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2531 EDA 2023

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 2531 EDA 2023

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DANELO CAVALCANTE,
Appellant

BRIEF FOR APPELLEE

Appeal from the August 22, 2023 Judgment of Sentence Imposed by the Honorable Judge Patrick Carmody of the Court of Common Pleas of Chester County, Criminal Division, CP-15-CR-0002951-2021

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE REGARDING ALLEGED INCIDENTS DATED JUNE 26, 2020 AND DECEMBER 24, 2020?

II. WHETHER THE SENTENCING COURT WAS WITHIN ITS DISCRETION DURING SENTENCING AND DID NOT CONSIDER IMPROPER FACTORS?

III. WHETHER THE SENTENCING COURT WAS WITHINT ITS DISCRETION WHEN SENTENCING THE DEFENDANT OUTSIDE THE GUIDELINES?

COUNTER STATEMENT OF THE CASE

The trial court summarized the following relevant facts as follows:

> On April 18, 2021, at approximately 4:17 p.m., Schuylkill Police were dispatched to 337 Pawling Road, Schuylkill Township, Chester County for a disturbance. When they arrived at the scene, they found Deborah Brandao laying in the driveway with numerous stab wounds to her chest. CPR and other life-saving measures were attempted, but Ms. Brandau [sic] was pronounced dead at 4:59 p.m. that day.
>
> The victim's seven-year-old daughter was a witness to the stabbing. She was outside playing with her younger brother when she saw appellant, who was her mother's ex-boyfriend, come over and say he was "going to do something bad to their lives." He then pulled out two (2) knives from a black bag, pulled the victim's hair and dragged her to the ground. He climbed on top of her and said he was going to kill the victim. The victim yelled for help and her daughter went to a neighbor's house and told them to call 911. The daughter looked out of the window and saw appellant leave in a car. He fled the scene and disposed of his bloody clothing and knife. He was caught by police in Virginia that same day. On April 19, 2021, appellant confessed to the murder to the police, as well as to several other witnesses. An autopsy performed on the victim showed she was stabbed 38 times.
>
> Based on the above, Appellant was charged with First Degree Murder and Possession of an Instrument of Crime (hereinafter "PIC"). (He was initially charged with additional crimes, but he only proceeded to trial on the Murder and PIC charges.) Following a three-day jury trial, he was convicted of both charges. On August 22, 203 he was sentenced to life imprisonment for the First Degree Murder charge, and a consecutive two-and-a-half (2 ½) to five (5) year sentence on the PIC charge. He then filed post-sentence motions, which were denied by Order dated September 1, 2023. He thereafter appealed his judgment of sentence and he was ordered to file a Concise Statement of Matters Complained of on Appeal. His Concise Statement was received on January 30, 2024. In it, he raises the following issues:
>
> 1. The trial court abused its discretion in admitting evidence regarding alleged incident dated June 26, 2020;

2. The trial court abused its discretion in admitting evidence regarding alleged incident dated December 24, 2020;

3. The trial court abused its discretion at sentencing by improperly considering that Appellant exercised his right to a jury trial;

4. The trial court abused its discretion in imposing a sentence that exceeded the aggravated range with regard to the Possession of Instrument of Crime conviction without stating adequate reasons.

   See Appellant's Concise statement of Errors Complained of on Appeal.

February 21, 2024, Opinion by the Honorable Patrick Carmody at 1-2.

SUMMARY OF ARGUMENT

In his Concise Statement, Defendant raised four (4) claims on appeal. His first two claims can be addressed together, which are that the trial court abused its discretion by admitting evidence relating to a June 26, 2020 incident and the trial court abused its discretion by admitting evidence relating to a December 24, 2020 incident. This issue is without merit as the evidence was more probative than prejudicial and was relevant to show motive, intent, malice, and ill-will regarding Defendant's brutal murder of the victim. Further, the trial court issued several cautionary instructions for how the jury was to use the evidence regarding those two dates, which cured any prejudicial effect from the admission of the evidence.

Defendant next argues the trial court considered improper factors at sentencing. This issue is without merit, as the sentencing court provided their reasons for sentencing on the record and also reiterated these reasons in their post-sentence Order and 1925 Opinion. The sentencing court did not punish the Defendant for exercising his right to trial, and in fact, could not punish the Defendant as he was facing a mandatory life sentence for his crimes.

Lastly, the sentencing court did not abuse its discretion in sentencing Defendant outside the guidelines for his PIC charge. The sentencing court is not required to stay within the guidelines, and in sentencing the Defendant stayed within the statutory maximum. As noted in the sentencing transcript, the sentencing court

contemporaneously provided its reasons for the deviation outside of the guidelines, and confirmed these reasons in its 1925 Opinion. The Judgement of Sentence should therefore be affirmed.

