction to consider this appeal since the notices of appeal were filed within thirty days of the imposition of sentence. ***See*** Pa.R.A.P. 903(c)(3).

Anders brief. This Court granted Appellant's petition to consolidate the appeals.

Present counsel for Appellant has filed in this Court a petition to withdraw accompanied by an ***Anders*** brief raising a challenge the sufficiency of the evidence underlying Appellant's conviction for intimidation of a witness or victim. ***Anders*** Brief at 5. Appellant did not respond to counsel's filing of the petition to withdraw and the ***Anders*** brief. Following our review, we affirm and grant present counsel's petition to withdraw.

Initially, we must consider present counsel's petition to withdraw. ***Commonwealth v. Martuscelli***, 54 A.3d 940, 947 (Pa. Super. 2012).

> Before counsel is permitted to withdraw, he or she must meet the following requirements:
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> > First, counsel must petition the court for leave to withdraw and state that after making a conscientious examination of the record, he has determined that the appeal is frivolous; second, he must file a brief referring to any issues in the record of arguable merit; and third, he must furnish a copy of the brief to the defendant and advise him of his right to retain new counsel or to himself raise any additional points he deems worthy of the Superior Court's attention.

Id. (citing ***Santiago***, 978 A.2d at 361). Moreover, when seeking withdrawal, counsel's brief must:

> (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous.

Santiago, 978 A.2d at 361.

Present counsel complied with the foregoing technical requirements of his petition to withdraw and attached a copy of his letter apprising Appellant of his right to proceed *pro se* or with private counsel. Counsel's brief also complies with the requirements of ***Santiago***. Accordingly, we will review counsel's assessment that this appeal is frivolous.

Present counsel identifies a single issue of arguable merit on appeal, a challenge to the sufficiency of the evidence underlying Appellant's intimidation of a witness or victim conviction. ***Anders*** Brief at 9-10. Specifically, counsel asserts, "[T]here was no evidence that [the complainant] was ever in fear for her safety as a result of" Appellant's contact with her. ***Id.*** at 10. Counsel, pursuant to ***Santiago***, also opines that this assertion raises a frivolous appellate claim because "actual fear is not required to sustain a conviction for this offense." ***Id.*** (citing ***Commonwealth v. Collington***, 615 A.2d 769 (Pa. Super. 1992)).

This Court has stated:

> As a general matter, our standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. 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. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty. Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter

> of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Lynch, 72 A.3d 706, 707-08 (Pa. Super. 2013) (*en banc*) (citations and quotation marks omitted). Moreover, "the fact-finder is free to believe all, part, or none of the evidence presented[, and i]t is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder." ***Commonwealth v. Mobley***, 14 A.3d 887, 888-90 (Pa. Super. 2011) (citation omitted).

The crime of intimidation of a witness or victim is defined, in relevant part, as follows:

> A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:
>
> * * *
>
> (3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge.

18 Pa.C.S. § 4952(a)(3). Subsection (b) distinguishes the various grades of the crime as follows:

> (1) The offense is a felony of the degree indicated in paragraphs (2) through (4) if:
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> (i) The actor employs force, violence or deception, or threatens to employ force or violence, upon the witness or victim or, with the requisite intent or knowledge upon any other person.

* * *

> (2) The offense is a felony of the first degree if a felony of the first degree or murder in the first or second degree was charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.
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> (3) The offense is a felony of the second degree if a felony of the second degree is the most serious offense charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.
>
> (4) The offense is a felony of the third degree in any other case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.
>
> (5) Otherwise the offense is a misdemeanor of the second degree.

18 Pa.C.S. § 4952(b)(1)(i), (2)-(5). Lastly, "the settled law in Pennsylvania has been that a defendant may be convicted of an offense that is a lesser-included offense of the crime actually charged." ***Commonwealth v. Sims***, 919 A.2d 931, 938 (Pa. 2007).

Therefore, an allegation of a defendant's threat to use force is a "grading" factor that must be proven beyond a reasonable doubt to obtain a felony conviction for intimidation of a witness or victim. ***See*** 18 Pa.C.S. § 4952(b)(1)(i). However, the failure of the Commonwealth to sustain its burden of proving the existence of a threat to use force does not preclude the court from finding Appellant guilty of the lesser-included offense of intimidation of a witness or victim graded as second-degree misdemeanor.

