No. 21-_____

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA

Respondent,

v.

KEITH ANTHONY ROSARIO

Petitioner.

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

APPENDIX VOLUME I TO

PETITION FOR A WRIT OF CERTIORARI

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COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KEITH ANTHONY ROSARIO	:	
Appellant	:	No. 1700 WDA 2019

Appeal from the Judgment of Sentence Entered February 18, 2020

In the Court of Common Pleas of Washington County Criminal Division at

No(s): CP-63-CR-0002611-2017

BEFORE: OLSON, J., MURRAY, J. and McCAFFERY, J.

OPINION BY MURRAY, J.: **FILED: March 23, 2021**

Keith Anthony Rosario (Appellant) appeals from the judgment of sentence imposed after a jury convicted him of one count of attempted homicide, two counts of aggravated assault, two counts of kidnapping, and one count of conspiracy to commit criminal homicide, aggravated assault, and kidnapping.[1]

FACTUAL AND PROCEDURAL HISTORY

In the first ten pages of its Pa.R.A.P. 1925(a) opinion, the trial court recounted the procedural history of this case, accurately observing that it "is quite lengthy and complex." Trial Court Opinion, 2/24/20, at 2 n.2. The trial court also detailed the

[1] 18 Pa.C.S.A. 901, 2501, 2702, 2901, and 903.

evidence presented at Appellant's four-day jury trial.[2] ***See id.*** at 10-24. The evidence at trial expanded on the factual recitation on the affidavit of probable cause, which states:

> On 09/05/17 at approximately 2233 hours, PSP was dispatched to the listed location for a report of a gunshot and a male screaming for help. Upon the arrival of PSP units contact was made with Marcus STANCIK. STANCIK related that he had been shot in the head by a mail known to him by the nickname of "Sin." Tpr. WEBB who was familiar with "Sin" asked do you mean ROSARIO to which STANCIK replied, yes, Keith ROSARIO. STANICK was treated at the scene for an injury to his neck and was subsequently transported to Allegheny General Hospital (AGH). At AGH STANICK was diagnosed with a gunshot wound to the neck at the base of the skull and a bullet was found to be present in his neck upon xray.
>
> [The Affiant] interviewed STANCIK at AGH and STANICK related he had known "Sin" for about a week. "Sin" lived on Ewing Street near Grove Street. STANICK stayed at "Sin's" for several nights. "Sin" was described as a 27 year old Puerto Rican from New York. STANICK was walking along Rt 40 when he was approached by a vehicle in which a male exited and requested STANICK get in. STANICK refused and the vehicle left. About 15 minutes later STANICK was walking in an alley off of Rt 40 when "Sin" and two other individuals stopped a vehicle near him. Sin and another male existed the vehicle, STANCIK was assaulted and then thrown in the vehicle. STANICK was placed in the back of the vehicle between Sin and another male. Then they drove STANICK to another location and "Sin" removed STANICK from the vehicle and shot him in the back of the head.

Affidavit of Probable Cause, 9/16/17.

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[2] The court noted it addressed Appellant's omnibus pretrial motion (which included Appellant's motions for discovery, severance of trials, severance of offenses, suppression, dismissal as "multiplicitous and duplicitous," writ of Habeas Corpus, change of venue and modification of bail) by separate Option and Order issued September 11, 2018. Trial Court Opinion, 2/24/20, at 4.

In a criminal complaint filed on September 6, 2017, the Commonwealth charged Appellant with attempted murder, alleging, "[Appellant] did intentionally attempt to cause the death of another human being by . . . shooting Marcus Stancik in the neck. . ." Criminal Complaint, 9/6/17 at 2. It also charged him with two counts of aggravated assault, stating Appellant "did attempt to cause or did intentionally, knowingly or recklessly cause serious bodily injury to Marcus Stancik under circumstances manifesting an extreme indifference to the value of human life . . . by shooting him with a firearm . . ." and "[Appellant] did attempt to cause or did intentionally or knowingly cause bodily injury to Marcus Stancik with a deadly weapon . . . [Appellant] did use a firearm to shoot Stancik in the neck . . ." ***Id.*** at 2,4. The Commonwealth also charged Appellant with conspiracy to commit aggravated assault based on Appellant shooting Stancik in the neck with a firearm. ***Id.*** at 3.

The Commonwealth filed a criminal information on November 9, 2017. It stated in pertinent part:

> **COUNT 1: Criminal Attempt – Homicide**
> 18 Pa.C.S. § 901(a) - 18 Pa.C.S.§ 2501(a) – Felony 1st DEGREE The Actor, with intent to commit the crime of criminal homicide, in violation of Section 2501 of the Pennsylvania Crimes Code, did an act or acts that constituted a substantial step toward the commission of that crime, that is, the Actor, acting alone and/or with others, did intentionally shoot MARCUS STANCIK in the neck, and/or head with a firearm, in violation of Section 901(a) of the Pennsylvania Code, Act of December 6, 1972;, 18 Pa.C.S, § 901(a), as amended.

COUNT 2: Aggravated Assault

18 Pa.C.S. § 2702(a)(1) Felony 1st DEGREE.

The Actor did attempt to cause serious bodily injury to another, or caused such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, that is, the Act, acting alone and/or with others, did shoot MARCUS STANCIK in the neck and/or head with a firearm intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, in violation of Section 2702(a)(1) of the Pennsylvania: Crime Code, Act of December 6, 1972, 18 Pa.C.S. § 2702(a)(1), as amended.

COUNT 3: Aggravated Assault

18 Pa. C.S. § 2702(a)(4) – Felony 2nd DEGREE.

The Actor attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another with a deadly weapon, that is, the Actor, acting alone and/or with others, did shoot MARCUS STANICK in the neck and/or head with a firearm, in violation of Section 2702(a)(4) of the Pennsylvania Crimes Code, Act of December 6, 1972, 18 Pa.C.S. § 2702(a)(4), as amended.

* * *

COUNT 6: Criminal Conspiracy

18 Pa.C.S, § 903(a)(1) – Felony 1st DEGREE

The Actor, With the intent of promoting or facilitating the crimes of criminal homicide and/or aggravated assault and/or kidnapping, in violation of Sections 2501 and/or 2702 and/or 2901 of the Pennsylvania Crimes Code, agreed with another person or persons, namely, RICHARD LACKS, that they or one or more of them would engage in conduct which constitutes the crime of criminal homicide and/or aggravated assault and/or kidnapping, and the Actor committed an overt act or acts in furtherance thereof, in violation of Section 903 of the Pennsylvania Crimes Code, Act of December 6, 1972, 18 Pa.C.S.§ 903, as amended.

Criminal Information, 11/9/17, at unnumbered pages 1-2.

A jury trial commenced on February 4, 2019. The jury convicted Appellant on February 7, 2019. The verdict sheet read with respect to the

charge of criminal conspiracy, which was count 6:

> If you find the defendant guilty at Count 6 [which the jury did] please indicate whether the following crimes were proven beyond a reasonable doubt as the objective of the conspiracy:
>
> a) Criminal Homicide Agree Disagree
>
> b) Aggravated Assault Agree Disagree
>
> c) Kidnapping Agree Disagree

Verdict, 2/7/19. The jury circled agree on all three crimes. ***Id.***

On June 3, 2019, the trial court sentenced Appellant to an aggregate 35-1/2 to 90 years of incarceration. Appellant filed post-sentence motions which were denied by operation of law on October 17, 2019. Appellant filed this timely appeal; both he and the trial court have complied with Pennsylvania Rules of Appellate Procedure 1925.

Notably, the trial court entered an order correcting Appellant's sentence on February 18, 2020, "to reflect that, at Count 6, [Appellant] **was sentenced on the Charge of Conspiracy to Commit Aggravated Assault.** All other terms and conditions of the Judgment of Sentence shall remain in effect." Order, 2/18/20 (bold in original). Citing both the record and legal authority, the court stated:

> because the typographical error made by the court reporter is patent and obvious, this Court retains the power to correct it although the 30-day period has expired.

Order, 2/18/20.

The record, particularly the transcript from the sentencing hearing, confirms the court only sentenced Appellant for conspiracy to commit aggravated assault, rather than conspiracy to commit homicide, aggravated assault, and kidnapping. **See, e.g.**, N.T., 6/3/19, at 27. We have explained:

> "Trial courts have the power to alter or modify a criminal sentence within thirty days after entry, if no appeal is taken." ***Commonwealth v. Quinlan***, 639 A.2d 1235, 1238 (Pa. Super. 1994), *appeal dismissed as improvidently granted,* 675 A.2d 711 (1996). ***See also*** 42 Pa.C.S.A. § 5505 (stating except as otherwise provided or prescribed by law, court upon notice to parties may modify or rescind any order within 30 days after its entry, notwithstanding prior termination of any term of court, if no appeal from such order has been taken or allowed). Nevertheless, once the thirty-day period expires, the trial court usually loses the power to alter its orders. An exception to this general rule exists to correct "clear clerical errors." . . .
>
> "[A]n alleged error must qualify as a clear clerical error (or a patent and obvious mistake) in order to be amenable to correction." ***Commonwealth v. Borrin***, 12 A.3d 466, 473 (Pa. Super. 2011) (*en banc*), *aff'd*, 80 A.3d 1219 (Pa. 2013).
>
> > This Court's case law has addressed the situations where … the terms of a defendant's sentence as stated at the sentencing hearing conflict (or are deemed incompatible) with the terms of the defendant's sentence as stated in the sentencing order.
> >
> > In these circumstances, for a trial court to exercise its inherent authority and enter an order correcting a defendant's written sentence to conform with the terms of the sentencing hearing, the trial court's intention to impose a certain sentence must be obvious on the face of the sentencing transcript. … Stated differently, only when a trial court's intentions are clearly and unambiguously declared during the sentencing hearing can there be a "clear clerical error" on the face of the record, and the [signed] sentencing order subject to later correction.

Commonwealth v. Kremer, 206 A.3d 543, 547-48 (Pa. Super. 2019)(some case

citations modified or omitted).

Here, the record reflects the clerical error involving the wording of the court's sentence at Count 6, which had no impact on the mathematical calculation of Appellant's 35½ – 90 year sentence. The trial court explained that "due to the court stenographer's error, the [June 3, 2019] sentencing order states that the Appellant was sentenced on criminal conspiracy to commit homicide, aggravated assault, and kidnapping. However, Appellant was only sentenced on criminal conspiracy to commit aggravated assault." Trial Court Opinion, 2/24/20, at 9 n.8; ***see also id.*** at 41-42 (citing transcript from sentencing hearing and stating "court stenographer's error undoubtedly qualifies as a clear clerical error."). We therefore proceed to address the issues Appellant raises on appeal.[3]

ISSUES

> I. Did the trial court err in denying [Appellant]'s motion to suppress the .40 caliber handgun found in [Appellant]'s home by concluding Tyree King, a teenager, had apparent authority to consent to a police search of [Appellant]'s home when police believed [Appellant] inside?
>
> II. Did the jury convict on the charge of criminal conspiracy based upon insufficient evidence?
>
> III. Did the trial court abuse its discretion in imposing a sentence that was manifestly excessive and/or unduly harsh making it unreasonable under 42 Pa.C.S. §9781(c)(2) because 1) it was disproportionate to [Appellant]'s crimes of conviction and without consideration of him as an individual and his character references after consideration of the factors in 42 Pa.C.S. §9721(b); 2) it implied [Appellant] cannot be rehabilitated; and 3) it subjected [Appellant] to imprisonment and/or parole supervision for the

[3] For ease of disposition, we have reordered the issues in Appellant's brief.

> remainder of his natural life?
>
> IV. Do [Appellant]'s individual sentences and aggregate sentence of 35-1/2 years to 90 years imprisonment violate the prohibition against cruel and unusual punishments under both the federal and Pennsylvania Constitutions?
>
> V. Did the trial court err by sentencing [Appellant] on charges of criminal attempt-homicide and criminal conspiracy in violation of 18 Pa.C.S. §906?
>
> VI. Did the trial court err in imposing two separate sentences for same-episode conduct constituting a "kidnapping" under 18 Pa.C.S. §2901(a)(2) and (a) (3)?

Appellant's Brief at 10-11.

Suppression

In his first issue, Appellant argues suppression was improper because Tyree King, who consented to the search of Appellant's residence, lacked authority to do so. Appellant emphasizes King's youth, being "sixteen or seventeen," and claims "the record does not establish King had apparent authority or that the police could reasonably believe King had such authority." Appellant's Brief at 51, 53.

At the outset, we recognize our review,

> is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. We are bound by the suppression court's factual findings so long as they are supported by the record; our standard of review on questions of law is *de novo*. Where, as here, the defendant is appealing the ruling of the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted. Our scope of review of suppression rulings includes only the suppression hearing

record and excludes evidence elicited at trial.

Commonwealth v. Yandamuri, 159 A.3d 503, 516 (Pa. 2017) (citations omitted). Additionally, "[i]t is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given to their testimony. The suppression court is free to believe all, some or none of the evidence presented at the suppression hearing." ***Commonwealth v. Byrd,*** 185 A.3d 1015, 1019 (Pa. Super. 2018) (citation omitted).

At Appellant's pretrial hearing, the court observed "there are nine parts to his omnibus." N.T., 5/4/18, at 5. However, the only pretrial issue before us on appeal is Appellant's claim that the court erred in denying his request to suppress a handgun recovered from his residence.

Appellant did not testify or present any witnesses at the pretrial hearing. The only testimony relevant to his suppression claim came from Pennsylvania State Troopers Fred Scott and Mateo Herrera. Trooper Scott stated that he was dispatched to Appellant's residence while he and his partner "were on a call at that time, out at a scene, which was "a serious incident," and "based on the circumstances, we related to the City of Washington they should be on the lookout for an individual whose name we had gotten at that time was [Appellant]." ***Id.*** at 40-41. When Trooper Scott arrived, "three individuals were outside the residence at that time directly in front of the residence . . . on the front stoop or sidewalk." ***Id.*** at 42. Other police were already on the

scene and "indicated these three people were the only people inside, to their knowledge, inside the residence." ***Id.*** Two of the individuals were "younger' white females" and the third was Tyree King, "a younger black male [who] indicated he was house-sitting for [Appellant] and that he was watching his dog as well. He gave the impression [Appellant] was out of town." ***Id.*** at 43.

Trooper Scott testified he "asked Mr. King for consent to look for [Appellant] within the residence [because] we had some concerns about his danger level and wanted to make sure he wasn't currently inside the house." ***Id.*** at 44. Trooper Scott told Tyree King "we just wanted to look for" Appellant; although Trooper Scott had no reason not to believe Tyree King was house-sitting for Appellant, and "felt [King's] indication was accurate," he also stated he "did not believe [Appellant] was out of town." ***Id.*** at 45-46. This testimony does not support Appellant's claim that Trooper Scott "believed King a liar and [Appellant] to be present inside, [such that] apparent authority as a house-sitter/dog-sitter could not reside with King and thus law enforcement could not rely on King's consent to search [the residence]." Appellant's Brief at 54-55.

In addition, Trooper Scott's partner, Trooper Herrera, testified to being dispatched to Appellant's residence because the officers were looking for Appellant "due to a serious criminal incident that happened on Cove Road." ***Id.*** at 56. Trooper Herrera corroborated Trooper Scott's testimony that three

individuals were standing outside the residence; the male, Tyree King, indicated he was house-sitting while Appellant was out of town, and Tyree King consented to a search of the residence. ***Id.*** at 56-57.

On this record, Appellant argues:

> [Trooper] Scott is clear that he did not believe King in this regard and that he believed [Appellant] [was] inside his residence at 449 Ewing. Yet, no one obtained a search warrant for the residence. The suppression court used circular logic to validate the search of [the residence] that uncovered the handgun by finding apparent authority to consent.

Appellant's Brief at 53. He continues:

> [Trooper] Scott's disbelief of King's statement that [Appellant] was not inside is fatal to a conclusion that apparent authority existed in King because only [Appellant's] absence from [the residence] would give King authority to consent. As Scott believed King a liar and [Appellant] to be present inside, apparent authority as a housesitter/dog-sitter could not reside with King and thus law enforcement could not rely on King's consent to search.

Id. at 54-55.

The record does not support Appellant's claim that Trooper Scott "was clear that he did not believe King," "believed Appellant was inside his residence," and "believed King a liar." Officer Scott specifically stated he "had no reason not to believe King," but "did not believe [Appellant] was out of town," and "wanted to make sure [Appellant] wasn't currently in the house." In addition, both Officer Scott and Officer Herrera testified they were looking for Appellant because he was suspected of being involved in a serious criminal incident and may be dangerous.

The suppression court rejected Appellant's argument, citing the Supreme Court's decision in ***Commonwealth v. Strader,*** 931 A.2d 630, 634 (Pa. 2007), and finding Tyree King had apparent authority to consent to the search. The court correctly explained that "police must make a determination on whether the facts available to them at the moment would lead a reasonable person of reasonable caution to believe that the consenting party had authority over the premises." Suppression Court Opinion, 9/11/18, at 4 (citing ***Strader, supra***).

The Pennsylvania Supreme Court explained:

> The Fourth Amendment protects the people from unreasonable searches and seizures. A warrantless search or seizure is presumptively unreasonable under the Fourth Amendment, subject to a few specifically established, well-delineated exceptions. One such exception is a consensual search, which a third party can provide to police, known as the apparent authority exception.
>
> A third party with apparent authority over the area to be searched may provide police with consent to search. Third party consent is valid when police reasonably believe a third party has authority to consent. Specifically, the apparent authority exception turns on whether the facts available to police at the moment would lead a person of reasonable caution to believe the consenting thirty party had authority over the premises. If the person asserting authority to consent did not have such authority, that mistake is constitutionally excusable if police reasonably believed the consenter had such authority and police acted on facts leading sensibly to their conclusions of probability.

Strader, 931 A.2d at 634.

Consent in ***Strader*** was given by an individual named Thornton. The

Court stated:

> [Police] knocked on the apartment door. A man who identified himself as Thornton answered the door. Detective Knox showed Thornton a wanted poster of Shields and asked Thornton whether he knew him; Thornton responded he did not. Detective Knox asked Thornton whether appellant was in the apartment, and Thornton said "no, he would be back shortly." **Thornton stated he was there temporarily**, and he and another man in the apartment had been there for about a day. Detective Knox asked Thornton whether he was in charge of the apartment. Thornton Responded, "yes." Detective Knox asked Thornton for permission to search the apartment for Shields; Thornton consented.

Id. at 632 (citations omitted, bold emphasis added). The Court continued,

> Here, police did not immediately ask Thornton if they could enter; instead, they spoke with him and determined appellant was not present. Before police sought permission to enter the apartment, they asked Thornton whether he had authority to control who entered the apartment. Once Thornton indicated he was in control, police asked him, as an occupant who expressly claimed authority to control the apartment, whether they could enter. The fact police knew appellant was likely to return soon is significantly less important here; police were searching for Shields as a fugitive, making time of the essence so that police could capture Shields and protect the public.

Id. at 635.

Although the appellant in ***Strader*** was not the fugitive sought by police in their search, the case is similar because Thornton, who gave consent, was "there temporarily," like Tyree King, and likewise, time was of the essence because Appellant, although not a fugitive, was sought by police because he was suspected of involvement in a "dangerous incident," and thought to "pose a danger." N.T., 5/4/18, at 41. Confirming Trooper

Scott's testimony, Trooper Herrera stated police "were looking for [Appellant] at this time due to a serious criminal incident that happened." ***Id.*** at 56.