ARGUMENT

I. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE REGARDING ALLEGED INCIDENTS DATED JUNE 26, 2020 AND DECEMBER 24, 2020.

Defendant alleges the trial court abused its discretion in admitting evidence regarding a June 26, 2020 incident and a December 24, 2020 incident for the purposes of showing motive, intent, malice, or ill-will. Defendant argues the probative value of the evidence was outweighed by the prejudicial nature of the evidence "especially due to the strength of the Commonwealth's case." (See Appellant's Brief at P. 26). Specifically, the Defendant alleges the admission of such evidence was manifestly unreasonable by the trial court. This argument is without merit.

The standard of review over evidentiary matters is well-settled: "[t]he admission of evidence is a matter vested in the sound discretion of the trial court, whose decision thereon can only be reversed by this Court upon a showing of an abuse of discretion." Commonwealth v. Travaglia, 792 A.2d 1261 (Pa. Super. 2002), *appeal denied*, 815 A.2d 633 (Pa. 2002), *cert. denied*, 540 U.S. 828, 124 S.Ct. 55 (2003) (citation omitted). The Pennsylvania Supreme Court has held that an abuse of discretion "is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the

evidence or the record, discretion is abused." Commonwealth v. Wade, 485 Pa. 453, 402 A.2d 1360 (1979); *See also* Commonwealth v. Kocher, 529 Pa. 303, 306, 602 A.2d 1308, 1310 (1992); Commonwealth v. Moyer, 497 Pa. 643, 647, 444 A.2d 101, 103 (1982).

This Court's scope of review is limited to an examination of the trial court's stated reason for its decision to allow the admission of the evidence in the Commonwealth's case-in-chief. Commonwealth v. Minerd, 562 Pa. 46, 753 A.2d 225 (2000). As the Pennsylvania Supreme Court stated:

> It is well settled, however, that "admission of evidence which may tend to inflame the minds of the jury is admissible at the trial court's discretion, and an appellate court will reverse only upon a showing of abuse of discretion." Commonwealth v. Bartlett, 446 Pa. 392, 400, 288 A.2d 796, 799-800 (1972). The function of the trial court is to balance the alleged prejudicial effect of the evidence against its probative value, and it is not for an appellate court to usurp that function. Id. See also Commonwealth v. Cargo, 498 Pa. 5, 15, 444 A.2d 639, 644 (1982) ("A trial court's rulings on evidentiary questions, moreover, 'are controlled by the discretion of the trial court and this Court will reverse only for clear abuse of that discretion.' Commonwealth v. Scott, 469 Pa. 258, 270, 365 A.2d 140, 146 (1976)."); Commonwealth v. McCutchen, 499 Pa. 597, 454 A.2d 547 (1982) (trial court's admission of potentially inflammatory evidence reviewed by abuse of discretion standard).

Commonwealth v. Dollman, 518 Pa. 86, 90, 541 A.2d 319, 321-22 (1988).

The threshold inquiry with admission of evidence is whether the evidence is relevant. "Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable

inference or presumption regarding the existence of a material fact." Commonwealth v. Minerd, 562 Pa. 46, 753 A.2d 225 (2000); *See also* Pa.R.E. Rule 401.

In cases involving a pattern of domestic violence, the courts of this Commonwealth have held that "[e]vidence of prior abuse between a defendant and an abused victim is generally admissible to establish motive, intent, malice, or ill-will. Commonwealth v. Ivy, 146 A.3d 241, 252 (Pa. Super. 2016) *citing* Commonwealth v. Jackson, 900 A.2d 936, 940 (Pa. Super 2006). In Jackson, the PA Superior Court found that evidence of the defendant and victim's lengthy domestic abuse that lasted over ten years, even though the defendant admitted to killing the victim, was admissible to demonstrate the escalating abuse that ultimately led to the victim's death. Id.

Furthermore, "evidence of prior abuse between a defendant and a homicide victim tending to establish motive, intent, malic or ill will is generally admissible. Commonwealth v. Passmore, 857 A.2d 697 (Pa. Super. 2004). The Pennsylvania Supreme Court has recognized that evidence of prior bad acts is admissible where the distinct crime or bad act "was part of a chain or sequence of events which formed the history of the case and was part of its natural development." Commonwealth v. Drumheller, 808 A.2d 893, 905 (Pa. 2002) (citations omitted).