See Sims, 919 A.2d at 938, 942 (holding that trial court properly convicted defendant of lesser-included offense of attempted escape, even though Commonwealth only charged defendant with escape).

In the present case, the Commonwealth charged Appellant with intimidation of a witness or victim graded as a felony of the third degree. At trial, the Commonwealth presented the testimony of the complainant that Appellant called her repeatedly and, in one instance, told her, "[S]tupid bitch, if you do not drop the case—if you continue with the case I'm going to fuck you up . . . ." N.T., 11/20/12, at 32. She further testified that Appellant also left messages telling her that she "should lie to the Judge, tell the Judge we're going to get married, we're together, he's my boyfriend, I don't want to continue with the case and all is well and done, and we're getting back together, I'm pregnant for him." ***Id.*** Additionally, the Commonwealth played a voicemail message from Appellant on the complainant's cellular phone.[9] ***Id.*** at 35.

The trial court specifically found that the Commonwealth did not prove that Appellant threatened the complainant with the use of force beyond a reasonable doubt. Verdict, 11/21/12, at 2, n.2. However, it stated that it was "convinced beyond a reasonable doubt" that Appellant, acting with "the intent to or with knowledge that his conduct would obstruct, impede, . . . or

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[9] The voice recording was not transcribed at trial, nor was a copy of the recording included in the certified record.

interfere with the administration of criminal justice," intimidated or attempted to intimidate the complainant. ***Id.*** Thus, the Court found Appellant guilty of a second-degree misdemeanor offense. ***Id.***

In light of this record and our standard of review, we concur with present counsel's assessment that a sufficiency challenge to Appellant's conviction of intimidation of a witness or victim, graded as a second-degree misdemeanor, was frivolous. The complainant's testimony alone provided ample basis for the trial court to find that Appellant attempted to intimidate her and did so with the requisite intent to obstruct or interfere with the administration of justice by having her withhold testimony. ***See*** 18 Pa.C.S. § 4952(a)(3). As counsel noted, although Appellant intended to argue that the complainant did not feel threatened or that he did not threaten complainant, "actual intimidation of the witness is not an essential element of the crime." ***See Collington***, 615 A.2d at 540.

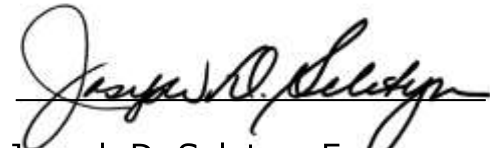
Furthermore, despite the variance between the grade of the offense charged, *i.e.* felony-three witness intimidation, and the grade of the conviction, *i.e.* misdemeanor-two witness intimidation, we detect no error in the decision of the trial court to convict Appellant on a lesser-included offense. ***See Sims***, 919 A.2d at 938, 942. Thus, Appellant's intended argument is irrelevant because the conviction was graded as a second-degree misdemeanor under section 4952(b)(5), and not a felony based on a

threat to employ force or violence under subsection (b)(1)(i) and (b)(2)-(4). Accordingly, no relief is due.

Having considered the issue identified by counsel, and after conducting an independent review of the record, we discern no non-frivolous questions for appeal.[10]

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/2013

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[10] We note that, in his *pro se* post sentence motions, Appellant sought to have his sentence modified based on his assertions that "mitigating circumstances [were] present . . . given that 'the discovery was incomplete, [a]nger management was completed without being informed by the [c]ourt, and [he was] also in the process of completing college[, and had] no priors, only current summary offenses.'" Appellant's *Pro Se* Mot. for Recons. of Sentence, 2/4/13.

However, because Appellant was represented by counsel when he filed his motions to modify the sentence *pro se*, they were legal nullities that did not operate to preserve his sentencing claims. ***See Nischan***, 928 A.2d at 355. In any event, the trial court had a presentence investigation report at the time of sentencing, expressly referenced the guideline sentences suggested by the Sentencing Code, and provided a thorough statement of reasons for its imposition of standard range, consecutive sentences. ***See*** N.T., 1/30/12, at 16-24. Accordingly, our review reveals no colorable discretionary sentencing claims in this appeal. ***See generally***, ***Commonwealth v. Moury***, 992 A.2d 162, 171 (Pa. Super. 2010).