The suppression court found that "given the totality of the circumstances, King's age by itself does not invalidate his consent for the search." Suppression Court Opinion, 9/11/18, at 6. The court noted that King's age was the "only distinction," and "given the substantial similarities in ***Strader*** to the present case . . . the police acted reasonably in their belief that King controlled access to the premise and had apparent authority to consent to search." ***Id.*** at 7. We agree. Appellant's suppression issue does not merit relief.

Sufficiency as to Conspiracy

Appellant next claims there was insufficient evidence to support his criminal conspiracy conviction. Appellant asserts "[t]he facts do not establish beyond a reasonable doubt that [Appellant] entered into a conspiracy with Lacks and King to commit kidnapping, aggravated assault and homicide against Stancik."[4] Appellant's Brief at 66. Appellant filed his brief on July 6, 2020, nearly four months after the court corrected its sentence to indicate that it only sentenced Appellant for conspiracy to commit aggravated assault. Appellant disregards the correction in his

[4] We note, as cited above, the criminal information only charged Appellant with entering into a conspiracy with Lacks, not King. Criminal Information, 11/9/17, at unnumbered page 1.

sufficiency argument,[5] and focuses on the statutory elements of conspiracy. ***See*** Appellant's Brief at 64-71.

We begin with our standard of review:

> A claim challenging the sufficiency of the evidence presents a question of law. ***Commonwealth v. Widmer,*** 560 Pa. 308, 744 A.2d 745, 751 (Pa. Super. 2000). We must determine "whether the evidence is sufficient to prove every element of the crime beyond a reasonable doubt." ***Commonwealth v. Hughes***, 521 Pa. 423, 555 A.2d 1264, 1267 (1989). We "must view evidence in the light most favorable to the Commonwealth as the verdict winner, and accept as true all evidence and all reasonable inferences therefrom upon which, if believed, the fact finder properly could have based its verdict." ***Id.***
> Our Supreme Court has instructed:
>
> > [T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.
>
> ***Commonwealth v. Ratsamy,*** 594 Pa. 176, 934 A.2d 1233, 1236 n.2 (2007).

Commonwealth v. Thomas, 65 A.3d 939, 943 (Pa. Super. 2013).

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[5] Appellant acknowledges the correction in his sentencing argument, where he vaguely states: "The trial court's sentence of [Appellant] for Conspiracy to Commit Aggravated Assault also creates a distinction without a difference among the objects of the conspiracy that raises an academic sentencing guidelines argument unnecessary to resolve here." Appellant's Brief at 40-41.

With respect to criminal conspiracy, the trier of fact must find: (1) the defendant intended to commit or aid in the commission of the criminal act; (2) the defendant entered into an agreement with another (a "co-conspirator") to engage in the crime; and (3) the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime. 18 Pa.C.S.A. § 903. The essence of a criminal conspiracy is the agreement between co-conspirators.

> Mere association with the perpetrators, mere presence at the scene, or mere knowledge of the crime is insufficient to establish that a defendant was part of a conspiratorial agreement to commit the crime. There needs to be some additional proof that the defendant intended to commit the crime along with his co-conspirator. Direct evidence of the defendant's criminal intent or the conspiratorial agreement, however, is rarely available. Consequently, the defendant's intent as well as the agreement is almost always proven through circumstantial evidence, such as by the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators. Once the trier of fact finds that there was an agreement and the defendant intentionally entered into the agreement, that defendant may be liable for the overt acts committed in furtherance of the conspiracy regardless of which co-conspirator committed the act.

Commonwealth v. Golphin, 161 A.3d 1009, 1018-19 (Pa Super. 2017) (citations omitted).

The crux of Appellant's argument is that there was insufficient evidence to support his conspiracy conviction because there was no evidence of an explicit agreement or criminal intent. He claims "the evidence reveals [Appellant's] actions were his own," and his actions "can best be described as

spontaneous." Appellant's Brief at 70-71. Appellant asserts that "[n]othing suggests [Appellant's] actions were planned, or an agreement to do harm to Stancik existed between [Appellant] and anyone else. The actions of Lacks [] do not evidence an agreement, but a lack of knowledge where [Appellant's] intent lied." ***Id.*** at 70. The record does not support this argument.

As noted and adopted above, the trial court devoted nearly 14 pages to its recitation of the evidence presented to the jury at trial. ***See*** Trial Court Opinion, 2/24/20, at 10-24. With regard to Appellant's conspiracy conviction, the court explained:

> Appellant and Richard Lacks clearly engaged in a criminal conspiracy to commit homicide, aggravated assault, and kidnapping. The evidence demonstrates that, upon initially sighting Mr. Stancik, Mr. Lacks phoned Appellant and informed him he had just seen Mr. Stancik. Appellant then met Mr. Lacks and Mr. King and the parties began to search for Mr. Stancik in the silver Honda Pilot, with Appellant driving the vehicle. When they found Mr. Stancik, Mr. Lacks actively participated in the kidnapping of Mr. Stancik when he aided Appellant in assaulting him and forcing him into the vehicle.
>
> Mr. Lacks also aided Appellant during the commission of the crime in several other ways. First, upon Appellant's request, he drove to the residence of 449 Ewing Street so that Appellant could obtain the .22 caliber handgun, and personally retrieved the handgun from the residence and gave it to Appellant. Appellant held this handgun against Mr. Stancik while in the vehicle and then later used it to shoot him. Furthermore, he complied with Appellant's request to drive towards any nearby body of water. Additionally, Mr. Lacks was able to hear Appellant's verbal threats of violence against Mr. Stancik in the vehicle: "'Shut the fuck up. You're getting what you deserve, you piece of shit[,]'" and "'Shut the fuck up. I'll leave you on the side of the road.'" (Trial Tr. Vol. 1, 120:4-6; Trial Tr. Vol. 2, 17:9-11.) According to Mr. Stancik,

> Mr. Lacks was in possession of a .40 caliber handgun while in the vehicle. Finally, Mr. Lacks was present at the body of water near 400 Cove Road where Appellant shot Mr. Stancik and testified that he heard a gunshot after Appellant forced Mr. Stancik into the woods.
>
> The foregoing facts indicate that Appellant and Mr. Lacks were engaged in a conspiratorial agreement to kidnap, assault, and murder Mr. Stancik. . . . Appellant and Mr. Lacks were associated with one another; furthermore, they each had knowledge of the crime, were present at the scene of the crime, and participated in the object of the conspiracy. This [c]ourt ultimately finds that the jury properly inferred a criminal conspiracy to commit homicide, aggravated assault, and kidnapping between Appellant and Mr. Lacks, and thus, the Commonwealth has sustained its burden with regard to this offense.

Id. at 55-56 (citing ***Commonwealth v. Mitchell***, 135 A.3d 1097, 1102-03 (Pa. Super. 2016)).

We agree with the trial court, and therefore find no merit to Appellant's Sufficiency argument.

SENTENCING

In his third issue, Appellant challenges the discretionary aspects of his sentence. "The right to appellate review of the discretionary aspects of a sentence is not absolute, and must be considered a petition for permission to appeal." ***Commonwealth v. Buterbaugh,*** 91 A.3d 1247, 1265 (Pa. Super. 2014). "An appellant must satisfy a four-part test to invoke this Court's jurisdiction when challenging the discretionary aspects of a sentence." ***Id.*** We conduct this four-art test to determine whether:

> (1) the appellant preserved the issue either by raising it at the time of sentencing or in a post-sentence motion; (2) the appellant filed a timely notice of appeal; (3) the appellant set forth a concise statement of reasons relied upon for the allowance of appeal pursuant to Pa.R.A.P. 2119(f); and (4) the appellant raises a substantial question for our review.

Commonwealth v. Baker, 72 A.3d 652, 662 (Pa. Super. 2013) (citation omitted). "A defendant presents a substantial question when he sets forth a plausible argument that the sentence violates a provision of the sentencing code or is contrary to the fundamental norms of the sentencing process." ***Commonwealth v. Dodge,*** 77 A.3d 1263, 1268 (Pa. Super. 2013) (citations omitted).

Appellant has complied with the first three prongs of the test by raising his discretionary sentencing claim in a timely post-sentence motion, filing a timely notice of appeal, and including a Rule 2119(f) concise statement in his brief. **See** Appellant's Brief at 23-26. Therefore, we examine whether Appellant presents a substantial question.

Appellant contends: (1) the sentence "is disproportionate to the crime of conviction and without consideration of [Appellant] as an individual;" (2) "the sentencing court implied . . . he is without the possibility of rehabilitation;" and (3) the imposition of consecutive sentences resulted in an "excessive aggregate sentence." Appellant's Brief at 24-25. Each of these claims raises a substantial question. ***See Commonwealth v. Swope,*** 122 A.3d 333, 338-39 (Pa. Super. 2015) (claim that imposition of consecutive sentences resulted in

excessive aggregate sentence may raise substantial question); ***Baker*****,** 72 A.3d at 662 (claim that failure to account for rehabilitative needs resulted in excessive sentence raises substantial question).

We review Appellant's claim mindful of the following:

> Sentencing is a matter vested in the sound discretion of the sentencing judge. The standard employed when reviewing the discretionary aspects of sentencing is very narrow. We may reverse only if the sentencing court abused its discretion or committed an error of law. A sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. We must accord the sentencing court's decision great weight because it was in the best position to review the defendant's character, defiance or indifference, and the overall effect and nature of the crime.

Commonwealth v. Cook, 941 A.2d 7, 11-12 (Pa. Super. 2007) (citations omitted).

Instantly, the trial court explained:

> . . . Contrary to Appellant's assertion, this [c]ourt did consider Appellant's individual characteristics and the character references submitted on his behalf. Prior to sentencing, the [c]ourt thoroughly reviewed the presentence investigation report prepared by John Pankopf. (Sent. Hr'g Tr. 25:17-19). In addition, the [c]ourt considered the character references submitted by Kattiria Rosario Gonzalez, Venus Sepulveda, Samantha Nelson, Ava Rivera, Alexi Mendez, Angel Mendez, and Ada Mendez. (Sent. Hr'g Tr. 25:25-26:4.) The [c]ourt also heard testimony from Ava Rivera, Appellant's mother, and Kattiria Rosario Gonzalez, Appellant's sister, at the sentencing hearing. (Sent. Hr'g Tr.10:7-12:14.) Finally, contrary to Appellant's argument, this [c]ourt did not suggest that Appellant could not be rehabilitated but merely

> stated that the "prior attempts to rehabilitate [Appellant] have failed." (Sent. Hr'g Tr. 29:17-18.) The [c]ourt emphasized that Appellant "had been paroled less than four months prior to this incident and was under the supervision of the Board of Probation and Parole," and was also "subject to consecutive probationary sentences on two prior drug offenses," when the incident occurred. (Sent. Hr'g Tr. 29:8-12.) Further, the offense for which Appellant was on parole was a "firearms offense," and yet, Appellant used a firearm in the instant matter. (Sent. Hr'g Tr. 29:18-21).) In imposing sentence, this [c]ourt had a duty to address the rehabilitative needs of Appellant, and therefore, this consideration was entirely proper.
>
> The [c]ourt's reasoning for the aggravated sentence, which has previously been stated in its entirety, was set forth clearly and thoroughly and with regard for the factors under Section 9721(b). Under the particular circumstances of this case, an aggravated sentence was in no way unreasonable, manifestly excessive, or unduly harsh. Appellant's prior failed attempts at rehabilitation, his involving a minor in this violent crime, his lack of remorse, and the sheer brutality of this violent crime itself indicated to this [c]ourt that an aggravated sentence was appropriate. Ultimately, this [c]ourt finds that the sentence was entirely reasonable under the circumstances, that it complied with Section 9721(b) in all respects, and that it also considered any mitigating factors in fashioning the sentence.

Trial Court Opinion, 2/24/20, at 32-33.

There is no merit to Appellant's contention that the trial court imposed a "manifestly excessive" sentence "disproportionate to the crimes of conviction and without consideration of [Appellant] as an individual, his character references or factors in 42 Pa.C.S. §9721(b)," or that it "implied . . . he is without the possibility of rehabilitation." Appellant's Brief at 24-25. The trial court had the benefit of a PSI. "Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant

information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Devers,*** 546 A.2d 12, 18 (Pa. 1988). Moreover, it expressly acknowledged Appellant's character references and testimony on Appellant's behalf.

We also agree the imposition of consecutive sentences did not result in an "excessive aggregate sentence." Appellant, while on supervised release, kidnapped Stancik, beat him with his fists and with the gun, threatened him, and forced him to a remote area. He dragged him from the car, shot him execution-style in the back of his head, and when the first shot was not fatal, attempted a second shot, failing only because the gun jammed. We find the aggregate sentence of 35-1/2 to 90 years is not grossly disparate to Appellant's conduct and does not "viscerally appear as patently 'unreasonable.'" ***Commonwealth v. Gonzalez-Dejusus,*** 994 A.2d 595, 599 (Pa. Super. 2010).

Next, Appellant maintains his "individual sentences and aggregate sentence of 35½ years to 90 years' imprisonment violate the prohibition against cruel and unusual punishments under both the Federal and Pennsylvania Constitutions."[6] Appellant's Brief at 57. We disagree.

> [T]he guarantee against cruel punishment contained in the Pennsylvania Constitution, Article 1, Section 13, provides no broader protections against cruel and unusual punishment than those extended under the Eighth Amendment to the United States

[6] An individual's right to be free from cruel and unusual punishment is a nonwaivable challenge to the legality of the sentence. ***Commonwealth v. Seskey,*** 86 A.3d 237, 241 (Pa. Super. 2014).

> Constitution. The Eighth Amendment does not require strict proportionality between the crime committed and the sentence imposed; rather, it forbids only extreme sentences that are grossly disproportionate to the crime.
>
> In ***Commonwealth v. Spells,*** [ ] 612 A.2d 458, 462, 417 Pa. Super. 233 (1992) (*en banc)*, this Court applied the three-prong test for Eighth Amendment proportionality review set forth by the United States Supreme Court in ***Solem v. Helm***, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 [ ] (1983):
>
> > [A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.
>
> ***Spells***, 612 A.3d at 462 (quoting **Solem**, 463 U.S. at 292 [ ]). However, this Court is not obligated to reach the second and third prongs of the ***Spells*** test unless a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

Commonwealth v. Lankford, 164 A.3d 1250, 1252-53 (Pa. Super. 2017) (some citations and quotation marks omitted).

Here, the trial court found that Appellant failed to satisfy the first prong of the ***Spells*** test. Trial Court Opinion, 2/24/20, at 25-27. Given the seriousness of Appellant's offenses, Appellant's sentence is not grossly disproportionate to the crime, and does not violate prohibitions against cruel and unusual punishment. Further, because Appellant has not satisfied the first prong of ***Spells***, we need not address the second and third prongs.

Finally, in his two remaining issues, Appellant challenges the legality of his

sentence. He first argues that his sentence on criminal attempt – homicide and criminal conspiracy – violates 18 Pa.C.S.A. § 906. Appellant's Brief at 35-42. He also maintains his "two separate sentences for kidnapping for the same-episode conduct are illegal sentences." ***Id.*** at 42-49.

We have stated:

> The issue of whether a sentence is illegal is a question of law; therefore, our task is to determine whether the trial court erred as a matter of law and, in doing so, our scope of review is plenary. Additionally, the trial court's application of a statute is a question of law that compels plenary review to determine whether the court committed an error of law.

Commonwealth v. Williams, 871 A.2d 254, 262 (Pa. Super. 2005) (citations and quotation marks omitted). Further, challenges to the legality of sentence cannot be waived and may be raised for the first time on appeal. ***Commonwealth v. Dickson,*** 918 A.2d 95, 99 (Pa. 2007) ("challenges to sentences based upon their legality" are not subject to waiver).

Appellant first claims his sentence for conspiracy is illegal, asserting, "[18 Pa.C.S.A.] Section 906 prohibits sentencing on both of these findings of guilt." Appellant's Brief at 37 (citations omitted). Section 906 states, "A person may not be convicted of more than one of the inchoate crimes of criminal attempt, criminal solicitation or criminal conspiracy for conduct **designed to commit or to culminate in the commission of the same crime.**" 18 Pa. C.S.A.§ 906 (emphasis added). Upon review, we find the recent Pennsylvania Supreme Court decision in ***Commonwealth v. King***, 234 A.3d 549 (Pa. 2020)

to be dispositive.[7]

In ***King***, the defendant was the passenger in a car driven by a co-conspirator when he fired at least nine bullets at the victim; she survived but suffered serious injuries. ***King***, 234 A.3d at 553. In pertinent part, the criminal information charged the defendant with attempted murder, aggravated assault, and a single count of conspiracy. ***Id.*** Relevant to our analysis, the trial court sentenced the defendant to consecutive terms of 20 to 40 years for attempted murder, and 10 to 20 years for conspiracy to commit aggravated assault.[8] This Court affirmed the judgment of sentence. On appeal to the Supreme Court, the defendant argued that the imposition of consecutive sentences for the inchoate crimes of attempted murder and conspiracy to commit aggravated assault violated Section 906. ***Id.*** at 566. The Supreme Court summarized the defendant/appellant's argument as follows:

> despite being charge and convicted of both conspiracy to commit murder and conspiracy to commit aggravated assault, there was only one conspiracy under Section 903(c), as both crimes were "the object of the same agreement or continuous conspiratorial agreement." King's Brief at 27 (quoting 18 Pa.C.S.§ 903(c). Accordingly, he argues the Superior Court erred in "finding there were two separate conspiracies where there was only one agreement." ***Id.*** at 28. King maintains that the Superior Court incorrectly relied on [***Commonwealth v.***] ***Kelly*** [, 78 A.3d 1136

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[7] The Supreme Court decided ***King*** on July 21, 2020, approximately two weeks after Appellant filed his brief.

[8] Like this case, the initial sentencing order was incorrect; it indicated the conspiracy sentence was for conspiracy to commit murder. The trial court subsequently corrected the error to reflect that defendant was sentenced for conspiracy to commit aggravated assault. ***King, 234*** A.3d at 553.

> (Pa. Super. 2013),] for the proposition that an offender may be sentenced on both attempted murder and conspiracy to commit aggravated assault because the two offenses are not necessarily designed to culminate in the commission of the same crime. ***Id.***
>
> King argues that this rationale "confuses § 906, which is concerned with the number of separate agreements." ***Id.***

Id. at 566-67.

The Supreme Court agreed. It noted the criminal information only charged a single count of conspiracy, and while the verdict sheet listed two conspiracy charges – conspiracy to commit murder and conspiracy to commit aggravated assault – it listed them under one count, Count 2, on the criminal information. ***Id.*** at 568. The Court found there was a single conspiracy, *i.e.,* to kill the victim. ***Id.*** at 569. It opined:

> The Commonwealth's legal argument assumes that there existed a separate conspiracy to commit aggravated assault that was not subsumed within the conspiracy to kill. But a person cannot conspire to kill a targeted individual and not concurrently conspire to commit aggravated assault against the same individual. This Court has held that "[t]he act necessary to establish the offense of attempted murder – a substantial step towards an intentional killing – includes, indeed, coincides with, the same act which was necessary to establish the offense of aggravated assault, namely, the infliction of serious bodily injury." ***Commonwealth v. Anderson,*** 538 Pa. 574, 650 A.2d 20, 24 (1994). As such, the single object of both the attempt and conspiracy convictions was [the victim's] murder, and thus, pursuant to Section 906, King could be convicted (*i.e.,* sentenced) for only one of these inchoate crimes.
>
> * * *
>
> The plain language of the specific statute governing this scenario

> precludes multiple sentences because there is no possibility that the conspiracy to commit aggravated assault existed independently of any conspiracy to kill, nor does the Commonwealth allege any kind of temporal separation or other circumstances to suggest that two conspiratorial agreements could have existed.
>
> By enacting Section 906, the General Assembly declared that where a defendant tried to achieve a result – in this case, murder – but fails to do so, he may only be punished once in the absence of distinct criminal objectives. We thus find that King is entitled to relief.