In Drumheller, evidence of the defendant's prior incidents of domestic violence, which included protection from abuse petitions and orders, was admitted

at trial. Id. at 903-04. Evidence revealed that the defendant repeatedly assaulted the victim for three years preceding the homicide where the defendant ultimately stabbed her to death. Id. at 905. Our PA Supreme Court stated that the evidence of prior violence revealed "the chain or sequence of events that formed the history of the case, is part of the natural development of the case, and demonstrates [the defendant's] motive, malice, intent, and ill-will toward [the victim]." Id. Moreover, "this attack was part of the sequence of events illustrating the deteriorating nature of Appellant's relationship with the victim prior." See Passmore *supra.*

Additionally, *res gestate*, also known as "chain of events" and "complete story" evidence, is admissible to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." Commonwealth v. Lark, 543 A.2d 491, 497 (Pa. 1988).

In Commonwealth v. Clemons, 200 A.3d 441 (Pa. 2019), the homicide victim had previously obtained a protection from abuse order against the defendant. Id. at 447. At trial, the Commonwealth introduced photographs of the victim's injuries depicting scratches, redness, and bruising on the victim's face from the prior domestic abuse incident that led to the protection from abuse order against the defendant. Id. at 475. The court found that, like a protection from abuse petition, photographic evidence can demonstrate "the continual and escalating nature of [the] abuse … [and it] shows the chain or sequence of events that formed the history of

the case, is part of the natural development of the case, and demonstrates… motive, malice, intent, and ill-will…" Id. (citations omitted). The Court further determined that the probative value of the photographs outweighed their prejudicial effect. Id. at 475-76. Therefore, the Court concluded that the trial court's evidentiary ruling was not an abuse of discretion. Id. at 476.

In the case at issue, Defendant was charged with the First Degree Murder of Deborah Brandao, whom he had begun a romantic relationship with around August 2019. The events the Commonwealth sought to bring in involved two separate events between the Defendant and the victim. On June 26, 2020, Officer Mark Minnick of the Upper Providence police responded to a call that turned into a domestic violence incident. N.T. 8/16/23, pp. 37-38, 40. During his investigation, Ofc. Minnick spoke with Deborah Brandao and her two children who relayed to him they were afraid of the Defendant. Id. at 43. Ofc. Minnick noticed Deborah had a swollen face, a swollen bottom lip, and dried blood on her dress. Id. She was visibly upset, she was crying, and she was emotional. Id. at 44. Ofc. Minnick noted her demeanor was indicative of her being terrorized. Id. Further investigation showed that the Defendant had been arguing with Deborah in the upstairs apartment, and that he had bit her on the bottom lip and chased her out of the apartment. Id. at 47. Deborah did not feel safe in the apartment and spent the night at a friend's house. Id.

On December 24, 2020, another violent incident occurred which led to the victim filing a PFA. Around midnight, the victim called her sister asking to be picked up because the Defendant tried to kill her. N.T. 8/14/23, pp 167. The victim appeared very agitated, desperate, and sad. She was also crying. Id. The victim explained to her sister that after putting the kids to bed, she found the Defendant looking at old messages on the victim's cell phone. Id. at 170. This sent the Defendant into a rage, and he hit the victim on the arm and pushed her from the chair. Id. He then grabbed a knife and ran towards the victim but the knife fell to the ground. Id. The victim fled, and broke a window to get to her two children. Id. The victim's sister noticed marks on the victim's arms for the week after, and stated that the Defendant had kicked the victim several times. Id. The victim had told her sister she was afraid to go home because the Defendant could kill her. Id.

The victim did apply for and was granted a temporary PFA on December 29, 2020. Her sister's testimony was supported by what the victim stated in the application:

> After dinner, [victim's] put the kids in bed, got back to kitchen, defendant was on [victim's] cell phone. Defendant started saying [victim] was a bad person, pushed from chair, threw all six plates on floor, kicked [victim] twice. [Victim] got up and started going towards door, defendant grabbed a knife and ran towards [victim] who ran out the door and started screaming for neighbor's help. Defendant ran a little after but went back home. [Victim] went to the back of the house and pulled children from the window. After almost one hour, [victim] called her sister who came to pick her and children up, around 11:30 pm. [Victim] filed report on 12-27-20.