Id. at 569-70, 572 (footnotes omitted).

Instantly, the Commonwealth acknowledges ***King.*** Commonwealth Brief at 18. However, the Commonwealth attempts to distinguish ***King*** by arguing "there are distinct criminal objectives." ***Id.*** at 19. The Commonwealth asserts there was an agreement between Appellant,

> Lacks, and King, that one more of them would kidnap and assault Marcus Stancik, the latter two offenses being committed in the alleyway and with a firearm in the backseat of the Honda Pilot. It is only after those offenses were committed, and thus the conspiracy then existing ended, that [Appellant] directed Lacks and King to find a body of water. For his part, if the conspiracy had not ended before, King ended the conspiracy at that point, handing the phone to Lacks and stating, "I don't want no parts of it."
>
> Once at the chosen body of water, Dam #4 in South Franklin Township, only [Appellant] got out of the vehicle with Stancik, whose head was still covered. Only [Appellant] had retrieved the firearm at that point. Only [Appellant] walked Stancik to the water's edge and shot him in the back of the head. In fact, it is only because of [Appellant's] ineffectiveness or the firearm's malfunction, combined with good luck, that Stanick survived. Once at the dam, [Appellant's] criminal objective changed to kidnapping and homicide of Stancik. Because there are separate and distinct criminal objectives between the attempted homicide and the conspiracy to commit aggravated assault offenses, the conviction and sentence does not run afoul of § 906 or the Supreme Court's analysis in ***King.***

Id. at 19-20.

We are not persuaded by this argument. After careful review, we find the Commonwealth's account of events to be at odds with the record; in addition, their account undercuts their argument that the evidence was sufficient to sustain Appellant's conviction of conspiracy to commit homicide, aggravated assault, and kidnapping. As set forth above, the criminal complaint described aggravated assault as being the shooting of Stancik in the neck, not the beating in the alleyway or the pistol whipping in the car. Criminal Complaint, 9/6/17, at 2-3. The shooting was the same act referenced in the attempted murder charge. ***Id.*** at 2. In the criminal information, also cited above, the Commonwealth likewise based the aggravated assault charges on Appellant shooting Stancik in the neck. Criminal Information, 11/9/17, at unnumbered page 1. The Commonwealth did not name King as a participant in the conspiracy; they only identified Richard Lacks as a co-conspirator, and stated the conspiracy as being "and/or" with respect to homicide, kidnapping and aggravated assault. ***Id.*** at unnumbered page 2.

In its opening, the Commonwealth spoke about the events as a continuous episode, and never mentioned or suggested that the conspiracy ended when Appellant and Stancik reached the water. N.T., 2/5/19, at 20-25. In its closing argument, the Commonwealth described King as an accomplice, not a co-conspirator. N.T., 2/7/19, at 25. Again, at no point did the Commonwealth

suggest there were multiple conspiracies; to the contrary, the Commonwealth described a single, continuous criminal episode. ***Id.*** at 12-29.

The trial court, in its charge to the jury, stated the conspiracy charge was: "to commit criminal homicide and/or aggravated assault and/or kidnapping." ***Id.*** at 57-58. It specifically named Lacks as the co-conspirator, not Lacks and King. ***Id.*** at 61. The trial court addressed the jury as follows:

> The information alleges that the defendant conspired with Richard Lacks to commit homicide and/or aggravated assault and/or kidnapping and that one or several overt acts were done. As far as numbers are concerned, the minimum requirements for conspiracy are an agreement between two people to commit one crime and one overt act committed by one of them. Thus, you may find the defendant guilty if you are satisfied that he conspired with at least one alleged co-conspirator to commit at least one alleged object crime and that he or that person did at least one alleged overt act in furtherance of the conspiracy.
>
> Before any defendant can be convicted, the 12 jurors must agree on the same person whom the defendant allegedly conspired with, the same object crime and the same overt act. And by object: crime, I mean attempted homicide, aggravated assault or kidnapping; those are the object crimes.
>
> * * *
>
> As general rule, if conspirators have agreed to commit a crime and after that one of them does any act to carry out or advance their agreement, then he has done an overt act in furtherance of their conspiracy. The other conspirators do not have to participate in the overt act or even know about it. In a sense, they are partners, and like partners, they are responsible for each other's actions.
>
> On the verdict sheet, there will be a special section for the crime of conspiracy. If you find that the Commonwealth has proved the defendant guilty beyond a reasonable doubt, you will be asked to mark the crime or crimes that you find proved beyond a reasonable doubt as the objective of the conspiracy. I charge you that a conspiracy

> can have as its objective one crime or many crimes, but it is your task to determine what objective has been proven beyond a reasonable doubt.

Id. at 61-63. After this charge, the jury returned their verdict of guilty as to conspiracy, and found the objects of the conspiracy were homicide, aggravated assault, and kidnapping. Verdict, 2/7/19.

It was not until sentencing that the Commonwealth first attempted to distinguish conspiracy to commit aggravated assault from the other objects (homicide and kidnapping), when it requested the trial court sentence Appellant only for conspiracy to commit aggravated assault. N.T., 6/3/19, at 19. In its opinion, the trial court acknowledged that sentencing Appellant on both attempted homicide and criminal conspiracy to commit homicide would run afoul of Section 906. Trial Court Opinion, 2/24/20, at 41. The opinion was written prior to the Supreme Court's decision in ***King***, and relies entirely on our opinion in ***Kelly***, which ***King*** effectively overruled. ***See King*** at 570-71.

Consistent with the foregoing, we find the Commonwealth's argument unpersuasive. This case is analogous to ***King*** insofar as the jury found Appellant engaged in a conspiracy to commit homicide, aggravated assault, and kidnapping, but, "because [Appellant] failed in his attempt to [kill the victim, Appellant] could not be sentenced to serve separate terms for the inchoate crime of conspiracy and attempt." ***King***, 234 A.3d at 568. Accordingly, we vacate his sentence for conspiracy.

Appellant also challenges his sentences for kidnapping, stating:

> [Appellant] was illegally sentenced to consecutive sentences under 18 Pa.C.S. §2901(a)(2) and (a)(3) for kidnapping Stancik. This is because the statutory construction of 18 Pa.C.S. § 2901 and the double jeopardy clauses of the Fifth Amendment to the U.S. Constitution and the Pennsylvania Constitution, Article I, Section 10 prohibit entry of a judgment of sentence under both 18 Pa.C.S. § 2901 (a)(2) and (a)(3) as they are the same criminal Act.

Appellant's Brief at 42.

Although Appellant did not raise this claim before the trial court, a challenge to the legality a sentence is not waivable. ***Dickson***, 918 A.2d at 99. As Appellant's challenge is one of statutory interpretation,

> [o]ur review is further governed by the Statutory Construction Act, 1 Pa.C.S.A. § 1501 et seq., under which our paramount interpretative task is to give effect to the intent of our General Assembly in enacting the particular legislation under review. ***See*** 1 Pa.C.S.A. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions."). Generally, the best indication of the General Assembly's intent may be found in the plain language of the statute. In this regard, it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include. Consequently, as a matter of statutory interpretation, although one is admonished to listen to what a statute says; one must also listen attentively to what it does not say.

Commonwealth v. Devries, 112 A.3d 663, 670 (Pa. Super. 2015) (citations omitted).

The crime of kidnapping is defined as follows:

> (a) Offense defined.--Except as provided in subsection (a.1), a person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with **any of the following intentions:**

> (1) To hold for ransom or reward, or as a shield or hostage.
>
> (2) To facilitate commission of any felony or flight thereafter.
>
> (3) To inflict bodily injury on or to terrorize the victim or another.
>
> (4) To interfere with the performance by public officials of any government or political function.

18 Pa.C.S.A. § 2901 (a)(1)-(4) (emphasis added).

Appellant argues:

> The statute makes clear that the *actus reus* of kidnapping has a static definition but the *mens rea* is a changing variable. [Appellant] was convicted of two counts of kidnapping, with the two differing intents from (a)(2) and (a)(3), respectively. The act of kidnapping for each of these counts was plead and presented at trial to be the same acts that were committed in one episode. The "any" in reference to the alternative intent makes it clear that at least one of the intents is necessary to convict, but that possessing multiple intents does not allow for multiple convictions for one kidnapping episode.

Appellant's Brief at 43. Appellant relies on this Court's decision in ***Commonwealth v. Lopez,*** 663 A.2d 746 (Pa. Super. 1995).

In ***Lopez***, the appellant pled *nolo contendere* to two counts of arson, endangering person, under 18 Pa.C.S.A. §§ 3301 (a)(1)(i) and (ii), arising from a single fire. ***Lopez***, 663 A.2d at 747. At sentencing, over appellant's objections, the trial court sentenced her to consecutive sentences of four to ten years imprisonment at each count. On appeal, she argued her sentence was illegal because, "18 Pa. C.S.A. § 3301 (a)(1)(i) and 18 Pa.C.S.A. §3301(a)(1)(ii) . . . are not themselves

separate offenses, but rather are alternative means for satisfying 18 Pa.C.S.A. § 3301(a)(1)." ***Id.*** at 748. We agreed rejecting the Commonwealth's argument that the two sections of the statute, "protect distinct and separate state interests." ***Id.*** We explained:

> Instantly, employing our Supreme Court's example [in ***Commonwealth ex rel. Specter v. Vignola,*** 285 A.2d 869, 871 (Pa. 1971)], it is our conclusion that the word "or" used in its ordinary sense, indicates an alternative between two or more unlike actions. Applying that definition to 18 Pa.C.S.A. § 3301(a), we read the statute to mean that any person who either "recklessly places another person in danger of death or bodily injury" or "commits the act with the purpose of destroying or damaging an inhabited building or occupied structure of another" may be prosecuted for and convicted of committing arson endangering persons. However, it simply does not follow from this reading that a person who commits both of the above acts may be sentenced twice for arson endangering persons when only one criminal offense, *i.e.,* starting one fire, has been committed. Not only does such a reading ignore the plain meaning of the word "or," but if applied could raise grave constitutional issues. ***See Commonwealth v. Bostic,*** 500 Pa.345, 456 A.2d 1320 (1983) (intent of double jeopardy clause is to prevent courts from imposing more than one punishment under particular legislative enactment); ***Commonwealth v. Ayala,*** 492 Pa. 418, 424 A.2d 1260 (1981) (where, practically speaking, there was only one offense against Commonwealth, defendant may only be punished for one offense, despite number of chargeable offenses arising out of single transaction); ***Commonwealth v. Williams,*** 344 Pa. Super. 108, 496 A.2d 31 (1985) (same). Accordingly, because this Court must resolve a statutory issue by reference to the statute's express language, we hold that the trial court's reading of § 3301(a) was in error.

Id. at 749.

We see no meaningful distinction between the statutory interpretation of the arson statute in ***Lopez*** and the kidnapping statute at issue here. A person commits the single crime of kidnapping if he or she satisfies, "any", of the intentions expressed in 18 Pa.C.S.A. § 2901(a)(1)-(4). Therefore, 18 Pa.C.S.A.

§ 2901(a)(2) and 18 Pa. C.S.A. § 2901 (a)(3) "are not themselves separate offenses, but rather are alternative means for satisfying 18 Pa.C.S.A. § [2901(a)]." ***Id.*** at 748. If a defendant is proven to have more than one of the expressed intentions, he can be convicted under two sections of the statute, but he cannot be sentenced under both, "when only one criminal offense, *i.e.,* [a single kidnapping], has been committed." ***Id.***

On appeal, the Commonwealth asserts ***Lopez*** is inapposite because Appellant committed two kidnappings. Commonwealth Brief at 21. In support, the Commonwealth for the second time makes an argument that is at odds with the record. ***Id.*** at 20-21. The Commonwealth states:

> [Appellant] participated in two separate and distinct kidnapping acts. The first was the literal kidnapping of Marcus Stancik off the alleyway near Hayes Avenue in Washington where he was assaulted, the hood placed over his head, and then forced into the backseat of the Honda Pilot between [Appellant] and Tyree King, and eventually the retrieved firearm shoved in Stancik's side by [Appellant] while the actors drove around. This act constituted the removal of Stancik a substantial distance with the intent to inflict bodily harm or terrorize him, under § 2901(a)(3). The second kidnaping act was by [Appellant] alone when he took Stancik out of the Honda, hood still over his head and walked him to the water's edge intending to kill him. The separate act, and separate intent to facilitate the commission of the felony (attempted) murder, is separate and apart from the kidnapping across the street.

Id.

In addition to being implausible, this is not the argument the Commonwealth made to the jury. In its closing, the Commonwealth recounted a single kidnapping,

which included the forcing of Stancik into the car, holding him at gunpoint, taking him out of the car, and walking him to the water. N.T., 2/7/19, at 21, 26, 28. The Commonwealth also argued that Appellant's act of shooting Stancik was part of the conspiracy between Appellant and Lacks, not a separate act where Appellant acted alone. ***Id.*** at 27. The Commonwealth's appellate argument is not logical, where anytime an individual is forced into a vehicle, and then removed from the vehicle by kidnappers, there would be two separate kidnappings. Had Stancik escaped and been recaptured, for example, we might be inclined to give credence to the Commonwealth's argument. However, our review compels our agreement with Appellant that there was a single kidnapping albeit one in which the Commonwealth proved intent under two subsections of 18 Pa.C.S.A. § 2901. As such, and pursuant to ***Lopez***, we vacate Appellant's two kidnapping sentences. ***See Lopez*** 663 A.2d at 749. This disposition, like our disposition vacating Appellant's sentence for conspiracy, compels remand. ***See Commonwealth v. Bartrug,*** 732 A.2d 1287 (Pa. Super. 1999), *appeal denied*, 561 Pa. 651, 747 A.2d 896 (1999) (holding sentencing error on one count in multi-count case generally requires all sentences for all counts to be vacated so court can restructure entire sentencing scheme).

OUTSTANDING MOTIONS

Appellant filed an application for relief on October 19, 2020, in which he requested we take judicial notice of a criminal information filed against Richard

Lacks. On October 28, 2019, the Commonwealth responded by filing an application to strike, requesting that any reference to Mr. Lacks' criminal information be stricken because a criminal information "constitutes allegations and is not evidence." Application to Strike, 10/28/19, at ¶ 2. Appellant responded on November 11, 2019. He "admitted that a criminal information was not introduced into evidence at the jury trial of the Appellant below." Answer to Application to Strike, 11/11/19, at ¶ 2. "It is black letter law in this jurisdiction that an appellate court cannot consider anything which is not part of the record in the case." ***Commonwealth v. Martz***, 926 A.2d 514, 524 (Pa. Super. 2007). For "purposes of appellate review, what is not of record does not exist." ***Commonwealth v. Holley,*** 945 A.2d 241, 246 (Pa. Super. 2008). Accordingly, we deny Appellant's application for judicial notice, and grant the Commonwealth's application to strike.

ORDER

Denial of suppression affirmed. Convictions affirmed. Judgment of sentence vacated. Case remanded for resentencing consistent with this decision. Application for judicial notice denied. Application to strike granted. Jurisdiction relinquished.

Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/23/2021

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
Appellee,	)	
	)	Nos. 2611-2017
v.	)	1700 WDA 2019
	)	
KEITH ROSARIO,	)	
	)	
Appellant.	)	
	)	

OPINION PURSUANT TO Pa.R.A.P. 1925(a)

This matter comes before the Superior Court of Pennsylvania upon the appeal of Keith Rosario ("Appellant") from the judgment of sentence entered by this Court on June 3, 2019,[1] which was made final by an Order issued by the Clerk of Courts on October 17, 2019 denying Appellant's post-sentence motions by operation of law. Appellant filed his notice of appeal on November 15, 2019. On November 18, 2019, this Court ordered Appellant to file and serve a concise statement of matters complained of on appeal no later than twenty-one days after the entry of the order. On November 26, 2019, this Court granted Appellant an extension of time and ordered him to file and serve a concise statement no later than January 6, 2020. Appellant filed two more motions for an extension of time on December 27, 2019 and January 15, 2020, both of which were granted by the Court. As a result, Appellant's

[1] This judgment of sentence was not filed with the Clerk of Courts until June 5, 2019.

concise statement was due no later than January 28, 2020, and Appellant filed the concise statement on that date. For the reasons set forth below, this appeal should be dismissed.

PROCEDURAL HISTORY[2]

On September 6, 2017, Trooper Thomas Kress of the Pennsylvania State Police ("PSP") filed a criminal complaint against Appellant which contained the following charges: Attempted Homicide, Section 901(a) of the Crimes Code; Aggravated Assault, Section 2702(a)(1) of the Crimes Code; Conspiracy to Commit Aggravated Assault, Sections 903(a) and 2709(a)(1) of the Crimes Code; Kidnapping, Section 2901(a)(3) of the Crimes Code; Conspiracy to Commit Kidnapping, Sections 903(a) and 2901(a)(3) of the Crimes Code; and Aggravated Assault, Section 2702(a)(4) of the Crimes Code. Appellant was committed to the Washington County Correctional Facility on September 6, 2017 and bail was set at $2,000.000, which Appellant was unable to post; a preliminary arraignment was held on the same day. A preliminary hearing occurred on October 12, 2017 and all of the charges were held for court.

On November 15, 2017, the Commonwealth filed a Bill of Information against Appellant which contained the following charges: Count 1, Attempted Homicide, a

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[2] The procedural history of this case is lengthy and complex. The Court has set forth the procedural history clearly and thoroughly; however, for purposes of efficiency and to avoid futility, several docket entries which the Court has deemed insignificant for purposes of this opinion have been omitted.

Felony of the First Degree, Sections 901(a) of the Crimes Code; Count 2, Aggravated Assault, a Felony of the First Degree, Section 2702(a)(1) of the Crimes Code, Count 3, Aggravated Assault, a Felony of the Second Degree, Section 2702(a)(4) of the Crimes Code; Count 4, Kidnapping to Facilitate a Felony, a Felony of the First Degree, Section 2901(a)(2) of the Crimes Code; Count 5, Kidnapping to Inflict Injury or Terrorize, a Felony of the First Degree, Section 2702(a)(3) of the Crimes Code; Count 6, Criminal Conspiracy to Commit Homicide, Aggravated Assault, and Kidnapping, a Felony of the First Degree, Section 903(a)(1) of the Crimes Code; and Count 7, Possession of Firearm Prohibited, a Felony of the Second Degree, Section 6105(a)(1) of the Crimes Code. Appellant was formally arraigned on November 21, 2017.

On December 5, 2017, Appellant, through his counsel, Herbert A. Terrell, Esquire, filed a Notice of Alibi Defense and an Omnibus Pretrial Motion. On January 26, 2018, the Commonwealth filed a Commonwealth's Motion for Case Management Order and a Notice of Joinder Pursuant to Pa.R.Crim.P. 582. In the Notice of Joinder, the Commonwealth asserted that Appellant should be tried jointly with his co-defendant, Richard Lacks. On January 30, 2018, this Court issued a Case Management Order scheduling this matter for a pretrial conference on March 8, 2018 and for jury selection on March 12, 2018, with the trial to occur later that week. The Commonwealth filed a Reply to Omnibus Pretrial Motion on February 1, 2018. On February 2, 2018, the Commonwealth filed a Motion for Joinder of Defendants at

February 2, 2018, the Commonwealth filed a Motion for Joinder of Defendants at Trial Pursuant to Pa.R.Crim.P. 582. Appellant filed a Defendant's Opposition to Commonwealth's Motion for Joinder of Defendants at Trial on February 8, 2018. Per this Court's order dated February 8, 2018, a hearing on the Commonwealth's Motion for Joinder was scheduled for May 4, 2018.[3] The previously scheduled pretrial conference, jury selection, and jury trial were subsequently cancelled.

On May 25, 2018, the Commonwealth filed a Memorandum of Law in Opposition to Omnibus Pretrial Motions. On June 4, 2018, Appellant filed a Defendant's Brief in Support of his Omnibus Pretrial Motion. Appellant filed a Motion to Compel Commonwealth to Produce Evidence on June 11, 2018. On August 9, 2018, Appellant filed a Motion to Supplement/Amend Defendant's Omnibus Pretrial Motion. Per this Court's order dated August 14, 2018, the Commonwealth was permitted to file an answer to the aforementioned motion within five days. On August 16, 2018, the Commonwealth filed a Memorandum in Opposition to Defendant's Motion to Sever[4] as its answer to Appellant's motion. On August 16,

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[3] Though not specified in this order, Appellant's previously filed Omnibus Pretrial Motion was also scheduled to be addressed and argued at the May 4, 2018 hearing.

[4] Though the title of this pleading specifies that it opposes Appellant's motion to sever, the Commonwealth actually addresses all of the issues raised in Appellant's Motion to Supplement/Amend Defendant's Omnibus Pretrial Motion therein. In this motion, Appellant sought leave to amend and/or supplement his Omnibus Pretrial Motion and also provided grounds for trial severance and for suppression of certain statements made by himself and others.

2018, Appellant filed a Reply to Commonwealth's Answer to Defendant's Motion to Supplement/Amend Defendant's Omnibus Pretrial Motion. On the same day, this Court ordered that Appellant's Motion to Supplement/Amend Defendant's Omnibus Pretrial Motion was granted in part and denied in part.[5]

On September 11, 2018, this Court issued an Opinion and Order regarding Appellant's Omnibus Pretrial Motion and the Commonwealth's Motion for Joinder. Appellant's motions for discovery, for severance of trials, and for severance of offenses were granted. However, Appellant's motions to suppress, to dismiss as "[m]ultiplicitous and[d]uplicitous," for writ of Habeas Corpus, for change of venue, and for modification of bail was denied. The Commonwealth's Motion for Joinder of defendants at trial was denied. As a result of Appellant's motion for severance of offenses being granted, the charge at Count 7 of the Bill of Information, Possession of Firearm Prohibited, was severed from the remaining charges.

The Commonwealth subsequently filed a Commonwealth's Motion for Reconsideration of Severance of Offenses & "Bifurcation" of Offenses at Trial on September 21, 2018. Appellant then filed a Defendant's Opposition to

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[5] The Court stated that Appellant's August 9, 2018 motion was granted insofar as Appellant would be permitted to amend and/or supplement his Omnibus Pretrial Motion, and the recent disclosure by the Commonwealth of several recorded telephone conversations would be considered in deciding Appellant's motion for trial severance. Appellant's motion to suppress all telephone calls or text messages obtained from any state correctional institution was denied.

Commonwealth's Motion for Reconsideration of Severance of Offenses and "Bifurcation" of Offenses at Trial. On October 11, 2018, the Commonwealth presented a Commonwealth's Request for Reciprocal Discovery. On October 16, 2018, this Court denied the Commonwealth's Motion for Reconsideration. The Commonwealth's Request for Reciprocal Discovery was granted by this Court per an order dated October 18, 2018.

On October 18, 2018, the Commonwealth presented a Motion for Case Management Order. The Court subsequently issued a Case Management Order scheduling this matter for a pretrial conference on November 29, 2018 and for jury selection on December 3, 2018, with a jury trial to occur later that week. On November 5, 2018, Appellant filed a Defendant's Motion in Limine, which contained numerous issues. On the same day, the Commonwealth filed three separate motions *in limine:* one of them sought to exclude the criminal history of the victim, Marcus Stancik; another sought to exclude Commonwealth witness Tyree King's criminal history; and another sought to allow Mr. Stancik to testify at trial without restraints and in business attire. A hearing on all of these motions *in limine* was scheduled for November 15, 2018. On November 13, 2018, Appellant filed a Defendant's Opposition to Commonwealth's Motion in Limine Regarding Victim's Criminal History, a Defendant's Answer to Commonwealth's Motion in Limine Regarding Marcus Stancik Courtroom Attire, and a Defendant's Supplemental Motion in Limine Nunc

Pro Tunc. On the same day, the Commonwealth filed a Commonwealth's Response to Motion in Limine.

On November 19, 2018, Appellant filed proposed *voir dire* questions, a Defendant's Initial Trial Disclosures/Witness List, and a Defendant's Motion to Postpone Trial and Modify Court's Pretrial Order. The Commonwealth filed a Notice of Intention to Use Prior Bad Acts testimony on the same day. On November 20, 2018, the Commonwealth filed a Commonwealth's Opposition to Motion to Postpone Trial. By order of this Court dated November 20, 2018, Appellant's Motion to Postpone Trial was granted, and this matter was rescheduled for a pretrial conference on January 3, 2019 and for jury selection on January 7, 2019. A Case Management Order was issued by this Court on the same day and reflected the aforementioned dates. On November 26, 2018, the Commonwealth filed proposed jury instructions. On December 5, 2018, Attorney Terrell filed a Motion to Withdraw and Strike Counsel's Appearance for Defendant. A hearing on the aforesaid motion occurred on December 11, 2018, and the Court granted Attorney Terrell's motion at the conclusion of the hearing. It was further ordered that the Public Defender's Office immediately enter their appearance on behalf of Appellant.

In an order dated December 11, 2018, the Court ruled on the Commonwealth's motions *in limine*, stating that Mr. Stancik and Mr. King's criminal histories would be excluded under Pennsylvania Rule of Evidence 609; however, Mr. Stancik's 2011 conviction for False Reports was ruled to be admissible for impeachment purposes if

Mr. Stancik testified. Further, the Court ruled that Mr. Stancik would be permitted to testify without restraints and in business attire. In a separate order issued the same day, the Court ruled on each of Appellant's motions *in limine* included in his November 5, 2018 motion. The following motions from Appellant were granted: "Exclusion of Any Person From Testifying on Behalf of Commonwealth Whose Prior Criminal Record Was Not Provide to the Defense"; "Exclusion of Testimony or Reports of .40 Caliber gun/Stolen Weapon"; "Exclusion of prior criminal records of defense witnesses more than 10 years old to impeach. Rule 609(b)"; "Exclusion of any witness to dispute/discredit defense alibi witnesses. Failure to Commonwealth to comply with Rule 567 C"; and "Formal or informal leniency or plea deals between the Commonwealth and any Commonwealth witness."[6]

On December 14, 2018, the Commonwealth filed a Motion to Disqualify Counsel, arguing that the Public Defender's Office could not represent Appellant because of a conflict of interest. On December 14, 2018, the Court appointed Kimberly Furmanek, Esquire, as counsel for Appellant, and she entered her appearance on

[6] Appellant included an extensive amount of issues in his November 5, 2018 Motion In Limine, most of which were granted, preserved for trial, or deemed moot. In regards to his final issue at paragraph (v), however, the Court stated in its December 11, 2018 order that the Commonwealth must provide Appellant with the names and addresses of any expert witnesses it intends to call at trial, as well as the subject matter of their testimony, the substance of the facts to which each expert is expected to testify, a summary of their opinions, and the grounds for each opinion.

behalf of Appellant on December 18, 2018. The Commonwealth filed a motion on December 20, 2018, requesting the Court to reconsider its December 11, 2018 Order. On the same day, the Court issued an order clarifying its December 11, 2018 Order.[7] On January 2, 2019, the Commonwealth filed proposed jury instructions. On January 3, 2019, Appellant presented a Motion to Continue and a Motion for Funds for Investigator and/or Expert Witness, both of which were granted by this Court. The pretrial conference was rescheduled for January 30, 2019, and jury selection was rescheduled for February 4, 2019 with the trial to occur later that week; further, Appellant was permitted to obtain an investigator and any expert witnesses, not to exceed $1,500.00. The Commonwealth filed more proposed jury instructions on January 22, 2019. On the same day, Appellant filed proposed *voir dire* questions. On January 25, 2019, the Commonwealth filed another set of proposed jury instructions, and on January 28, 2019, Appellant filed proposed jury instructions. On January 29, 2019, the Commonwealth filed a Motion in Limine to Exclude Witnesses's [sic] Prior Criminal History and a Commonwealth's Amended Witness List. On February 4, 2019, the Commonwealth filed another amended witness list.

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[7] The Commonwealth argued in its motion that the December 11, 2018 was "in violation of FBI rules" because it required the Commonwealth to provide to Appellant the criminal histories of each law enforcement officer witness. (Cmwlth.'s Mot.1, Dec. 20, 2018.) In its order, the Court clarified that only fact witnesses' criminal histories were required, and not law enforcement officers or medical professionals.

After jury selection on February 4, 2019, the trial began the next day and ended on February 7, 2019. The Commonwealth was represented by Jason M. Walsh, Esquire and John P. Friedmann, Esquire; Appellant was represented by Kimberly Furmanek, Esquire. At the conclusion of the trial, Appellant was found guilty of all six charges, and the jury agreed that Appellant conspired to commit criminal homicide, aggravated assault, and kidnapping. A sentencing hearing was scheduled for May 6, 2019. Since his finding of guilt at trial, Appellant has filed a plethora of *pro se* motions, each of which this Court has responded to with a letter stating that the Court will not entertain any *pro se* motions since Appellant has the benefit of counsel. On February 21, 2019, Appellant filed a *pro se* Motion for a Judgment of Acquittal. On March 8, 2019, Appellant filed a *pro se* Motion to Strike Counsel and Request the Appointment of Appeallet [sic] Counsel. Appellant filed *pro se* letter addressed to this Court on April 1, 2019. On April 9, 2019, Appellant filed a *pro se* Application for Order Mandating the Clerk of Courts and/or Court Stenographer, to Furnish Court Records and Transcribed Notes of Testimony, In Forma Pauperis. On April 15, 2019, the Commonwealth filed a Commonwealth's Sentencing Memorandum. The sentencing hearing was continued to June 3, 2019 per this Court's order dated April 23, 2019.

On June 3, 2019, the Court sentenced Appellant as follows: at Count 1, Criminal Attempt – Homicide, to be confined for no less than one hundred twenty (120) months to no more than two hundred forty (240) months in an appropriate state

correctional institution ("SCI"); at Count 2, Aggravated Assault, the Court imposed no sentence as it merged with the sentence at Count 1; at Count 3, Aggravated Assault, to be confined for no less than thirty-six (36) to no more than one hundred twenty (120) months in a SCI; at Count 4, Kidnapping to be confined for no less than ninety (90) to no more than two hundred forty (240) months at a SCI; at Count 5, Kidnapping, to be confined for no less than ninety (90) to no more than two hundred forty (240) months in a SCI; and at Count 6, Criminal Conspiracy to Commit Aggravated Assault[8] to be confined to no less than ninety (90) to no more than two hundred forty (240) months in a SCI. Each of Appellant's sentences were to run consecutively to one another. Appellant's aggregate sentence was a period of incarceration in an appropriate SCI for no less than thirty-five and a half (35 ½) to no more than ninety (90) years.[9]

On June 6, 2019, Attorney Furmanek submitted a Motion to Withdraw as Counsel, which was denied by this Court. On June 11, 2019, Appellant filed a *pro se* Motion for Leave of Court to Proceed Pro Se and Petition for Release of Notes of

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[8] Due to the court stenographer's error, the sentencing order states that Appellant was sentenced on criminal conspiracy to commit homicide, aggravated assault and kidnapping. However, Appellant was only sentenced on criminal conspiracy to commit aggravated assault. This error will be addressed in the "Discussion" section of this opinion.

[9] As a special condition of his sentence, Appellant was ordered to have no contact with the victim, Marcus Stancik. Additionally, this sentence was ordered to run consecutively to the sentence imposed at CP-63-CR-1262-2013 and CP-63-CR-1543-2013.

Testimony and All Other Related Documents. Appellant filed a *pro se* Motion for a Rest [sic] of Judgment on June 13, 2019. On the same day, Appellant, through his counsel, filed a Post-Sentence Motion. The Commonwealth filed a response to the aforesaid motion on June 17, 2019. A hearing on the motion was scheduled for August 14, 2019. On June 25, 2019, Attorney Furmanek presented a Motion to Strike Defendant's Improper Pleading; the motion was granted and Appellant's *pro se* June 13, 2019 motion was stricken from the record. Appellant was also ordered to cease filing any further pleadings. In spite of this order, Appellant filed a *pro se* Motion to Dismiss for Failure to Prosecute Pursuant to Rule 600 on July 25, 2019. On September 4, 2019, Appellant filed a *pro se* Motion for Withdrawal of Counsel Inter Alia Ineffective Assistance of Counsel. Appellant filed a *pro se* letter addressed to this Court on October 16, 2019.

On October 17, 2019, the Clerk of Courts issued an order denying Appellant's June 13, 2019 post-sentence motion. On October 24, 2019, Attorney Furmanek filed another Motion to Withdraw as Counsel, which was granted by this Court, and John Egers, Esquire, was appointed to represent Appellant. On the same day, Appellant filed a *pro se* Motion for a Stay of Reconsideration Pursuant to Pa.R.A.P. §1702(A). On November 12, 2019, Appellant, through his new counsel, filed an Application for Leave to Appeal In Forma Pauperis Pursuant to Pa.R.A.P. 552(d). On November 15, 2019, counsel for Appellant filed instant Notice of Appeal.

FACTUAL HISTORY

1. Witnesses on Behalf of the Commonwealth

a) Richard Lacks

Richard Lacks testified that he knew Appellant and stated that Appellant was commonly known as "Sin." (Trial Tr. Vol. 1, 106:12-25.) Mr. Lacks explained that he, Tyree King, and Marcus Stancik had all been staying at Appellant's residence at 449 Ewing Street around the date of September 5, 2017. (Trial Tr. Vol. 1, 107:8-108:1.) He indicated that Appellant's residence was utilized as a "drug operation center" in which "all the drugs were sold, they were kept at that house" and "[t]ransactions that were made were made at that house." (Trial Tr. Vol. 1, 108:2-12.) He stated that Appellant was involved in these drug activities and that handguns were commonly found inside the residence. (Trial Tr.108:13-18.) Specifically, Mr. Lacks indicated that a .9 millimeter handgun, a .40 caliber handgun, and a .22 caliber handgun were all found within the residence. (Trial Tr. Vol. 1, 111:22-25.) Regarding Mr. Stancik, Mr. Lacks explained that he initially met him "towards the end of August and the beginning of September" of 2017 and that Mr. Stancik came back to Appellant's residence with Mr. Lacks on the night they met. (Trial Tr. Vol. 1, 108:24-110-12.) Mr. Stancik eventually began participating in drug activities with Mr. Lacks, Mr. King, and Appellant. (Trial Tr. Vol. 1, 111:2-9.)

A few days before September 5, 2017, Mr. Lacks stated that "a handgun came up missing" and that Appellant was "angry" about it. (Trial Tr. Vol. 1, 111:10-14,

112:15-17.) Specifically, the .9 millimeter handgun was missing from the residence. (Trial Tr. Vol. 1, 111:16-17.) According to Mr. Lacks, Appellant "thought [Mr. Stancik] stole the gun." (Trial Tr. Vol.1, 112:16-20.) He confronted Mr. Stancik and informed him that "he felt like he stole the gun and that he wanted him to replace it," but Mr. Stancik denied stealing the gun. (Trial Tr. Vol. 1, 113:14-17.) At that point, Mr. Stancik left Appellant' s residence and Mr. Lacks did not see him again until September 5, 2017. (Trial Tr. Vol. 1, 113:23-114:16.) On that date, Mr. Lacks was driving towards his home on Addison Street with Mr. King when they observed Mr. Stancik "by the beer store," at which point Mr. Lacks stopped his vehicle and briefly spoke with Mr. Stancik. (Trial Tr. Vol 1. 114 17-115:15.) Mr. Lacks and Mr. King left without Mr. Stancik after their conversation. (Trial Tr. Vol. 1, 115:14-18.)

During a subsequent phone conversation with Appellant, Mr. Lacks "mentioned…that I had just seen Marcus" and Appellant then directed Mr. Lacks and Mr. King to come to the home of Appellant's girlfriend, Dechaunta Jolly, which is where Appellant was staying at the time. (Trial Tr. Vol. 1, 115:20-116:6.) Mr. Lacks stated that Ms. Jolly is commonly known as "Fatty" and that she is the mother of Appellant's child. (Trial Tr. Vol. 1, 116:7-14.) When Mr. Lacks and Mr. King arrived at Ms. Jolly's house, "Sin was outside, and he had us get in Fatty's" vehicle, which was a "silver Honda Pilot." (Trial Tr. Vol. 1, 117:2-9.) Mr. Lacks indicated that Appellant was driving and that they began searching for Mr. Stancik. (Trial Tr. Vol. 1, 117:15-19.) Mr. Stancik was eventually seen in an alleyway, and Appellant "pulled

down the alley, jumped out of the car and …started beating him up" and then forced him inside the vehicle. (Trial Tr. Vol. 1, 117-20-118:7.) This occurred "between 9 and 10" p.m. on September 5, 2017. (Trial Tr. Vol. 1, 118:13-15.)

At that point, Mr. Lacks was driving the Honda Pilot while Mr. King was seated behind the driver's seat, Appellant was seated behind the passenger's seat, and Mr. Stancik was seated between them in the backseat. (Trial Tr. Vol. 1, 118:16-119:3.) While in the vehicle, Mr. Stancik's "hoodie was pulled down over his head." (Trial Tr. Vol. 1, 122:15-17.) Mr. Lacks drove to Appellant's residence at 449 Ewing Street because "Sin wanted…Tyree to go in there and grab the .22,"referring to one of the handguns located inside the residence. (Trial Tr. Vol 1, 119:4-22.) Mr. King retrieved the handgun and gave it to Appellant, and Mr. Stancik "began apologizing for taking the gun and Sin was just telling him to basically, 'Shut the fuck up. You're getting what you deserve, you piece of shit.'" (Trial Tr. Vol. 1, 120:1-6.) Appellant then directed Mr. Lacks to drive and directed Mr. King to find any nearby "body of water" on his phone. (Trial Tr. Vol. 1, 120:10-13.) Mr. King located a body of water and Mr. Lacks "could hear the GPS, like, giving directions what way to turn." (Trial Tr. Vol. 1, 120:19-21.) Mr. Lacks followed "the direction that they're telling [him] to go" and eventually, he "was told to just pull over on the side of the road into, like, a grassy area," and he complied. (Trial Tr. Vol. 1, 121:16-23.)