See Exhibit C, Reproduced Record. These incidents were more probative than prejudicial in showing motive, malice, intent, and ill-will and explaining the chain of events that led to the victim's brutal murder on April 18, 2021. In admitting the evidence, the Court laid out their reason:

> It is being admitted in order to show motive, intent, identity, and or/absence of mistake or accident as permitted by Pa.R.Ev. 404(b)(2). In addition, the prior incidents help from the history of the case. See, e.g., Commonwealth v. Jackson, 900 A.2d 936 (Pa. Super. 2006); Commonwealth v. Passmore, 857 A.2d 697 (Pa. Super. 2004); Commonwealth v. Rivera, 828 A.2d 1094 (Pa. Super. 2003). The court finds that the probative value of the evidence relating to the prior incidents outweighs any prejudice to the defendant. Thus, evidence of the prior incidents outweighs any prejudice to the defendant. Thus, evidence of the prior incidents are admissible pursuant to Pa.R.Ev. 404(b). The court, however, is limiting this evidence to include only the occurrences of June 26, 2020 and December 24, 2020, as the court finds that the probative value of this information is outweighed by its prejudicial effect. In addition, they are corroborated by physical evidence and defendant's own statements.
>
> The Commonwealth also made proffers that Sarah Brandao and two other witnesses expected to be called at trial (defendant's sister, Eleni Souza Cavalcante, and his mother Iracoma Souza Dos Santos) will testify that one of the reasons the victim was killed was because she threatened to go to the police and inform them that defendant had an outstanding charge for homicide in Brazil. While this evidence is relevant, it needs to be sanitized so that its prejudicial effect will not outweigh its probative value. The court has asked the parties to agree to some language, such as the victim told defendant that she was going to tell the police about outstanding criminal charges defendant has in Brazil.

July 28, 2023 Order of Judge Patrick Carmody, p. 4. The trial court did not abuse its discretion in admitting the evidence, and in fact limited what the

Commonwealth could offer into evidence to ensure that the probative value was not outweighed by the prejudicial effect. These incidents showed the pattern of abuse that led to the victim's death, and the steps she took as she feared for her life, and the final violent act before the Defendant fatally stabbed the victim in April 2021. All relevant and probative information to show motive, malice, intent, and ill-will.

Any possible prejudicial effect was further limited by the trial courts instruction to the jury on the limited purpose of the evidence admitted:

> Thank you ladies and gentlemen, to give you a couple legal guidelines about some of the evidence you heard. You heard about a prior June 2020 assault that the victim went to the police, and you also heard about a PFA in December about a year before the murder in April 2021. Those case, this June, didn't result in conviction, and the PFA didn't result in a final PFA. They're brough in for one reason only, not to say the defendant's a bad guy. They're brought in to show the nature of the relationship, the ill-will between the parties. Do you follow me on those two instances?

N.T. 8/14/23, p.35. This was not the only instruction given. For a second time the jury was told:

> Yes. So ladies and gentlemen, what I'm doing here, instead of having the entire narrative [for the PFA following the December 24, 2020] written by Ms. Brandao, I'm just having them summarize it because, again, we can't – she's not here to be questioned, so we're just keeping it she got a PFA, she alleged she was assaulted and chased with a knife. Everybody follow me on that?
>
> Also, on the same point about that to reinforce the idea here, Mr. Cavalcante is not on trial for the incident that happened in June of 2020 that you just head about from Officer Minnick. He's not on trial here for the December PFA that she got against him when she was allegedly chased by a knife. You heard from multiple witnesses about that. You

> can't hold that against the defendant in this trial. Those aren't separate charges.
>
> The reason it's being brought in throughout this case is to show the relationship of the parties, the ill-will between the parties at times, and show a possible motive for this murder. Does everybody follow me on that? You don't conclude, oh, he might have done these things in the past, he did this crime that he's charged with in April 2021. Does everybody follow me on that?

N.T. 8/16/23, pp. 64-65. And finally, the jury was again instructed:

And also, similarly, I've said this multiple times throughout this case, but I'm reinforcing the idea again. You heard evidence about a June 26, 2020 arrest, and a December 25, 2020 PFA, and an outstanding warrant in Brazil. Those are brought up for limited reasons. Let me give you the instruction on it. This evidence is before you for a limited purpose of tending to show the relationship between Mr. Cavalcante and Ms. Brandao, the ill-will between them, and a possible motive for this crime, talking about the warrant. This evidence must not be considered by you in any way, other than that purpose. You must not regard this evidence as showing the defendant is person of bad character or criminal tendencies for which you may be inclined to infer guilt. And you heard, for example, the PFA was dismissed later. So we don't hold that against him. It's brought in to give you the whole picture of what happened in this case in the relationship between these parties. You all follow me on that. Okay?