The area where Mr. Lacks stopped the vehicle was near "a bunch of woods." (Trial Tr. Vol. 1, 122:5-7.) Appellant then exited the vehicle with Mr. Stancik and

Appellant was "holding on to [Mr. Stancik's] hoodie." (Trial Tr. Vol. 1, 122:8-10.) Appellant led Mr. Stancik "away from the truck, like towards the woods" while Mr. Lacks and Mr. King remained inside the vehicle. (Trial Tr. Vol. 1, 122-21-24.) Mr. Lacks testified that he and Mr. King "couldn't see anything" but that "a couple minutes after [Appellant and Mr. Stancik] walk away from the truck, me and Tyree heard a gunshot in the woods." (Trial Tr. Vol. 1, 122:21-123:1.) Thereafter, Appellant "came running back to the truck and told us to leave," and Mr. Lacks "pulled off." (Trial Tr. Vol.1, 123:2-6.).

b) Tyree King

Tyree King testified that his mother is Amy Kennedy, and further explained that he was seventeen years of age in September of 2017 and that he had been staying at the residence at 449 Ewing Street during that time. (Trial Tr. Vol. 1, 151:9-21.) Mr. King confirmed that he, Mr. Lacks, and Appellant all regularly stayed at this residence and described the residence as "a place where you sell drugs out of." (Trial Tr. Vol. 1, 151:22-152:23.) He stated that he and the other two individuals all participated in the sale of drugs. (Trial Tr. Vol. 1, 153:2-7.) Mr. King confirmed his mother's testimony that Appellant wrote him a letter in October of 2017 and testified that he interpreted the letter as follows: "That I hold his freedom in my hands, basically." (Trial Tr. Vol. 1, 153:20-154:5.) He also understood the letter to mean that Appellant wanted him "to be quiet and not say nothing." (Trial Tr. Vol. 1, 154:10-12.) This letter will be stated in its entirety later in this opinion.

Mr. King was familiar with Marcus Stancik and stated that Mr. Stancik had begun staying at 449 Ewing Street several weeks prior to September 5, 2017 and that he was "helping sell drugs." (Trial Tr. Vol. 1, 154:13-24.) Mr. King confirmed Mr. Lacks' testimony that a .22 caliber handgun, a .40 caliber handgun, and a .9 millimeter handgun were all located inside the residence. (Trial Tr. Vol. 1, 155:11-15.) He also confirmed that, a few days before September 5, 2017, Appellant was angered because a "gun was missing" and Appellant thought Mr. Stancik had stolen the gun. (Trial Tr. Vol. 1, 155:3-25.) Mr. King specified that the .9 millimeter handgun was missing from the residence. (Trial Tr. Vol. 1, 155:16-17.) Furthermore, a few days before September 5, 2017, Mr. Stancik left the residence and was not seen again until that date. (Trial Tr. Vol. 1, 156:4-12.)

Regarding the incident on September 5, 2017, Mr. King set forth essentially the same version of events as Mr. Lacks. According to Mr. King, however, he and Mr. Lacks went to 449 Ewing Street after initially seeing Mr. Stancik and Mr. Lacks had a phone conversation with Appellant and mentioned seeing Mr. Stancik; soon thereafter, Appellant arrived at 449 Ewing Street and Mr. King and Mr. Lacks entered his vehicle, which was a silver Honda Pilot. (Trial Tr. Vol. 1, 158:4-159:15.) Further, Mr. King testified that, upon locating Mr. Stancik, both "Richie and Sin" exited the vehicle and "started beating him up" before forcing him into the vehicle. (Trial Tr. Vol. 1, 160:5-22.) Mr. King's testimony also indicates that Mr. Lacks

actually retrieved the .22 caliber handgun from the 449 Ewing Street residence for Appellant. (Trial Tr. Vol. 1, 162:1-10.)

In the vehicle, Mr. Stancik was "[p]leading for his life" and saying, "Please don't kill me. I have kids. I don't want to die," and Appellant was "just telling him to shut the whole time, just shut up." (Trial Tr. Vol. 1, 162:16-23.) Mr. King's testimony conflicts with Mr. Lacks' as to who was controlling the phone with directions to the nearest body of water. Mr. King testified that Appellant did give him Appellant's own phone and directed him to find a nearby body of water, but that Mr. King "[passed] it up to Richie and said, "I don't want no parts [sic] of it."" (Trial Tr. Vol. 1, 163:1-6.) Eventually, a body of water was located and Mr. Lacks drove towards it and stopped the vehicle, where Appellant exited the vehicle and had a hold on Mr. Stanick "by the shirt still over his head," and they walked away from the vehicle. (Trial Tr. Vol. 1, 163:7-164:17.) Mr. King stated that although he could not see whether Appellant was in possession of the handgun at that time, he "knew he had it." (Trial Tr. Vol. 1, 164:24-25.)

After Appellant and Mr. Stancik walked away from the vehicle, Mr. King stated that he "heard the gun go off," and subsequently, Appellant came "back to the car frantic" and said that "the gun jammed and that he needed help unjamming it and then finishing him." (Trial. Tr. Vol. 1, 165:6-22.) Mr. King understood this to mean "finish killing him." (Trial Tr. Vol. 1, 165:23-24.) In response, Mr. King shut his door and "said no," and Appellant then entered the vehicle and they left; Mr. King

could hear Mr. Stancik "scream for help," and specifically heard him say, "Help. I'm in the water." (Trial Tr. Vol. 1, 166:2-10.)

c) Marcus Stancik

Marcus Stancik testified that in August and September of 2017, he was living in Washington, Pennsylvania and that he met Richard Lacks when Mr. Lacks approached him "outside of a Circle K" and "pretty much asked me if I would do something sexual for money," to which Mr. Stancik replied that he would. (Trial Tr. Vol. 2, 4:21-5:7, Feb. 6, 2019.) Mr. Stancik stated that he was homeless and that he was a drug user at the time he met Mr. Lacks. (Trial Tr. Vol. 2, 5:22-25.) On the night they met, Mr. Stancik went with Mr. Lacks "to an apartment on Ewing Street," and he identified this residence as "Keith Rosario's home." (Trial Tr. Vol. 2, 6:1-13.) He confirmed that Appellant's nickname was "Sin." (Trial Tr. Vol. 2, 7:3-4.) Mr. Stancik further confirmed that Appellant' s residence "was a place to sell drugs" and that himself, "Richard Lacks, Tyree King and Keith Rosario" all participated in the sale of drugs. (Trial Tr. Vol. 2, 7:11-20.) Mr. Stancik stated that three handguns were located in Appellant's residence: "a.9, a.22 and .40 caliber"; furthermore, he witnessed Appellant possessing these handguns. (Trial Tr. Vol. 2, 9:23-10:9.)

A few days prior to September 5, 2017, Mr. Stancik was confronted by Appellant because "the .9 came up missing and I was getting blamed for it." (Trial Tr. Vol. 2, 10:10-15.) The weapon could not be located, and Appellant then told Mr. Stancik that Mr. Stancik was "going to have to" commit murder in order to "avoid

violence happening to [him]." (Trial Tr. Vol. 2, 11:7-16.) Mr. Stancik "was in fear for [his] life, so [he] left and….never came back." (Trial Tr. Vol. 2, 11:21-23.) Mr. Stancik's testimony as to the events of September 5, 2017 was essentially consistent with the testimonies of Mr. Lacks and Mr. King. Mr. Stancik testified that both Appellant and Mr. Lacks exited their vehicle, assaulted him, and then forced him into the vehicle, which is consistent with Mr. King's testimony. (Trial Tr. Vol. 2, 14:20-25.) While in the vehicle, Mr. Stancik stated that his "shirt was up over my head" but that he could "see into the front seat." (Trial Tr. Vol. 2, 17:21-25.)

Mr. Stancik also testified that Mr. Lacks retrieved the .22 caliber handgun from the 449 Ewing Street residence, which is consistent with Mr. King's testimony and contrary to Mr. Lacks'. (Trial Tr. Vol. 2, 16:7-9.) Mr. Stancik's account differs from Mr. King's in that Mr. Stancik indicated that Mr. King was the individual who located the body of water on his phone. (Trial Tr. Vol. 2, 18:6-10.) Further, according to Mr. Stancik, Mr. Lacks was in possession of a ".40 Caliber" handgun in the vehicle. (Trial Tr. Vol. 2, 18:1-5.) When they arrived at the body of water, Appellant forced Mr. Stancik out of the vehicle and into the woods with him, and when they reached the edge of the water, Mr. Stancik stated: "He put me on my knees, and I was like crying and screaming, and he told me to shut the fuck up and I was going where I belonged, and he shot me in the back of the head." (Trial Tr. Vol. 2, 19:8-11.) After being shot, Mr. Stancik immediately realized he survived, and

he held his “breath hoping that [Appellant] wouldn't shoot [him] again trying to play dead, and...the gun jammed,” and Appellant “kept pulling the trigger.” (Trial Tr. Vol. 2, 19:16-21.) When Mr. Stancik heard Appellant “pull the clip out of the gun,” he “jumped into the water.” (Trial Tr. Vol. 2, 20:2-3.)

Mr. Stancik began to swim away and he “started screaming for help at the top of [his] lungs,” and he "heard police sirens" after several minutes had passed. (Trial Tr. Vol. 2, 20:23-21:6.) He eventually spoke with an officer and told him that he "was shot by Sin," and the officer asked him if he was referring to Keith Rosario, and Mr. Stancik said, “‘Yes, Keith Rosario shot me.’” (Trial Tr. Vol. 2, 22:2-8.), When asked at trial whether there was any doubt in his mind that Appellant was the individual who shot him, Appellant replied: “Not at all.” (Trial Tr. Vol. 2, 22:11-13.)

d) William Kline

William Kline testified that he resided at "400 Cove Road, South Strabane Township, Washington, Pa., 15301" on September 5, 2017. (Trial Tr. Vol. 1, 73:11-16.) At approximately 10:30 p.m. that evening, Mr. Kline "heard something that I thought was a gunshot" and then "heard some commotion and a gentleman's voice screaming, 'Help, help. I've been shot.'" (Trial Tr. Vol. 1, 73:24-74:6.) He and his wife subsequently telephoned the police and waited on their porch, where they "continued to hear commotion in the water." (Trial Tr. Vol. 1, 74:10-16.)

e) Matthew Noorbakhsh, M.D.

The Court heard testimony from Matthew Noorbakhsh, M.D., a trauma surgeon at Allegheny General Hospital in Pittsburgh, Pennsylvania. (Trial Tr. Vol. 1, 26:13-17, Feb. 5, 2019.) The Court found that Dr. Noorbakhsh was qualified to testify as an expert in the field of trauma surgery. (Trial Tr. Vol. 1, 29:2-4.) On September 5, 2017, Dr. Noorbakhsh treated Marcus Stancik, who had suffered a gunshot wound to "the back of the head, the base of the head, upper portion of the neck." (Trial Tr. Vol. 1, 29:16-24.) Dr. Noorbakhsh testified that Mr. Stancik sustained "an injury that could have caused death or serious injury[.]" (Trial Tr. Vol. 1, 31:11-13.)

f) Trooper Todd M. Porter

Trooper Todd M. Porter of the PSP testified that on September 5, 2017 at 11:30 p.m., he was dispatched to the area of "400 Cove Road," where his primary duty was "to assist with documenting the scene as it appears for photography and/or video and locating objects or collecting evidence and packaging and preserving that evidence." (Trial Tr. Vol. 1, 37:10-38:7.) One photograph taken by Trooper Porter depicted "shell casing" from a ".22 caliber weapon"; he also collected this casing as evidence. (Trial Tr. Vol. 1, 38:18-25.) Furthermore, there was a pathway that led from Cove Road to a body of water. (Trial Tr. Vol. 1, 40:9-12.) The shell casing was found near this body of water. (Trial Tr. Vol. 1, 40:9-17.) There was also a "pull-off area" near Cove Road "where cars have pulled off" from the roadway;

the pull-off area led to the aforementioned pathway. (Trial Tr. Vol. 1, 42:6-17.) The trooper indicated that the scene of the incident was a "heavily wooded area." (Trial Tr. Vol. 1, 41:5-6.)

g) Trooper Zachary Webb

Trooper Zachary Webb of the PSP testified that on September 5, 2017, at "[a]pproximately 10:44 p.m.," he was "dispatched to...400 Cove Road" because a "lady called and said that she believed she heard a gunshot" and also that "she heard a gentleman screaming that he had been shot." (Trial Tr. Vol. 2, 53:5-54:4.) He described the area around 400 Cove Road as a "very remote location" and "very dark and heavily wooded," and stated that there is "a reservoir" in the area. (Trial Tr. Vol. 2, 54:12-20.) When he and another officer arrived, he "could hear someone vividly screaming, 'Oh, my god. I've been shot. Please help me, please help me.'" (Trial Tr. Vol. 2, 55:6-8.) He also stated that he could "hear what sounded like someone moving around in the water, like footsteps in the water" and that he "engaged in a dialogue with him to try and determine what his exact location was so that way [they] could help him." (Trial Tr. Vol. 2, 55:18-23.) The victim "wanted to know if [Trooper Webb] was the State Police because he wanted to know that he wasn't going to be shot again" and he repeatedly screamed, "'Are you the police? Are you the police?'" (Trial Tr. Vol. 2, 56:1-6.)

When he eventually located the victim, Trooper Webb stated that he "could see at the base of his neck there was a gunshot wound," (Trial Tr. Vol. 2, 57:16-17.)

Mr. Stancik told Trooper Webb that an individual named "Sin" shot him; the trooper then asked if he was referring to "Rosario," and Mr. Stancik replied, "Yes, yes, Keith Rosario." (Trial Tr. Vol. 2, 58:12-59:1.) Furthermore, Mr. Stancik indicated to Trooper Webb that Appellant "believed that [Mr. Stancik] stole a gun from him, and...because he was alleged to have stolen a gun from Rosario, that Rosario wanted him dead." (Trial Tr. Vol. 2, 59:23-60:2.)

h) Trooper Mateo Herrera

Trooper Mateo Herrera of the PSP testified that on September 5, 2017, he arrived at the area near 400 Cove Road at approximately 11:15 p.m. after receiving "a call... about a person in distraught [sic] asking for help." (Trial Tr. Vol. 2, 65:2-14.) Trooper Herrera stayed in this area for "approximately an hour-and-a-half." (Trial Tr. Vol. 2, 65:17-19.) On September 6, 2017, at "a little after 1 p.m.," the trooper proceeded to the residence located at 449 Ewing Street with another officer. (Trial Tr. Vol. 2, 65:20-66:9.) The officers searched the residence for Appellant and located a handgun in the basement, which they collected as evidence. (Trial Tr. Vol. 2, 66:13-67:1.) Trooper Herrera testified that the handgun was "a Smith and Wesson M&P Shield .40 caliber." (Trial Tr. Vol. 2, 67:12-13.)

i) Trooper Thomas Kress

Trooper Thomas Kress of the PSP filed the Criminal Complaint against Appellant. (Trial Tr. Vol. 2, 71:23-72:1.) Trooper Kress stated that the only piece of evidence located at the scene was the ".22 casing" which Trooper Porter had

testified about earlier. (Trial Tr. Vol. 2, 72:11-19.) Trooper Kress and another officer subsequently interviewed Mr. Stancik while he was at Allegheny General Hospital. (Trial Tr. Vol. 2, 73:12-19.) Mr. Stancik told the officers that "he had been shot and that the person that shot him was known to him by Sin," and that "Sin lived on Ewing Street." (Trial Tr. Vol. 2, 74:5-10.) Mr. Stancik further indicated that he was shot "over a missing gun." (Trial Tr. Vol. 2, 74:18-21.)

On September 7, 2017, Trooper Kress interviewed Tyree King. (Trial Tr. Vol. 2, 75:9-11.) I. Prior to the interview, Amy Kennedy told the trooper that "she knew Keith Rosario, and she also knew him as Sin," and that "her son had disclosed to her that he was involved in something the prior evening" and "she would allow him to interview." (Trial Tr. Vol. 2, 76:4-12.) As part of his investigation, Trooper Kress also interviewed Richard Lacks, Appellant, and Dechaunta Jolly. (Trial Tr. Vol. 2, 77:17-80:24.) Trooper Kress stated that the charges against Appellant were "based upon the interview that [the officers] had with the victim, Marcus Stancik, and based upon the corroborative evidence that [the officers] had found at the scene, the .22 casing, that that crime had been committed there," and also based upon the information provided by Mr. Stancik "as to who had shot him." (Trial Tr. Vol. 2, 81:4-13.)

j) Amy Kennedy

Amy Kennedy testified that she had known Appellant for "a few years" and that he was commonly known by the nickname, "Sin." (Trial Tr. Vol. 1, 77:5-15.) Ms.

Kennedy stated that her son, Tyree King, resided with Appellant in August and September of 2017 at Appellant's residence located at "449 Ewing Street." (Trial Tr. Vol. 1, 77:16-25.) Another individual who was residing at Appellant's residence at that time was "Richie Lacks." (Trial Tr. Vol. 1, 78:7-8.) At that time, Ms. Kennedy visited Appellant's residence on a daily basis to purchase cocaine from Appellant. (Trial Tr. Vol. 1, 78:14-79:2.) She testified that during these visits, she observed "guns" in the residence and stated that these guns were possessed by Appellant. (Trial Tr. Vol. 1, 79:7-18.)

Ms. Kennedy indicated she knew that Marcus Stancik had been shot on or about September 5, 2017, explaining as follows: "Tyree, I basically made him tell me the truth on some of the stuff that happened. Of course, I didn't get everything because he was scared, and I contacted the State Police and took Tyree in." (Trial Tr. Vol. 1, 88:1-89:3.) Ms. Kennedy was familiar with Marcus Stancik as she had seen him at Appellant's residence during her daily visits in August and September of 2017. (Trial Tr. Vol. 1, 87:4-5.) On September 7, 2017, Ms. Kennedy went to the PSP with Mr. King and Mr. King was interviewed by police. (Trial Tr. Vol. 1, 88:4-11.) Ms. Kennedy also testified that in October of 2017, Appellant wrote a letter addressed to Mr. King. (Trial Tr. Vol. 1, 83:1-4.) She indicated that this letter was sent after charges were filed in the instant matter. (Trial Tr. Vol. 1, 83:5-6.) Furthermore, Mr. King had already given a statement to police regarding the

instant matter when the letter was sent. (Trial Tr. Vol. 1, 85:11-13.) In the letter, Appellant states, in pertinent part:

> To My Guy,
>
> I know it's not easy with everything happening so quick. You a man now and have to think for yourself. You have the key, don't let anyone tell you when to turn it. You know what's right. I trust you do. Saying nothing is everything and that's your right. Don't be fooled by others [sic] intentions for they haven't walked in your shoes. [...] I'm holding on to what we got a bond that can't be broken. No threats or lies of any man can make me turn on anyone I love.
> Don't know what's up with your mother and her sudden disappearing act. She should know more then [sic] anyone, it's not what they think they know. It's what they can prove in the court of law beyond reasonable doubt. Policies and procedures that law enforcement and court officials have to abide by.
> […]

(Cmwlth.'s Ex. 29.) In regards to this letter, Ms. Kennedy stated: "I was a little concerned about it, considering with everything that Tyree just opened up to me about what happened." (Trial Tr. Vol. 1, 85:8-10.) She also indicated she contacted police after reading this letter. (Trial Tr. Vol. 1, 84:3-5.)

2. Witnesses on Behalf of Appellant

a) Dechaunta Jolly

Dechaunta Jolly testified that she and Appellant "have a child together." (Trial Tr. Vol. 2, 122:1-2.) She confirmed that she is commonly known as "Fatty" and that she drives a silver Honda Pilot. (Trial Tr. Vol. 2, 130:25-131:7.) She explained that Appellant stayed at her home on 480 Addison Street every night but that it "wasn't his address." (Trial Tr. Vol. 2, 122:15-20.) On September 5, 2017,

Ms. Jolly stated that Appellant returned to her home "[a] little after 9 p.m.," and around that same time, Ms. Jolly left to drive her friend home. (Trial Tr. Vol. 2, 122:21-123:24.) She returned to her home at "[a]pproximately 9:30" and Appellant was still there; she and Appellant went to bed at around 10:30 p.m. and they both stayed at her home for the rest of the night. (Trial Tr. Vol. 2, 124:15-125:4.) However, an audio recording introduced by the Commonwealth indicated that Ms. Jolly told Trooper Kress she "was asleep before [Appellant]" on the night of September 5, 2017. (Trial Tr. Vol. 2, 140:17-18.) Ms. Jolly then stated that she received a phone call from her sister around the time they went to bed. (Trial Tr. Vol. 2, 128:12-16.) She also recalled that Appellant had a phone conversation with someone at some point after the conversation with her sister. (Trial Tr. Vol. 2, 128:25-129:6.) Ms. Jolly testified that she awoke at 7:30 a.m. the next morning and Appellant was "still sleeping in bed." (Trial Tr. Vol. 2, 129:7-12.)

b) Appellant

Appellant testified that his name is Keith Rosario. (Trial Tr. Vol. 2, 148:1-3.) He also confirmed that he is commonly known as "Sin." (Trial Tr. Vol. 2, 159:14-21.) Appellant testified that he knew Amy Kennedy "for a couple years" and stated that she is "like a sister" to him. (Trial Tr. Vol. 2, 148:10-15.) He was also familiar with Richard Lacks, stating that Mr. Lacks has "been in the neighborhood" and that he knew Mr. Lacks "since he was a young adult." (Trial Tr. Vol. 2, 148:18-20.)