N.T. 8/16/23, p. 217. The court issued cautionary instructions regarding the admission of the 404(b) material on three separate occasions. The jury was told the purpose of the evidence and what it could be considered for. It was not to be viewed as evidence of a guilt of any crime, and was only shown for the purpose of motive or ill-will between the parties.

Accordingly, the Commonwealth asserts the probative value of the evidence outweighed any prejudicial effect. However, in the event there was any possible harm, such harm was cured by the not one, not two, but three separate instructions given to the jury on how to consider the evidence submitted regarding the June 26, 2020 and December 24, 2020 incidents.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION DURING SENTENCING AND DID NOT CONSIDER IMPROPER FACTORS.

Defendant next argues that the trial court abused its discretion by considering the fact that Defendant exercised his right to a jury trial. The trial court did not consider the Defendant's constitutional right to a trial when sentencing him, and this issue is a challenge to the discretionary aspect of the sentencing court's sentence.

With respect to appeals challenging the discretionary aspects of sentencing, 42 Pa.C.S.A. § 9781(b) (emphasis added) provides:

> The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. *Allowance of appeal may be*

> *granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.*

Moreover, Pa.R.A.P. 2119(f) (emphasis added) provides:

> *An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence.* The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

In Commonwealth v. Palmer, 700 A.2d 988 (Pa. Super. 1997), the Superior Court stated in part:

> Generally, sentencing is a matter within the sound discretion of a sentencing judge and a sentence will not be disturbed by an appellate court absent manifest abuse. The sentence must either exceed the statutory limits or be manifestly excessive to constitute an abuse of discretion.... Two requirements must be met before appellant's challenge to the judgment of sentence will be heard on the merits. First appellant must set forth in his brief a concise statement of reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under this chapter.

Palmer at 994 (footnote omitted) (citations omitted) (internal quotations omitted).

In Commonwealth v. Malovich, 903 A.2d 1247, (Pa. Super. 2006), the Superior Court stated:

> Before we reach the merits of this case, we must engage in a four part analysis to determine: (1) whether the appeal is timely; (2) whether Appellant preserved his issues; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal

> with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is inappropriate under the sentencing code.

Malovich at 1250.

Generally, the imposition of sentence is a matter vested within the sound discretion of the trial court. Commonwealth v. duPont, 730 A.2d 970, 986 (Pa. Super. 1999). A challenge to an imposed sentence that does not exceed the statutory limit and does not concern application of mandatory minimum penalty is a challenge to the discretionary aspects of sentencing. Commonwealth v. Ellis, 700 A.2d 948, 957-959 (Pa. Super. 1997). With respect to appeals challenging the discretionary aspects of sentencing, review is not automatic. Commonwealth v. Disalvo, 70 A.3d 900, 902 (Pa. Super. 2013). Allowance of appeal may be granted at the discretion of the Superior Court where it appears that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b); Commonwealth v. Tuladziecki, 513 Pa. 508, 522 A.2d 17 (1987); Commonwealth v. Zelinski, 392 Pa. Super. 489, 573 A.2d 569 (1990). The determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. Commonwealth v. Maneval, 455 Pa. Super. 483, 688 A.2d 1198 (1997). In Commonwealth v. Mouzon, 571 Pa. 419, 812 A.2d 617 (2002), in a plurality decision, the Supreme Court stated in part:

> If an appellant … complies with all statutory and procedural requirements regarding a challenge to the discretionary aspects

> of sentencing, and articulates in his Rule 2119(f) statement a substantial question so as to warrant appellate review, § 9781 requires the Superior Court to review the manner in which the trial court exercised its discretion. This does not mean, however, that the Superior Court must accept bald allegations of excessiveness. Rather, only where the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process, will such a statement be deemed adequate to raise a substantial question so as to permit a grant of allowance of appeal of the discretionary aspects of the sentence.

Mouzon at 435, 812 A.2d at 627.

In the present case, the defendant filed a timely appeal, raised the challenges in his post-sentence motion, and included the necessary separate concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). The last question of this four-part test is whether the defendant raised a substantial question.

A court's reliance on a defendant's decision to go to trial rather than accept a plea bargain constitutes an abuse of discretion and presents a substantial question. See Commonwealth v. Bethea, 474 Pa. 571, 575–76, 379 A.2d 102, 104 (1977) (noting "a practice which exacts a penalty for the exercise of the right [to a jury trial] is without justification and unconstitutional"); Commonwealth v. Smithton, 429 Pa.Super. 55, 631 A.2d 1053, 1056–57 (1993) (holding court abuses its discretion if it considers irrelevant factors during sentencing such as defendant's decision to stand

trial rather than plead guilty, any prior constitutionally infirm convictions, defendant's political ideology, defendant's citizenship status, or unverified hearsay); Commonwealth v. Moury, 992 A.2d 162, 170 (Pa.Super., 2010). A sentence based in part on an impermissible consideration is not made proper simply because the sentencing judge considers other permissible factors as well. Commonwealth v. Bethea, 379 A.2d 102, 106, 474 Pa. 571, 580 (Pa. 1977).

At sentencing, the Court stated their reasoning prior to issuing the sentence:

> We get numb in the criminal justice system to violent acts, but this was a particularly horrific crime to kill someone in front of her children, ages seven and four at the time. To hear the testimony of a witness who is a good Samaritan who was present, and saw, and had to bring the four year old son [redacted] away while watching his mother's dying breaths as she's locked eyes with him was chilling. And I want to commend Sarah Brandao and [redacted] for testifying. But that's what gets me here.
>
> A crime like this can take a few – a matter of minutes to do, a short time, but if you were truly sorry, you would realize that the Commonwealth had about as strong a case as possibly could be presented of overwhelming evidence. And everyone has the right to have their day in court, but to choose to make [redacted] relive the murder of her own mother in court was a conscious decision by you. It was a selfish decision. It was the decision of a homem pequeno. That's Portuguese for a small man.
>
> …
>
> You thought of yourself and you did not think of those children. The sentence is life imprisonment for murder in the first degree and consecutive two-and-a-half to five years on possession of instrument of crime.

N.T. 8/22/23, pp. 12-13. The trial court was not punishing Defendant for exercising his right to trial, but rather, taking into account Defendant's lack of remorse and failure to take responsibility. As seen during sentencing, Defendant was hesitant to even apologize for the pain and tragedy inflicted upon his victim and her family:

> The Court: What would you like to say, sir?
> Defendant: No.
> The Court: Do you understand this is your only chance to address Ms. Brandao's family?
> Defendant: Yes.
> The Court: And you choose not to do so?
> Defendant: I want to say I'm sorry to them.

N.T. 8/22/23, p. 12. Further, the trial court explained their reasons for sentencing and the factors they considered:

> This is one of the most horrific homicides the court has witnessed in its 40-year career. A sentence of life for First Degree Murder plus 2 ½ to 5 years for Possession of an Instrument of Crime is totally appropriate under the circumstances. Defendant killed the victim by stabbing her 38 times in front of her two children, ages seven and four years old. The evidence in this case was overwhelming and defendant deserved the maximum sentence based on all of the circumstances.
>
> Furthermore the court did not punish defendant for electing to go to trial. The Court simply mentioned to defendant that in a case with overwhelming evidence that included eyewitness testimony, DNA evidence, a confession, etc., he chose to make a now nine-year old girl relive her mother's murder by testifying. That showed a lack of remorse for the crime, as did defendant's demeanor at trial and at sentencing. At sentencing, defendant first declined to say anything but then only upon the court's prodding did he say he was sorry. The court can consider a lack of remorse of a defendant as an aggravating factor. See Commonwealth v. Lewis, 911 A.2d 558, 567 (Pa. Super. 2000) (Trial

> court considered defendant's lack for remorse and failure to take responsibility as making him a poor candidate for rehabilitation and justifying a sentence outside the guidelines).

September 1, 2023, Order Denying Post-Sentence Motions. As indicated by the trial court, the factors it considered in passing its sentence was not based on the impermissible factor that Defendant exercised his right to trial. Here, the sentencing court did not punish the Defendant for going to trial. At no point did the sentencing court ever say it was punishing Defendant for going to trial, nor could he, as the mandatory sentence for the murder committed by the Defendant was life in prison. The sentencing court was also presented with a mitigation report by the Defendant, who acknowledged the sentencing court was constrained by virtue of the mandatory sentences imposed. Rather, the trial court's sentence was based at least on the horrific nature of the crime, the impact on the victims, and the Defendant's normalization of stabbing the victim 38 times in front of her two young children by showing a complete lack of remorse. Accordingly, the trial court did not abuse its' discretion in sentencing Defendant and did not consider any impermissible factors.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION DURING SENTENCING BY IMPOSING A SENTENCE THAT EXCEEDED THE AGGRAVATED RANGE WITH REGARD TO POSSESSION OF INSTRUMENT OF CRIME.

Defendant alleges the trial court abused its discretion by imposing a sentence outside the aggravated range with respect to the possession of instrument of crime.