Furthermore, Appellant stated that he knew Tyree King, that Mr. King "looked up to [him]" and that Appellant was like an "uncle" to Mr. King. (Trial Tr. Vol. 2, 149:23-150:6.) Appellant confirmed that his residence was 449 Ewing Street but that he stayed at Dechaunta Jolly's home every night beginning in July of 2017. (Trial Tr. Vol. 2, 151:7-14.) Around this time, he began allowing Mr. Lacks and Mr. King to stay at the 449 Ewing Street residence. (Trial Tr. Vol. 2, 151:23-152:15.)

Appellant explained that on September 5, 2017, he received two phone calls from Mr. Lacks: one at 10:00 p.m. and the other at 11:00 p.m. (Trial Tr. Vol. 2, 152:16-153:3, 155:17-22.) Appellant was at Ms. Jolly's residence at 480 Addison Street during both of these calls and he did not leave her residence in the period between the calls. (Trial Tr. Vol. 2, 155:9-14, 155:23-156.1.) According to Appellant, he arrived at Ms. Jolly's home at 6:00 p.m. on September 5, 2017 and briefly left her home to visit his residence at 449 Ewing Street, but returned to Ms. Jolly's home "before dark" and did not leave again until the next morning. (Trial Tr. Vol. 2, 156:2-157:8.)

Appellant denied that he participated in any drug activity at the 449 Ewing Street residence but stated that Mr. Lacks and Mr. King were involved in these activities and admitted he "knew it was going on." (Trial Tr. Vol. 2, 157:13-23.) Regarding the events of September 5, 2017, Appellant denied that he drove Ms. Jolly's Honda Pilot on that date, that he assaulted Marcus Stancik and forced him into the vehicle, that he directed Tyree King or Richard Lacks to retrieve a handgun

from his residence and to locate a body of water, and that he shot Mr. Stancik. (Trial Tr. Vol. 2, 158:3-23.) He denied that he ever possessed a gun on that date. (Trial Tr. Vol.2, 158:24-159:1.) Appellant stated: "I am not guilty of any of these crimes." (Trial Tr. Vol. 2, 159:4.)

DISCUSSION

I. Cruel and Unusual Punishment

In his first issue on appeal, Appellant sets forth the following argument: "The Court's individual sentences and aggregate sentence of Rosario are in violation of the United States Constitution, Amendments VIII and XIV and the Pennsylvania Constitution Article I, Section 13 as a cruel and unusual punishment in that they are grossly disproportionate to the crimes committed." (Appellant's Concise Statement 2, January 28, 2020.) Both the United States and Pennsylvania Constitutions prohibit cruel and unusual punishment. U.S. Const. Amendment VIII; Pennsylvania Const. Art. I, § 13. It is well-settled that "the guarantee against cruel and unusual punishment contained in the Pennsylvania Constitution, Article 1, Section 13, provides no broader protections against cruel and unusual punishment than those extended under the Eighth Amendment to the United States Constitution." Commonwealth v. Thompson, 106 A.3d 742, 763 (Pa. Super. 2014) (quoting Commonwealth v. Spells, 612 A.2d 458, 461 (Pa. Super.1992)). The constitutional prohibition of "excessive or cruel and unusual punishments flows

from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" Commonwealth v. Thompson, 106 A.3d 742, 763 (Pa. Super. 2014) (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (citation omitted)). However, neither the United States nor the Pennsylvania Constitution requires "strict proportionality between the crime committed and the sentence imposed; rather, it forbids only extreme sentences that are grossly disproportionate to the crime." Commonwealth v. Succi, 173 A.3d 269, 285 (Pa.Super. 2017).

In determining whether a sentence is proportional to the crime committed, a court's analysis must be guided by objective criteria, including: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. Commonwealth v. Spells, 612 A.2d 458, 462 (Pa. Super. 1992) (quoting Solem v. Helm, 463 U.S. 277, 292 (1983)). However, a court is not obligated to reach the second and third prongs of the proportionality test unless "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Spells, 612 A.2d at 463 (citation omitted).

The evidence presented at trial established the following facts: on September 5, 2017, Appellant assaulted Mr. Stancik and then forced him into Appellant's vehicle; Mr. Stancik was positioned between Appellant and Mr. King in the backseat so that he could not escape and his hood was placed over his head so that

he could barely see; at Appellant's request, Mr. Lacks drove to the residence at 449 Ewing Street so that Appellant could acquire a handgun; once Appellant obtained the handgun, he held it against Mr. Stancik in the vehicle and made vicious threats towards him; Mr. Lacks then drove to a nearby body of water, also at Appellant's request; when they arrived, Appellant forced Mr. Stancik out of the vehicle and into a wooded area near the water, where he shot Mr. Stancik in the back of the head. The sheer brutality of Appellant's crime alone convinces this Court that its sentence in no way leads to an inference of gross proportionality.

Additionally, the Court notes that its sentence was within the sentencing guidelines and none of the individual sentences exceeded any statutory maximums. Although each individual sentence - with the exception of the sentence for attempted homicide - fell within the aggravated range of the sentencing guidelines, this Court duly and thoroughly placed its reasoning for the aggravated sentence on the record:

> First and foremost, at the time of this offense, the defendant was on parole for a firearms violation. He had been paroled less than four months prior to this incident and was under the supervision of the Board of Probation and Parole. He was also subject to consecutive probationary sentences on two prior drug offenses. While the guidelines include the prior record convictions score, they do not take into account that the defendant was on supervised release at the time of these offenses.
>
> It is abundantly clear that prior attempts to rehabilitate the defendant have failed. It is also noteworthy that the defendant was on parole for a prior firearms offense when he committed this offense with a firearm.
>
> Further, the Court is troubled by the defendant involving a juvenile, Tyree King, in this criminal episode. Both the defendant and Mr. King testified at

> trial that the two of them had a special bond, much like father and son, yet the defendant exposed Mr. King to this violent assault on Mr. Stancik and even encouraged him to remain silent after the commission of the assault.
>
> The Court also considers the defendant's lack of genuine remorse for his actions and his failure to accept responsibility for his conduct as aggravating factors.
>
> Finally, the Court considers the profound impact this assault had on the victim, Marcus Stancik. At trial, the Court had the benefit of hearing extensive medical testimony from the treating emergency room physician. He explained the injuries that resulted from Mr. Stancik being shot in the back of his head and even provided x-rays showing the bullet lodged in his skull. [...]
>
> The Court also heard directly from the victim, Mr. Stancik, the horrifying account of his abduction and assault. It is truly a miracle that Mr. Stancik survived being shot in the back of his head at close range and living to tell about it. Although Mr. Stancik miraculously survived his attempted execution, the bullet remains lodged in his face, a lasting reminder of the atrocities committed on September 5, 2017.
>
> For all of these reasons, the Court finds that a sentence in the aggravated Range is warranted.

(Sent. Hr'g Tr. 29:6-31:2, June 3, 2019.) The Court not only considered the brutality of Appellant's crime in fashioning the sentence, but also Appellant's prior failed attempts at rehabilitation, his involving a minor in this violent crime, and his complete and utter lack of remorse. It is clear to this Court that Appellant cannot satisfy the first prong of the proportionality test, and therefore, further analysis is not necessary. Accordingly, Appellant's first claim must be dismissed as his sentence does not constitute cruel and unusual punishment.

2. Failure to Hold a Hearing on Defendant's Ability to Pay Costs

Next, Appellant argues that this Court erred in imposing the costs of prosecution on Appellant "without making the mandated determination of his ability to pay those costs pursuant to 42 Pa.C.S. 9721(c.1) and 9728(b.2), as well as Pa.R.Crim.P. 706(C)." (Appellant's Concise Statement 2.) Sections 9721(c.1) and 9728(b.2) of the Judicial Code mandate that the court must order the defendant to pay costs at sentencing, and in the event the court fails to issue such an order, the defendant shall nevertheless be liable for said costs. Further, Pennsylvania Rule of Criminal Procedure 706 states in pertinent part:

> (A) A court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fine or costs.
> (B) When the court determines, after hearing, that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the court may provide for payment of the fines or costs in such installments and over such period of time as it deems to be just and practicable, taking into account the financial resources of the defendant and the nature of the burden its payments will impose, as set forth in paragraph (D) below.
> (C) The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including the defendant's ability to make restitution or reparations. [...]

Pa.R.Crim.P. 706.

Here, Appellant appears to argue that the aforementioned provisions require courts to hold a hearing prior to or at sentencing to determine a defendant's ability to pay costs. In Commonwealth v. Hernandez, 917 A.2d 332 (Pa. Super. 2007), the Superior Court of Pennsylvania considered the constitutionality of Rule 706 in light

of the United States Supreme Court's ruling in Fuller v. Oregon, 417 U.S. 40 (1974). The Hernandez Court specifically addressed the question of whether a pre - sentencing hearing on ability to pay is mandated under Rule 706, and ultimately concluded that it is not. The Court stated as follows:

> The Supreme Court... did not state that *Fuller* requires a trial court to assess the defendant's financial ability to make payment at the time of sentencing. In interpreting *Fuller*, numerous federal and state jurisdictions have held that it is not constitutionally necessary to have a determination of the defendant's ability to pay prior to or at the judgment of sentence. These decisions often conclude that the constitutional concerns of *Fuller* are only implicated when sanctions are sought for nonpayment[.] ... [We] conclude that Fuller compels a trial court only to make a determination of an indigent defendant's ability to render payment before he/she is committed.

Hernandez, 917 A.2d at 337.

More recently, the Superior Court encountered an identical situation in Commonwealth v. Childs, 63 A.3d 323 (Pa. Super. 2013), where the appellant argued that the trial court erred in failing "to hold a hearing to determine [the appellant's] ability to pay costs, prior to imposing such costs." Id. at 325. Citing Hernandez, the Childs Court concluded that the trial court did not err in failing to hold the hearing and clarified that "[i]n the event that Appellant fails to make payment as ordered, the trial court will be required to hold a hearing on Appellant's ability to pay." Childs, 63 A.3d at 326. On the basis of the foregoing, it is clear that Rule 706 deals specifically with situations in which a defendant has been ordered to pay costs at sentencing and later fails to do so. Rule 706 does not, however, require a court to hold a hearing at or before sentencing to determine a

defendant's ability to pay costs. As such, Appellant's position is without merit and his second issue should be dismissed.

3. Challenge to Imposition of Miscellaneous Costs

For his third issue on appeal, Appellant states: "The Court imposed certain costs in its sentencing of Rosario that lack a statutory basis: Copies (Washington) for $50.00, Clerk of Courts (Washington) $210.00, District Attorney (Washington), $80.00; and Sheriff (Washington), $20.00." (Appellant's Concise Statement 2.) Appellant's assertion, however, is plainly incorrect. As has already been established, Sections 9721(c.1) and 9728(b.2) of the Judicial Code state that defendants are liable for the costs of prosecution. Further, all of the specific costs mentioned by Appellant are contained within Section 9728(g) of the Judicial Code and Section 7708 of the County Code, both of which govern the imposition of costs on defendants. Section 9728(g) of the Judicial Code states as follows:

> (g) Costs, etc. --Any sheriffs costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including, but not limited to, any reasonable administrative costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.

42 Pa.C.S. § 9728(g). Further, Section 7708 of the County Code provides:

> All necessary expenses incurred by the district attorneys of any county of this Commonwealth or his assistants, or any officer directed by him, in the investigation of crime and the apprehension and prosecution of persons charged with or suspected of the commission of crime, shall be paid by the

> respective counties, out of moneys in the county treasury, upon the approval of the bill of expense by the district attorney and the court of their respective counties. And in cases where a defendant is convicted and sentenced to pay the costs of prosecution and trial, the expenses of the district attorney, in connection with such prosecution, shall be considered a part of the costs of the cases and be paid by the defendant.

16 P.S. § 7708. On the basis of the foregoing, the costs imposed on Appellant are statutorily permissible and Appellant's position is, therefore, meritless. Accordingly, his third issue should be dismissed.

4. Challenge to Discretionary Aspects of Sentencing

For his fourth issue on appeal, Appellant challenges the Court's aggregate sentence of thirty-five and a half (35 ½) to ninety (90) years incarceration, arguing that the sentence "constitutes an abuse of discretion" and is "manifestly excessive and/or unduly harsh," and thus, "clearly unreasonable" under Section 9781(c)(2) of the Judicial Code. (Appellant's Concise Statement 2-3.) Appellant further asserts:

> (1) [T]he sentence is disproportionate to the circumstances of the convictions and without consideration of Rosario as an individual and his character references after consideration of the factors in 42 Pa.C.S. § 9721(b); (2) the Court implied that Rosario cannot be rehabilitated in finding that Rosario failed in all prior attempts of rehabilitation; (3) the sentence in effect subjects Rosario to imprisonment and/or parole supervision for the remainder of his natural life.

(Appellant's Concise Statement 3.) When reviewing a challenge to the discretionary aspects of sentencing, the following standard is applied:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its

> judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Shull, 148 A.3d 820, 831-32 (Pa. Super. 2016) (quoting Commonwealth v. Antidormi, 84 A.3d 736, 760 (Pa. Super. 2014)). "Challenges to discretionary aspects of sentencing must raise a substantial question." Commonwealth v. Ellis, 700 A.2d 948, 958 (Pa.Super. 1997) (quoting Commonwealth v. Tuladziecki, 522 A.2d 17, 18 (Pa. 1987)). The Superior Court of Pennsylvania has held that an excessive sentence claim, in conjunction with an assertion that the court did not consider mitigating factors, raises a substantial question. Commonwealth v. Gonzalez, 109 A.3d 711, 731 (Pa. Super. 2015); Commonwealth v. Perry, 883 A.2d 599, 602 (Pa. Super. 2005).

When imposing sentence, the sentencing court must consider the factors set forth in Section 9721(b) of the Judicial Code. Commonwealth v. Shugars, 895 A.2d 1270, 1275 (Pa. Super. 2006) (quoting Commonwealth v. Fullin, 892 A.2d 843, 847 (Pa. Super. 2006) (citation omitted)). Section 9721(b) states in pertinent part:

> [T]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing[.]

42 Pa.C.S. § 9721(b). Furthermore, "[a] trial court judge has wide discretion in sentencing and can, on the appropriate record and for the appropriate reasons, consider any legal factor in imposing a sentence in the aggravated range." Shugars,

895 A.2d at 1275 (quoting Commonwealth v. Stewart, 867 A.2d 589, 593 (Pa. Super. 2005) (citation omitted)). This Court's judgment of sentence clearly falls within the sentencing guidelines, and Appellant has not argued to the contrary. Therefore, because Appellant's sentence falls within the sentencing guidelines, his sentence cannot be disturbed unless it is clearly unreasonable. 42 Pa.C.S. § 9781(c)(2); Commonwealth v. Macias, 968 A.2d 773, 777 (Pa. Super. 2009). Appellant received a sentence in the aggravated range for every offense for which he was convicted, with the exception of his standard range sentence for attempted homicide.

Contrary to Appellant's assertion, this Court did consider Appellant's individual characteristics and the character references submitted on his behalf. Prior to sentencing, the Court thoroughly reviewed the presentence investigation report prepared by John Pankopf. (Sent. Hr'g Tr. 25:17-19.) In addition, the Court considered the character references submitted by Kattiria Rosario Gonzalez, Venus Sepulveda, Samantha Nelson, Ava Rivera, Alexi Mendez, Angel Mendez, and Ada Mendez. (Sent. Hr'g Tr. 25:25-26:4.) The Court also heard testimony from Ava Rivera, Appellant's mother, and Kattiria Rosario Gonzalez, Appellant's sister, at the sentencing hearing. (Sent. Hr'g Tr. 10:7-12:14.) Finally, contrary to Appellant's argument, this Court did not suggest that Appellant could not be rehabilitated but merely stated that the "prior attempts to rehabilitate [Appellant] have failed." (Sent. Hr'g Tr. 29:17-18.) The Court emphasized that Appellant "had been paroled less than four months prior to this incident and was under the supervision of the

Board of Probation and Parole," and was also "subject to consecutive probationary sentences on two prior drug offenses," when the incident occurred. (Sept. Hr'g Tr. 29:8-12.) Further, the offense for which Appellant was on parole was a "firearms offense," and yet, Appellant used a firearm in the instant matter. (Sent. Hr'g Tr. 29:18-21.) In imposing sentence, this Court had a duty to address the rehabilitative needs of Appellant, and therefore, this consideration was entirely proper.

The Court's reasoning for the aggravated sentence, which has previously been stated in its entirety, was set forth clearly and thoroughly and with regard for the factors under Section 9721(b). Under the particular circumstances of this case, an aggravated sentence was in no way unreasonable, manifestly excessive, or unduly harsh. Appellant's prior failed attempts at rehabilitation, his involving a minor in this violent crime, his lack of remorse, and the sheer brutality of the crime itself indicated to this Court that an aggravated sentence was appropriate. Ultimately, this Court finds that its sentence was entirely reasonable under the circumstances, that it complied with Section 9721(b) in all respects, and that it also considered any mitigating factors in fashioning the sentence. Accordingly, Appellant's fourth issue should be dismissed.

5. Application of Deadly Weapon Enhancement to Kidnapping Offenses

Appellant's fifth issue on appeal reads as follows:

The Court committed error in sentencing Rosario to illegal sentences as to

> Counts 4 and 5 of the Information, (the two kidnapping charges) when it applied a deadly weapon enhancement to each of these two sentences without the legal authority to do so because the evidence at trial established that the two crimes of kidnapping were complete prior to Rosario's possession or use of a deadly weapon.

(Appellant's Concise Statement 3.) As noted in the preceding section of this opinion, "a sentence will not be disturbed on appeal absent a manifest abuse of discretion." Shull, 148 A.3d at 831-832 (quoting Antidormi, 84 A.3d at 760). Pennsylvania courts have held that "application of the [deadly weapon enhancement] presents a substantial question for review." Commonwealth v. Buterbaugh, 91 A.3d 1247, 1266 (Pa. Super. 2014).

The deadly weapon enhancement provisions of the sentencing guidelines provide that an enhancement "shall apply to each conviction offense for which a deadly weapon is possessed or used." 204 Pa. Code § 303.10(a)(4). A trial court does not have discretion to "disregard an applicable enhancement when determining the appropriate sentencing ranges." Commonwealth v. Tavarez, 174 A.3d 7, 10 (Pa. Super. 2017) (quoting Commonwealth v. Cornish, 589 A.2d 718, 720 (Pa. Super. 1991)). When a deadly weapon is "used," the sentencing guidelines provide:

> (2) When the court determines that the offender used a deadly weapon during the commission of the current conviction offense, the court shall consider the DWE/Used Matrix (§ 303.17(b)). An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual:
>
> (i) Any firearm, (as defined in 42 Pa.C.S. § 9712) whether loaded or unloaded, or
>
> (ii) Any dangerous weapon (as defined in 18 Pa.C.S. § 913), or

> (iii) Any device, implement, or instrumentality capable of producing death or serious bodily injury.