The record supports the assertion that there was no abuse of the sentencing court's exercise of discretion.

As in the issue above, Defendant filed a timely appeal, raised the challenges in his post-sentence motion, and included the necessary separate concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). The last question of this four-part test is whether the defendant raised a substantial question.

A claim that the court imposed an aggravated-range sentence without placing adequate reasons on the record raises a substantial question for our review. See Commonwealth v. Bromley, 862 A.2d 598, 604 (Pa. Super. 2004) (*citing* Commonwealth v. Brown, 741 A.2d 726, 735 (Pa. Super. 1999)). A claim that the trial court focused exclusively on the seriousness of the offense also raises a substantial question. See Commonwealth v. Bricker, 41 A.3d 872, 875 (Pa. Super. 2012) (citing Commonwealth v. Macias, 968 A.2d 773, 776 (Pa. Super. 2009)).

"Although a sentencing judge must state his or her reasons for the sentence imposed, a discourse on the court's sentencing philosophy is not required[; however, t]he court must explain any deviation from the sentencing guidelines." Simpson, supra at 338 (citing Commonwealth v. Hill, 629 A.2d 949, 953 (Pa. Super. 1993)) (internal citations, quotation marks, and ellipsis omitted). "[G]uidelines have no binding effect ... they are advisory guideposts that are valuable, may provide an

essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence." Commonwealth v. Walls, 592 Pa. 557, 926 A.2d 957, 964–65 (2007). This Court has previously held that "[w]hen the record demonstrates that the sentencing court was aware of the guideline ranges and contains no indication that incorrect guideline ranges were applied or that the court misapplied the applicable ranges, we will not reverse merely because the specific ranges were not recited at the sentencing hearing." Commonwealth v. Griffin, 804 A.2d 1, 8 (Pa.Super. 2002); Commonwealth v. Rush, 162 A.3d 530, 544 (Pa.Super., 2017).

A trial court has rendered a proper "contemporaneous statement" under section 9721(b) of the Sentencing Code, so long as the record demonstrates with clarity that the court considered the sentencing guidelines in a rational and systematic way and made a dispassionate decision to depart from them. Commonwealth v. Rodda, 723 A.2d 212, 216 (Pa.Super. 1999). This requirement is satisfied "when the judge states his reasons for the sentence on the record and in the defendant's presence." Commonwealth v. Smith, 369 Pa.Super. 1, 6, 534 A.2d 836, 838 (1987). When imposing sentence, a court is required to consider "the particular circumstances of the offense and the character of the defendant." Commonwealth v. Frazier, 500 A.2d 158, 159 (Pa. 1985); Commonwealth v. Dotter, 589 A.2d 726, 730 (Pa.Super.,1991).

Here, the record as a whole demonstrates the Court as a whole was aware of the sentencing guidelines and any deviation from them, which were in fact pointed out by the Commonwealth at sentencing:

> The Commonwealth makes this request based on the grave seriousness of the offenses, the traumatic impact this crime had on the victims, the safety of the community, the defendant's lack of remorse and in the interest of justice.
>
> Your Honor, I have the sentencing guidelines for the Court's consideration along with a request for a DNA order.

N.T. 8/22/23, p. 10. The sentencing court did make a contemporaneous statement in the Defendant's presence when deviating from the guidelines: At sentencing, the Court stated:

> We get numb in the criminal justice system to violent acts, but this was a particularly horrific crime to kill someone in front of her children, ages seven and four at the time. To hear the testimony of a witness who is a good Samaritan who was present, and saw, and had to bring the four year old son [redacted] away while watching his mother's dying breaths as she's locked eyes with him was chilling. And I want to commend Sarah Brandao and [redacted] for testifying. But that's what gets me here.
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> A crime like this can take a few – a matter of minutes to do, a short time, but if you were truly sorry, you would realize that the Commonwealth had about as strong a case as possibly could be presented of overwhelming evidence. And everyone has the right to have their day in court, but to choose to make [redacted] relive the murder of her own mother in court was a conscious decision by you. It was a selfish decision. It was the decision of a homem pequeno. That's Portuguese for a small man.

> …
>
> You thought of yourself and you did not think of those children. The sentence is life imprisonment for murder in the first degree and consecutive two-and-a-half to five years on possession of instrument of crime.