204 Pa. Code § 303.10(a)(2). The standard of proof governing the applicability of deadly weapon enhancement is a preponderance of the evidence. Commonwealth v. Ellis, 700 A.2d 948, 959 (Pa. Super. 1997) (quoting Commonwealth v. McKeithan, 504 A.2d 294, 298 (Pa.Super. 1986)). In the instant matter, Appellant was convicted of two counts of kidnapping under Sections 2901(a)(2) and (a)(3) of the Crimes Code. These provisions read as follows:

> **(a) Offense defined**.-- Except as provided in subsection (a.1), a person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following intentions: [...]
>
> (2) To facilitate commission of any felony or flight thereafter.
>
> (3) To inflict bodily injury on or to terrorize the victim or another. [...]

18 Pa.C.S. §§ 2901(a)(2) and (3).

Appellant argues that the deadly weapon enhancement should not have been applied because "the two crimes of kidnapping were complete prior to Rosario's possession or use of a deadly weapon." (Appellant's Concise Statement 3.) However, this contention is simply unsupported by the record. At trial, the testimony established that Appellant and Mr. Lacks assaulted Stancik and then forced him into their vehicle on September 5, 2017. Mr. Stancik was positioned between Appellant and Mr. King in the backseat so that he could not escape and

his hood was placed over his head so that he could barely see. Then, at Appellant's request, they drove to the residence at 449 Ewing Street so that Appellant could acquire the .22 caliber handgun; when they arrived, Mr. Lacks retrieved the handgun for Appellant. Mr. Stancik testified that Appellant "held [the handgun] on me in the back seat." (Trial Tr. Vol. 2, 16:11-12.) Appellant made the following threats toward Mr. Stancik while holding the handgun on him: "'Shut the fuck up. You're getting what you deserve, you piece of shit[,]'" and "'Shut the fuck up. I'll leave you on the side of the road.'" (Trial Tr. Vol. 1, 120:4-6; Trial Tr. Vol. 2, 17:9-11.) Finally, when they arrived at the body of water, Appellant forced Mr. Stancik out of the vehicle and into a wooded area near the water, where he shot Mr. Stancik with the .22 caliber handgun.

The crimes were not complete after Appellant assaulted Mr. Stancik and forced him into the vehicle, as Appellant appears to contend. Instead, the commission of the crimes lasted from the time Mr. Stancik was assaulted and forced into the vehicle right up until the moment he was shot by Appellant. For that duration of time, Mr. Stancik was being unlawfully removed a substantial distance under the circumstances from where he was found, or being unlawfully confined for a substantial period in a place of isolation. Thus, the fact that Appellant was not in possession of the handgun when Mr. Stancik was initially kidnapped is insignificant. Furthermore, the handgun was clearly employed by Appellant in a way that threatened or injured Mr. Stancik, as required by the

sentencing guidelines. On the basis of the foregoing, the Court finds that the deadly weapon enhancement was properly applied to the kidnapping convictions because Appellant undoubtedly used a handgun during the commission of the crimes. Accordingly, Appellant's fifth issue should be dismissed.

6. Denial of Motion to Suppress .40 Caliber Handgun

Appellant's sixth issue reads as follows: "The Court committed an error in denying the [sic] Rosario's motion to suppress the .40 caliber handgun by finding that Tyree King had apparent authority to consent to search the premises where the handgun was found." (Appellant's Concise Statement 3.) When reviewing a challenge to a trial court's denial of a motion to suppress, the following standard of review is applied:

> The standard and scope of review for a challenge to the 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. When reviewing rulings of a suppression court, we must consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Hunter, 963 A.2d 545, 549 (Pa. Super. 2008) (quoting Commonwealth v. Booze, 953 A.2d 1263, 1268-69 (Pa. Super. 2008) (citations omitted)).

Both the United States and Pennsylvania Constitutions prohibit "unreasonable searches and seizures." U.S. Const. Amendment IV; Pennsylvania

Const. Art. 1, § 8. Warrantless searches and seizures are generally considered to be unreasonable, subject to a few specifically established, well-delineated exceptions. Commonwealth v. Strader, 931 A.2d 630, 634 (Pa. 2007) (quoting Horton v. California, 496 U.S. 128, 134 n. 4 (1990) (citations omitted)). One such exception is known as the "apparent authority exception," in which a third party with apparent authority over the area to be searched may provide police with consent to search. Strader, 931 A.2d at 634 (quoting United States v. Matlock, 415 U.S. 164, 171 (1974)). Pennsylvania courts have explained this exception as follows:

> A third party with apparent authority over the area to be searched may provide police with consent to search. Third party consent is valid when police reasonably believe a third party has authority to consent. Specifically, the apparent authority exception turns on whether the facts available to police at the moment would lead a person of reasonable caution to believe the consenting third party had authority over the premises. If the person asserting authority to consent did not have such authority, that mistake is constitutionally excusable if police reasonably believed the consenter had such authority and police acted "on facts leading sensibly to their conclusions of probability."

Commonwealth v. Hunter, 963 A.2d 545, 552-53 (Pa. Super. 2008) (quoting Strader, 931 A.2d at 634). To evaluate the voluntariness of the consent to a warrantless search, a court must examine the totality of the circumstances. Commonwealth v. Reese, 31 A.3d 708, 722 (Pa. Super. 2011) (quoting Commonwealth v. Gillespie, 821 A.2d 1221, 1225 (Pa. 2003)).

At the suppression hearing on May 4, 2018, Corporal Fred Scott testified that he was dispatched to the residence at 449 Ewing Street in the late hours of September 5, 2017. (OPTM Hr'g Tr. 40:9-20, May 4, 2018.) When he arrived, three

individuals were outside of the residence "on the front stoop or front sidewalk." (OPTM Hr'g Tr. 42:6-15.) He described these individuals as "a younger black male and two younger white females" and identified the male as Tyree King. (OPTM Hr'g Tr. 43:1-16.) Mr. King told Cpl. Scott that "he was house-sitting for Mr. Rosario and that he was watching his dog as well[,]" and he "gave the impression Mr. Rosario was out of town." (OPTM Hr'g Tr. 43:10-13.) Trooper Scott informed Mr. King that he was searching for Appellant and inquired if he could search the residence, to which Mr. King replied, 'Yeah, you can go ahead and search.'" (OPTM Hr'g Tr. 45:5-14.) Cpl. Scott testified that he did not have any reason to disbelieve Mr. King's claim that he was house-sitting for Appellant. (OPTM Hr'g Tr. 46:2-4.) Mr. King was unambiguous in his expression of consent and he never recanted his consent. (OPTM Hr'g Tr. 46:17-47:2.) Trooper Mateo Herrera, who accompanied Cpl. Scott, corroborated Cpl. Scott's testimony and stated that Mr. King consented to a search of the residence. (OPTM Hr'g Tr. 56:2-58:4.)

Upon review of the evidence presented at the suppression hearing, this Court finds that the search of the residence was proper because Mr. King had apparent authority to consent to the search. The Court notes that testimony was presented at the suppression hearing indicating that Mr. King was a minor on September 5, 2017. (OPTM Hr'g Tr. 51:6-7, 63:9-12.) Further, Mr. King testified at trial that he was seventeen years of age in September of 2017. (Trial Tr. Vol. 1, 151:17-18.) This fact does not affect the Court's conclusion, however. A comparable factual scenario

where the consent of a minor was called into question is Commonwealth v. Hughes, 836 A.2d 893 (Pa. 2003). In Hughes, the police arrived at the residence of the defendant and found three teenaged girls on the porch. Id. at 901. The officers inquired if they could enter the home to search for the defendant; the girls responded, "no problem," and opened the door for them. Id. The Court in Hughes noted that the girls showed no hesitation when they gave the officers consent, opened the door for the officers, and followed them into the home. Id. The Court concluded that it was reasonable to believe, from the totality of the circumstances, that the girls had proper authority to consent to a search. Id. Here, Mr. King claimed he was house-sitting for Appellant and that he was watching Appellant's dog; Cpl. Scott stated he had no reason to disbelieve Mr. King's claim. Further, Mr. King clearly and unambiguously consented to a search of the residence by saying 'Yeah, you can go ahead and search.'" (OPTM Hr'g Tr. 45:5-14.) Thus, the police reasonably believed Mr. King had proper authority to consent.

The fact that the police knew Mr. King was not the owner or leaseholder of the residence at 449 Ewing Street similarly does not affect this Court's conclusion. In Strader, a parole officer relayed a tip for the location of Cecil Shields, a parole absconder, to a Wilkinsburg Police Department detective. Id. at 632-33. The detective and other officers went to the apartment in search of Shields. Id. at 633. From prior contacts, the detective knew that Shields was the leaseholder at the apartment. Id. Upon knocking on the apartment door, a man who identified

himself as Thornton answered. Id. at 632-33. The detective showed Thornton a picture of Shields and asked if he knew him, to which Thornton replied that he did not. Id. Then, the detective asked if Shields was inside the apartment and Thornton said, "no, he would be back shortly." Id. Thornton stated he and another man were staying there temporarily and had only been there for a day. Id. The detective asked Thornton if he was in charge of the apartment and Thornton responded, "yes." Id. The detective then proceeded to ask Thornton for permission to search the apartment for Shields and Thornton consented. Id. The Court in Strader ruled that the police reasonably believed Thornton had proper authority to consent to a search of the apartment although he was not the owner or leaseholder of the apartment. Id. at 635.

In the instant matter, Cpl. Scott knew that Mr. King was not the owner or leaseholder of the residence at 449 Ewing Street; Mr. King told him that he was house-sitting for Appellant, that he was watching Appellant's dog, and that Appellant was out of town. As set forth in Strader, an individual who is not the owner or leaseholder of property may have apparent authority to consent to a search of that property. In this case, Mr. King acted as though he had temporary control of the residence and clearly and unambiguously consented to a search of the residence. For the foregoing reasons, the Court finds that Mr. King had apparent authority to consent to the search.

Assuming, *arguendo*, the admission of the .40 caliber handgun was improper,

Appellant's claim should still be dismissed because any error resulting from the admission of the handgun is harmless. In conducting a harmless error analysis, courts are guided by the following principles:

> [A]n error will be deemed harmless where the appellate court is convinced beyond a reasonable doubt that the error could not have contributed to the verdict. Guidelines for determining whether an error is harmless include: (1) whether the error was prejudicial to the defendant or if prejudicial, whether the prejudice was de minimis; (2) whether the erroneously admitted evidence was merely cumulative of other, untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) whether the evidence of guilt was so overwhelming as established by properly admitted and uncontradicted evidence that the prejudicial effect of the error was so insignificant by comparison to the verdict.

Commonwealth v. Adams, 39 A.3d 310, 322 (Pa. Super. 2012) (quoting Commonwealth v. Nolen, 634 A.2d 192, 196 (Pa. 1993) (internal citations omitted)). At trial, there was a substantial amount of testimony indicating that multiple handguns were located inside Appellant's 449 Ewing Street residence. Four witnesses - Ms. Kennedy, Mr. Lacks, Mr. King, and Mr. Stancik - all testified that they observed several handguns at that residence. Furthermore, Mr. Lacks, Mr. King, and Mr. Stancik all testified that one such handgun found at that residence was a .40 caliber handgun. Thus, the admission of the .40 caliber handgun is cumulative of these witnesses' testimonies, and the jury could have properly concluded that the handgun was within the residence even if it had not been admitted. Additionally, Appellant was not prejudiced in any way by the admission of the handgun; its admission did not come as a surprise to the jury because they

had already heard a great deal of testimony indicating that the handgun was within the residence.

Finally, the evidence of Appellant's guilt was so overwhelming as established by properly admitted and uncontradicted evidence that any prejudicial effect of the error, if any, was so insignificant by comparison to the verdict. As will be discussed at much greater length in the succeeding portions of this opinion, the evidence presented at trial clearly and unequivocally demonstrates that Appellant is guilty of each crime charged: The admission of the .40 caliber handgun had absolutely no bearing on the jury's verdict as there was more than enough remaining evidence for the jury to find Appellant guilty. Accordingly, Appellant's sixth issue should be dismissed.

7. Sentencing on Multiple Inchoate Crimes

Appellant's seventh issue on appeal states as follows:

> The Court committed an error of law by entering a judgment of sentence on two inchoate crimes in violation of 18 Pa.C.S. § 906, namely Count I, Criminal Attempt --Homicide and Count VI, Criminal Conspiracy to commit homicide, aggravated assault and kidnapping when the "conduct [was] designed to commit or to culminate in the commission of the same crime," namely, criminal homicide.

(Appellant's Concise Statement 3.) This Court agrees that a sentence on both attempted homicide and criminal conspiracy to commit homicide would have been improper. Section 906 of the Crimes Code clearly prohibits such a sentence, stating as follows: "A person may not be convicted of more than one of the inchoate crimes of criminal attempt, criminal solicitation or criminal conspiracy for conduct

designed to commit or to culminate in the commission of the same crime." However, the Court did not actually sentence Appellant on criminal conspiracy to commit homicide or kidnapping; rather, the Court sentenced Appellant on criminal conspiracy to commit aggravated assault.

It is true that the sentencing order issued by this Court on June 3, 2019 states that Appellant was sentenced at "Count 6, Criminal Conspiracy to Commit Homicide, Aggravated Assault and Kidnapping, § 903(a)(1), Felony 1[.]" (Sent. Order 2, June 3, 2019.) However, this was not the Court's intention and was done in error by the court stenographer. The transcript from the sentencing hearing reveals the actual sentence at Count 6: "Criminal Conspiracy to commit aggravated assault, Felony of the First Degree, § 903(a)(1) of the Crimes Code[.]" (Sent. Hr'g Tr. 27:22-24.) It is well settled that "a trial court has the inherent, common-law authority to correct 'clear clerical errors' in its orders." Commonwealth v. Thompson, 106 A.3d 742, 766 (Pa. Super. 2014) (quoting Commonwealth v. Borrin, 12 A.3d 466, 471 (Pa. Super. 2011) (citation omitted)). Further, "an oral sentence which is on the record, written incorrectly by the clerk of courts, and then corrected by the trial judge, is [ ] a clerical error." Thompson, 106 A.3d at 766 (quoting Borrin, 12 A.3d at 474 (citation omitted)). Upon discovery of this error, the Court filed an order on February 19, 2020 amending the judgment of sentence to reflect that Appellant was sentenced on criminal conspiracy to commit aggravated assault at Count 6.

This Court had authority to correct the recorded sentence in this manner because the court stenographer's error undoubtedly qualifies as a clear clerical error.

The Court's actual sentence - attempted homicide and criminal conspiracy to commit aggravated assault - is permissible under the law. The Superior Court of Pennsylvania has stated that "[a]ttempted murder and conspiracy to commit aggravated assault are not designed to culminate in the commission in the same crime, *i.e.* , murder." Commonwealth v. Kelly, 78 A.3d 1136, 1144 (Pa. Super. 2013). Thus, because these offenses are not designed to culminate in the commission of the same crime, the Court's sentence satisfies the dictates of Section 906. Accordingly, Appellant's seventh issue should be dismissed.

8. Weight of the Evidence

For his eighth issue on appeal, Appellant argues that all of his convictions "were against the weight of the evidence." (Appellant's Concise Statement 3-4.) The appropriate standard of review for a claim that the verdict was against the weight of the evidence is as follows:

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice. It has often been stated that a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:
>
> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Thomas, 194 A.3d 159, 168 (Pa. Super. 2018) (quoting Commonwealth v. Clay, 64 A.3d 1049, 1054-55 (Pa. 2013) (internal citations and quotation marks omitted) (emphasis in original)).

This Court ultimately finds that Appellant's convictions are not against the weight of the evidence and that they in no way shock one's sense of justice, as the testimony and evidence presented by the Commonwealth clearly establishes that Appellant is guilty of the offenses. The following facts were established at trial. Mr. Lacks, Mr. King, and Mr. Stancik had been staying at Appellant's residence at 449 Ewing Street around the date of September 5, 2017. All of those individuals, including Appellant, participated in the sale of narcotics at that residence. There were several handguns at this residence -a .9 millimeter handgun, a .40 caliber handgun, and a .22 caliber handgun. Mr. Stancik observed both Appellant and Mr. Lacks in possession of these handguns. Several days prior to September 5, 2017, Appellant confronted Mr. Stancik regarding a handgun that had gone missing from

the residence; Appellant believed Mr. Stancik had stolen the handgun. When the handgun could not be located, Mr. Stancik testified that Appellant told Mr. Stancik that he was "going to have to" commit murder in order "to avoid violence happening to me." (Trial Tr. Vol. 2, 11:7-16.) Because Mr. Stancik "was in fear for his life," he left Appellant's residence and did not return. (Trial Tr. Vol. 2, 11:21-23.)

On September 5, 2017, Mr. Lacks and Mr. King sighted Mr. Stancik while they were driving, at which point they stopped their vehicle and had a brief discussion with Mr. Stancik and then drove away. Thereafter, Appellant joined them in their vehicle and they continued driving until they again found Mr. Stancik. Although Mr. Lacks indicated that only Appellant exited the vehicle and assaulted Mr. Stancik before forcing him into the vehicle, Mr. King and Mr. Stancik's testimonies indicate that both Appellant and Mr. Lacks assaulted Mr. Stancik and then forced him into the vehicle. Mr. King testified that Appellant and Mr. Lacks were "[p]unching, hitting" him before forcing him into the backseat, while Mr. Stancik stated that they "jumped out and started kicking me, punching me, forced me to the ground," and that they "grabbed" him by the "back of my shirt and pulled it up over my head and forced me into the back seat of the car." (Trial Tr. Vol. 1, 160:18; Trial Tr. Vol. 2, 14:11-15:5.) While he was in the vehicle, Mr. Stancik's hood remained over his head so that he could barely see.

By all accounts, they proceeded to the residence at 449 Ewing Street because Appellant expressed that he wished to obtain a .22 caliber handgun, which he

referred to as a "deuce."(Trial Tr. Vol. 1, 119:9-14.) While Mr. Lacks indicated that Mr. King retrieved the handgun from the residence, both Mr. King and Mr. Stancik testified that Mr. Lacks went inside the residence to retrieve the handgun. After Mr. Lacks handed Appellant the handgun, Mr. Stancik testified that Appellant "held it on me in the back seat." (Trial Tr. Vol. 2, 16:11-12.) According to Mr. Stancik, Mr. Lacks was also in possession of a firearm while in the vehicle -a .40 caliber handgun. Mr. Stancik began pleading for his life while in the vehicle. Appellant responded by saying, "'Shut the fuck up. You're getting what you deserve, you piece of shit[,]'" and "'Shut the fuck up. I'll leave you on the side of the road.'" (Trial Tr. Vol. 1, 120:4-6, 162:22-23.).

Appellant then ordered Mr. Lacks, who was driving the vehicle, to drive towards any body of water, and Mr. Lacks complied. When they arrived at a body of water, Appellant forced Mr. Stancik out of the vehicle and into a nearby wooded area while Mr. Lacks and Mr. King remained in the vehicle. After a few moments, both Mr. Lacks and Mr. King testified that they heard a gunshot. Subsequently, Appellant ran back to the vehicle and told Mr. King that "the gun jammed and that he needed help unjamming it and then finishing him," which Mr. King understood to mean "finish killing him." (Trial Tr. Vol. 1, 165:6-24.)