N.T. 8/22/23, pp. 12-13. A reading of the transcript shows the reasoning of the sentencing court, and how it considered several factors including the seriousness of the offense and the crime's impact on the community. It also shows the sentencing court was aware of the guidelines and how the sentence passed was a deviation from it. Further, the sentencing court explained their reasoning for the sentence deviation in its well-reasoned opinion:

> In the instant case, the defendant was correctly sentence in accordance with 42 Pa.C.S.A § 9721 and existing case law. The court took into account all relevant factors, including all the information provided in the Mitigation Report, and considered the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant and determined the defendant should be sentenced to two-and-a-half years to five years' incarceration for the PIC charge. After considering the seriousness of the crimes charged, the impact these crimes had on the victim, her family and the community, and all other factors, the court determined that a sentence of two-and-a-half to five years' incarceration was warranted. It should ne noted that the sentence appellant received was well within the statutory limit for the crime for which he was sentenced. Accordingly, appellant's sentence is proper and should be upheld.
>
> The court acknowledges that the sentence appellant received for the PIC charge was above the aggravated range, but still within the statutory maximum of the sentence that he could have received. The court felt there were several aggravating factors that mandated this kind of sentence. Specifically, the court considered the effect these crimes had on the victim, her family, and on the community. Appellant's lack

> of remorse also played a major role in the court's decision making when determining what appellant's sentence should be. In addition, this was a horrific crime where the victim was stabbed 38 times in front of her young children. The way defendant butchered the victim justifies an aggravated sentence in this case.
>
> As stated above, 42 Pa.C.S.A. §9721 states in relevant part, "the 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." 42 Pa.C.S.A. §9721(B). Pursuant to the statute, "the court should consider the information set forth by the victim concerning the sentencing, the impact of the crime on himself or his family, and finally the impact the offense had on the community." Commonwealth v. King, 182 A.3d 449, 455 (Pa. Super. 2018). At the sentencing hearing, the victim's sister testified to the impact these crimes had on her personally, on her family, and on Ms. Brandao's children, whom she was now raising. This evidence was properly considered by the court as an aggravating factor pursuant to 42 Pa.C.S.A. §9721, Commonwealth v. King, 182 A.3d 449, 455 (Pa. Super. 2018), Commonwealth v. Penrod, 578 A.2d 486 (Pa. Super. 1990), Commonwealth v. Bromley, 82 A.2d 598, 605 (Pa. Super. 2004), Commonwealth v. Butler, 512 A.2d 667 (Pa. Super. 1986), Commonwealth v. Ward, 534 A.2d 1095 (Pa. Super. 1987), and Commonwealth v. Dickter, 465 A.2d 1 (Pa. Super. 1983). Moreover, appellant's lack of remorse displayed during sentencing was palpable. The court properly took into account all relevant factors and explained its reasoning during the sentencing hearing. See N.T. 8/22/23, pp. 12-13. Based on the totality of the circumstances and after applying all relevant factors, the court properly sentenced appellant in this matter.

February 21, 2024 Opinion of Judge Patrick Carmody, pp. 6-8. As discussed by the sentencing court, multiple, permissive factors were considered when he sentenced Defendant on the PIC outside of the guidelines but within the statutory limit. Defendant may not be happy with his sentence, but as laid out at both the sentencing

hearing and in the 1925 Opinion, the brutality of Defendant's crimes, the effect they had on the victim and her family, and overall lack of remorse justified the aggravated sentence outside of the guidelines.

Defendant's sentence for PIC follows a mandatory life sentence for First Degree Murder. The law of this Commonwealth has long made it clear that a sentencing court's discretion is broad and shall not be disturbed except for substantial reasons. Here, the sentencing court in this matter did abuse its discretion in issuing a thoughtful sentence after considering numerous factors. Accordingly, this claim is without merit and should be dismissed.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests this Honorable Court to affirm Defendant's Judgment of Sentence.

Respectfully submitted,

7/1/2024
DATE

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IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 2531 EDA 2023

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DANELO CAVALCANTE,
Appellant

CERTIFICATION OF COMPLIANCE
PURSUANT TO Pa.R.A.P. 2135(d)

I hereby certify that this principal brief complies with the word count limits set forth in Pa.R.A.P. 2135(a)(1) because:

☒ this brief does not exceed 30 pages, excluding the parts of the brief exempted by Pa.R.A.P. 2135(b).

☒ this brief does not exceed 14,000 words, based on the word processing system used, excluding the parts of the brief exempted by Pa.R.A.P. 2135(b).

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I certify that this filing complies with the provisions of the ***Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts*** that require filing confidential information and documents differently than non-confidential information and documents.

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PROOF OF SERVICE

I hereby certify that I am serving two copies of this document, upon the person indicated below, by **FIRST CLASS MAIL**, which satisfies the requirements of Pa.R.A.P. 121:

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