By Mr. Stancik's account, when he and Appellant eventually reached the edge of the water, he explained: "[Appellant] put me on my knees, and I was like crying and screaming, and he told me to shut the fuck up and I was going where I

belonged, and he shot me in the back of the head." (Trial Tr. Vol. 2, 19:8-11.) Thereafter, when police eventually arrived and spoke with Mr. Stancik, he immediately identified Appellant as the shooter. When asked at trial whether there was any doubt that Appellant had shot him on September 5, 2017, he replied: "Not at all." (Trial Tr. Vol. 2, 22:11-13.) Mr. Stancik subsequently explained to police that Appellant had shot him because he believed he had stolen a handgun from him. Furthermore, police found shell casing from a .22 caliber handgun at the scene of the crime.

William Kline, who lived near the area where this incident occurred at 400 Cove Road, corroborated this account and testified that he heard a gunshot on September 5, 2017 at approximately 10:30 p.m. accompanied by commotion in the water, and he subsequently called the police. Further, after charges were filed in this matter, Appellant wrote a letter addressed to Mr. King in October of 2017. In this letter, Appellant stated, in pertinent part:

> You have the key, don't let anyone tell you when to turn it... Saying nothing is everything and that's your right...it's not what they think they know. It's what they can prove in the court of law beyond reasonable doubt. Policies and procedures that law enforcement and court officials have to abide by.

(Cmwlth.'s Ex. 29.) Mr. King testified that he understood the letter to mean that he "holds [Appellant's] freedom in my hands" and that Appellant "wanted me to be quiet and not say nothing." (Trial Tr. Vol. 1, 154:3-12.) Upon review of the letter itself and the accompanying testimony, this Court finds that Appellant was

attempting to persuade Mr. King to remain silent and to not cooperate with the authorities investigating this matter.

In addition, the Court did not find Dechaunta Jolly or Appellant to be credible in their testimonies. Ms. Jolly stated that she and Appellant both went to bed at approximately 10:30 p.m. on September 5, 2017 and that both of them stayed at her residence for the remainder of the night. However, the Commonwealth introduced an audio recording at trial indicating that Ms. Jolly told Trooper Kress she "was asleep before [Appellant]" on the night of the incident. (Trial Tr. Vol. 1, 140:17-18.) Ms. Jolly's account is also inconsistent with the testimony of Mr. Kline, who stated that he heard a gunshot and commotion in the water near 400 Cove Road at approximately 10:30 p.m. Further, Appellant testified that he was not involved in the sale of narcotics. Regarding the events of September 5, 2017, he denied that he assaulted Mr. Stancik and forced him into the Honda Pilot, that he directed Mr. Lacks or Mr. King to locate a body of water, and that he shot Mr. Stancik. All of this testimony, however, is wholly inconsistent with those of four separate witnesses: Ms. Kennedy, Mr. Lacks, Mr. King, and Mr. Stancik.

In conclusion, despite several conflicts in the testimony, the evidence presented clearly establishes that Appellant and Mr. Lacks conspired to kidnap and inflict harm on Mr. Stancik. Although Mr. Lacks testified that only Appellant assaulted and kidnapped Mr. Stancik and that Mr. King retrieved the handgun, both Mr. King and Mr. Stancik testified that Appellant and Mr. Lacks assaulted

and kidnapped Mr. Stancik and that Mr. Lacks retrieved the handgun for Appellant. There was also testimony indicating that Mr. Lacks drove towards the body of water at Appellant's request and that he possessed a .40 caliber handgun while in the vehicle. The evidence presented also clearly demonstrates that Appellant kidnapped and attempted to murder Mr. Stancik. Although Ms. Jolly and Appellant denied Appellant's involvement altogether, their testimony was not credible and was substantially inconsistent with other testimony.

It is well established that "[t]he finder of fact...exclusively weighs the evidence, assesses the credibility of witnesses, and may choose to believe all, part, or none of the evidence." Commonwealth v. Sanchez, 36 A.3d 24, 39 (Pa. 2011). Furthermore, an appellate court "cannot substitute its judgment for that of the jury on issues of credibility, or that of the trial judge respecting weight." Id. Upon review of all the evidence presented, this Court finds that the jury properly weighed the evidence and assessed the credibility of the witnesses, and that the verdict does not shock one's sense of justice. As such, this Court will not disturb the jury's verdict, and accordingly, Appellant's eighth issue must be dismissed.

9. Sufficiency of the Evidence

In his ninth and final issue on appeal, Appellant argues that the "evidence was insufficient to prove" the elements of each of the crimes for which he was convicted. (Appellant's Concise Statement 4-5.) The standard of review for addressing sufficiency of the evidence claims is well-settled:

> A claim challenging the sufficiency of the evidence is a question of law. 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. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim[,] the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Ortiz, 160 A.3d 230, 233-234 (Pa. Super. 2017) (quoting Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (internal citations omitted)).

First, Appellant was convicted of attempted homicide. A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being. 18 Pa.C.S. § 2501(a). Further, a person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime. 18 Pa.C.S. § 901(a). There was a plethora of evidence presented at trial demonstrating that Appellant intended to cause the death of Marcus Stancik. Appellant was reportedly angry with Mr. Stancik because he believed Mr. Stancik had stolen a handgun from his residence. Appellant confronted Mr. Stancik about the handgun and told him that he was "going to have to" commit murder in order "to avoid violence happening to me." (Trial Tr. Vol. 2, 11:7-16.) Mr. Stancik "was in fear for his life" and he left Appellant's residence and did not return. (Trial Tr. Vol. 2, 11:21-

23.) Appellant's belief that Mr. Stancik had stolen the handgun was his motive for the attempted slaying, and his threat towards Mr. Stancik indicates his intent to murder him.

On September 5, 2017, Appellant and Mr. Lacks assaulted Mr. Stancik and then forced him inside their vehicle and kept his hood over his head. Mr. Lacks, Mr. King, and Mr. Stancik testified that Appellant specifically requested that they drive to the residence at 449 Ewing Street in order to obtain the .22 caliber handgun, or the "deuce." Once Appellant obtained this, handgun, he held it against Mr. Stancik for the remainder of their time in the vehicle. When Mr. Stancik began pleading for his life, Appellant responded with vicious threats. Mr. Lacks testified that Appellant told him, "'Shut the fuck up. You're getting what you deserve, you piece of shit[,]'" while Mr. Stancik testified that Appellant stated, "'Shut the fuck up. I'll leave you on the side of the road.'" (Trial Tr. Vol. 1, 120:4-6; Trial Tr. Vol. 2, 17:9-11.) At this point, Mr. Stancik "knew it was over" and "knew I was going to get shot." (Trial Tr. Vol. 2, 17:12-16.) Appellant's request to obtain the handgun, and his threats towards Mr. Stancik while in the vehicle, indicate his intent to murder Mr. Stancik.

The following string of events was firmly established by testimony. Appellant requested that Mr. Lacks drive towards a body of water. When they arrived at the body of water, Appellant forced Mr. Stancik out of the vehicle with a grip on Mr. Stancik's hood, which remained over his head. He led Mr. Stancik towards the

water into a wooded area and when they reached the edge of the water, Mr. Stancik testified as follows: "[Appellant] put me on my knees, and I was like crying and screaming, and he told me to shut the fuck up and I was going where I belonged, and he shot me in the back of the head." (Trial Tr. Vol. 2, 19:8-11.) Mr. Stancik immediately realized he survived and noticed that Appellant's handgun had jammed; however, Appellant continued to pull the handgun's trigger after it had jammed, which is further indicative of his intent to murder Mr. Stancik. When he eventually spoke to police, Mr. Stancik immediately identified Appellant as the shooter, and he testified at trial that he had no doubt Appellant was the individual who shot him.

As has been shown, Appellant's conduct clearly demonstrates his intent to murder Appellant. Furthermore, Dr. Matthew Noorbakhsh, who treated Mr. Stancik after the shooting, corroborated Mr. Stancik's account and stated that he had suffered a gunshot wound "to the back of the head, the base of the head, upper portion of the neck." (Trial Tr. Vol. 1, 29:16-24.) He further described the injury as one that "could have caused death[.]" (Trial Tr. Vol. 1, 31:11-13.) Thus, Appellant's act of shooting Mr. Stancik in the back of the head was a substantial step towards the commission of the crime of homicide. Accordingly, the Commonwealth has satisfied its burden of proof with regard to the crime of attempted homicide.

Second, Appellant was convicted of two counts of aggravated assault. The first count is found at Section 2702(a)(1) of the Crimes Code, which states that a

person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. "Serious bodily injury" is defined as bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa.C.S. § 2301. The second count is found at Section 2702(a)(4) of the Crimes Code, which states that a person is guilty of aggravated assault if he attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon. 18 Pa.C.S. § 2301. "Bodily injury" is defined as impairment of physical condition or substantial pain, while "deadly weapon" is defined, in pertinent part, as any loaded or unloaded firearm. 18 Pa.C.S. § 2301.

The evidence presented at trial demonstrates that Appellant is guilty of aggravated assault under Sections 2702(a)(1) and (a)(4). As has been firmly established in this opinion, Appellant, with the intent to murder Mr. Stancik, shot Mr. Stancik in the back of the head on September 5, 2017. Appellant used a .22 caliber handgun in the commission of the shooting, which was established by testimony and by physical evidence of shell casing from a .22 caliber firearm found at the scene of the crime. Further, Dr. Noorbakhsh testified that Mr. Stancik's injury could have caused death. Mr. Stancik testified that immediately after being shot, he was in pain and that his injury "burned." (Trial Tr. Vol. 2,

21:21.) He explained that he was in the hospital for several days after the shooting, that the bullet had caused a scar and that, at the time of trial, the bullet was still lodged in his body. (Trial Tr. Vol. 2, 22:22-23:13.) The Court finds that all of the elements for both counts of aggravated assault have clearly been met, and accordingly, the Commonwealth has sustained its burden with regard to these offenses.

Next, Appellant was convicted of two counts of kidnapping. The two counts are found at Sections 2901(a)(2) and (a)(3) of the Crimes Code, which read as follows:

> **(a) Offense defined**.-- Except as provided in subsection (a.1), a person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following intentions: [...]
>
> (2) To facilitate commission of any felony or flight thereafter.
>
> (3) To inflict bodily injury on or to terrorize the victim or another. [...]

18 Pa.C.S. §§ 2901(a)(2) and (3). "For purposes of the kidnapping statute, a substantial distance is not limited to a defined linear distance or a certain time period." Commonwealth v. Malloy, 856 A.2d 767, 779 (Pa. 2004). Rather, "the determination of whether the victim was moved a substantial distance is evaluated 'under the circumstances' of the incident." Id. "[A] sensible interpretation is one that views a substantial distance as one that isolates the victim and exposes him or her to increased risk of harm." In re T.G., 836 A.2d 1003, 1006 (Pa. Super. 2003).

Furthermore, a "place of isolation" under the statute "is not geographic in nature, but contemplates the confinement of a victim where he or she is separated from the normal protections of society in a fashion that makes discovery or rescue unlikely." Commonwealth v. Rushing, 99 A.3d 416, 425 (Pa. 2014). "The requirement that the victim be confined in a place of isolation does not require that the victim be left alone; the fact that other people are present does not necessarily negate the victim's isolation from the usual protections of society." Commonwealth v. Green, 149 A.3d 43, 49 (Pa. Super. 2016). Finally, "the determination of a substantial period subsumes not only the exact duration of confinement, but also whether the restraint, by its nature, was criminally significant in that it increased the risk of harm to the victim." Commonwealth v. Markman, 916 A.2d 586, 600 (Pa. 2007).

As a threshold inquiry, the Court must first determine whether: (1) Appellant unlawfully removed Mr. Stancik a substantial distance under the circumstances from the place where he is found, or (2) if Appellant unlawfully confined Mr. Stancik for a substantial period in a place of isolation. This Court finds that Appellant's conduct satisfies both of these threshold conditions under Section 2901(a). The Court will begin its analysis with the first threshold condition.

In Malloy, the appellant and three co-conspirators sought to find the victim because they suspected he had fired a weapon at them earlier in the evening. Id. at 773-774. The appellant was in one vehicle with another individual, while the other two individuals were in a separate vehicle. Id. at 774. When they located the victim,

he initially entered the appellant's vehicle voluntarily. Id. Both vehicles stopped at one of the individuals' apartments, where the appellant acquired a handgun. Id. At a certain point in the evening, the appellant and the victim were outside of their vehicle when the appellant became angry and struck the victim with the handgun and then forced him into the vehicle. Id. The appellant and the driver then transported the victim to a vacant lot approximately ten to fifteen minutes away while the other vehicle followed. Id. Once both vehicles arrived, the appellant forced the victim out of the vehicle and shot him in the head four times. Id. The Court in Malloy ruled that there was sufficient evidence to sustain the appellant's kidnapping conviction because the distance traveled to the vacant lot was a substantial distance under Section 2901(a), and "the movement of the victim to a secluded part of town obviously increased the potential harm to him" as it resulted in his murder. Id. at 780.

The present case contains substantially similar facts to Malloy. Appellant assaulted Mr. Stancik and then forced him into the vehicle against his will; thus, it is clear that he unlawfully removed Mr. Stancik under Section 2901(a). Further, although no significant testimony was presented indicating exactly how far these individuals traveled once they forced Mr. Stancik into the vehicle, the Court finds the distance traveled is a substantial distance under Section 2901(a).
As stated in Malloy, there is no "defined linear distance or a certain time period" which constitutes a substantial distance. Malloy, 856 A.2d at 779. Rather, the

proper inquiry is whether the distance traveled is "one that isolates the victim and exposes him or her to increased risk of harm." T.G., 836 A.2d at 1006.

Here, Mr. Stancik was certainly isolated and exposed to an increased risk of harm. He was positioned between Appellant and Mr. King in the backseat of the vehicle, which hindered any opportunity for him to exit the vehicle and escape; his hood was over his head the entire time he was in the vehicle so that he could barely see; he could not cry for help in the vehicle; once Appellant acquired the handgun, he held it against Mr. Stancik while in the vehicle; finally, the distance traveled resulted in Mr. Stancik being forced out of the vehicle and onto his knees facing a body of water, where he was shot in the back of the head. On the basis of the foregoing facts, the Court is satisfied that Mr. Stancik was unlawfully removed a substantial distance from the place where he was found under Section 2901(a).

Assuming, *arguendo*, the distance traveled was not a substantial distance, Appellant's conduct still satisfies the threshold inquiry under Section 2901(a) because he unlawfully confined Mr. Stancik for a substantial period in a place of isolation. To determine whether a victim was in a place of isolation, a court must decide whether the victim was "separated from the normal protections of society in a fashion that makes discovery or rescue unlikely." Rushing, 99 A.3d at 25. As was previously stated, Mr. Stancik was forced into the backseat between Appellant and Mr. King, Appellant was holding a handgun against him, and there were no means

for which he could escape or cry for help. Therefore, he was undoubtedly in a place of isolation. In accordance with Green, the fact that Mr. Stancik was not alone and that others were present does not affect this determination. The final inquiry is whether Mr. Stancik was confined for a substantial period, which is determined by whether "the restraint, by its nature, was criminally significant in that it increased the risk of harm to the victim." Markman, 916 A.2d at 600. As has been established, Mr. Stancik was undoubtedly exposed to an increased risk of harm. Thus, the Court is satisfied that Mr. Stancik was unlawfully confined Mr. Stancik for a substantial period in a place of isolation under Section 2901(a).

The final step in this analysis is to determine whether, by removing or confining Mr. Stancik, Appellant intended to facilitate commission of any felony or flight thereafter, and to inflict bodily injury on or to terrorize Mr. Stancik or another. 18 Pa.C.S. §§ 2901(a)(2) and (3). As has been thoroughly and clearly established in this section of the opinion, the evidence overwhelmingly demonstrates that Appellant, through both words and conduct, intended to murder Mr. Stancik. Thus, Appellant intended to facilitate commission of a felony, and to inflict bodily injury on or terrorize Mr. Stancik. Accordingly, the Commonwealth has sustained its burden of proof with regard to Sections 2901(a)(2) and (a)(3).

Finally, Appellant was convicted of criminal conspiracy to commit homicide, aggravated assault, and kidnapping. A person is guilty of conspiracy with another

person or persons to commit a crime if, with the intent of promoting or facilitating its commission, he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. 18 Pa.C.S. § 903(a)(1). In regards to the offense of criminal conspiracy, the Superior Court of Pennsylvania has stated:

> The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of the shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved, and it need not be, for proof of criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation. The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt.

Commonwealth v. Reed, 216 A.3d 1114, 1122 (Pa. Super. 2019) (quoting Commonwealth v. Melvin, 103 A.3d 1, 42-43 (Pa. Super. 2014) (citation omitted)). Additionally, there are four factors for a court to consider in determining whether a criminal conspiracy existed: "(1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy." Commonwealth v. Mitchell, 135 A.3d 1097, 1102-03 (Pa. Super. 2016).

In this case, Appellant and Richard Lacks clearly engaged in a criminal conspiracy to commit homicide, aggravated assault, and kidnapping. The evidence demonstrates that, upon initially sighting Mr. Stancik, Mr. Lacks phoned Appellant

and informed him that he had just seen Mr. Stancik. Appellant then met with Mr. Lacks and Mr. King and the parties began to search for Mr. Stancik in the silver Honda Pilot, with Appellant driving the vehicle. When they found Mr. Stancik, Mr. Lacks actively participated in the kidnapping of Mr. Stancik when he aided Appellant in assaulting him and then forcing him into the vehicle.

Mr. Lacks also aided Appellant during the commission of the crime in several other ways. First, upon Appellant's request, he drove to the residence at 449 Ewing Street so that Appellant could obtain the .22 caliber handgun, and personally retrieved the handgun from the residence and gave it to Appellant. Appellant held this handgun against Mr. Stancik while in the vehicle and then later used it to shoot him. Furthermore, he complied with Appellant's request to drive towards any nearby body of water. Additionally, Mr. Lacks was able to hear Appellant's verbal threats of violence against Mr. Stancik in the vehicle: "'Shut the fuck up. You're getting what you deserve, you piece of shit[,]'" and "'Shut the fuck up. I'll leave you on the side of the road.'" (Trial Tr. Vol. 1, 120:4-6; Trial Tr. Vol. 2, 17:9-11.) According to Mr. Stancik, Mr. Lacks was in possession of a .40 caliber handgun while in the vehicle. Finally, Mr. Lacks was present at the body of water near 400 Cove Road where Appellant shot Mr. Stancik and testified that he heard a gunshot after Appellant forced Mr. Stancik into the woods.

The foregoing facts indicate that Appellant and Mr. Lacks were engaged in a

conspiratorial agreement to kidnap, assault, and murder Mr. Stancik. All four of the factors set forth in Mitchell have been met: Appellant and Mr. Lacks were associated with one another; furthermore, they each had knowledge of the crime, were present at the scene of the crime, and participated in the object of the conspiracy. This Court ultimately finds that the jury properly inferred a criminal conspiracy to commit homicide, aggravated assault, and kidnapping between Appellant and Mr. Lacks, and thus, the Commonwealth has sustained its burden with regard to this offense.

Accordingly, as the Commonwealth has proven beyond a reasonable doubt all of the offenses for which Appellant was convicted, Appellant's ninth issue should be dismissed.

CONCLUSION

For the reasons set forth above, this Court's judgment of sentence entered on June 3, 2019 should be affirmed and this appeal should be dismissed.

DATE: BY THE COURT:

2-24-20 /s/Valarie Constanzo
VALARIE CONSTANZO, JUDGE