J-S32028-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JEFFERY L. PATTON	:	
a/k/a JEFFREY PATTON,	:	
	:	
Appellant	:	No. 2424 EDA 2012

Appeal from the Judgment of Sentence Entered July 31, 2012,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0012416-2011.

BEFORE: GANTMAN, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED OCTOBER 04, 2013**

Appellant, Jeffery L. Patton a/k/a Jeffrey Patton, appeals from the judgment of sentence entered on July 31, 2012. We vacate and remand for resentencing in accordance with this Memorandum.

The trial court summarized the factual history as follows:

> On October 15, 2011, the victim in this case, a male, Farid Ahmed, was the guest of a female acquaintance in a house located at 1106 West Wyoming Avenue, in the City of Philadelphia. The victim and his female acquaintance had been together in the basement of the home for several hours. During that time, he had left on one or two occasions to go to a store to purchase cigarettes as well as other items. He described the basement as dimly lit, sparsely furnished with a TV and pool table.
>
> Between 3:30 and 4:00 a.m., the female excused herself and went upstairs, leaving Mr. Ahmed alone. About 15 minutes later, while the victim was still alone in the basement, the Defendant emerged from the dark and pointed a taser in the

victim's face and demanded the victim to give him his money and made certain threats.

The testimony of Mr. Ahmed during the Commonwealth's case was as follows:

N.T., Page 13

> **A**. While she was upstairs, I was approached by Mr. Patton right there. I was approached in such a way that I literally didn't know until he was there until he was maybe five feet away from me. So it felt as though maybe he was in the shadows. And

N.T., Page 14

> when he approached me, he approached me with a taser to my face. He basically said "Give me your money. Empty your pockets. Don't tell anybody upstairs about what happened. Don't tell anybody about what happened at all or I'm going to come for your family."

N.T., Page 15

> **Q**. When he approaches you, how far away is he when he walks up to you? How close does he get to you?
>
> **A**. Close enough that I had no defense.
>
> **Q.** When you said no defense, what do you mean?
>
> **A**. What I mean is if I saw a person and they're by that computer over there and walking towards me, I have the ability to get up. I didn't have the ability to get up when he approached me. I barely saw him coming.
>
> **Q.** When he walks up to you, what exactly did he show you?
>
> **A.** He showed me a taser.
>
> **Q.** How do you know it was a taser?

A. I had actually seen that same weapon outside

N.T., Page 16

on the steps when I come in to drop her off. Just, obviously, a taser.

Q. Can you describe that object?

A. Yes.

On the top its curved from the left and the right. In the middle it's a little thinner.

Q. Can you give the dimensions of it?

A. It couldn't be bigger than my hand, like right here.

Q. How close was that taser to you?

A. Maybe a foot away from my face, probably less. If I'm right here, then it was about right here (indicating).

Q. How much money did you give to the defendant?

A. I had $440 in my pocket.

Q. After you give him money, what happened?

A. After I gave him money, I did, for the most part, what he said. I didn't tell the other person why I was leaving. I left.

After he left, the victim went to a gas station and called the police. Upon arrival, Mr. Ahmed described the incident to the police and they then proceeded to the house where this robbery occurred and Police arrested Mr. Patton after he was identified. The victim testified that the money taken from him was comprised of four (4) one hundred dollar bills and two (2) twenty dollar bills.

The next Commonwealth witness was Police Officer Smith, Badge No. 2016. Officer Smith testified that he responded to a

radio call. He met the victim at Broad Street and Wingohocking Avenue. From there, he proceeded to 1106 West Wyoming Avenue, the location of the robbery.

Once there, he knocked and was granted access to the residence. Officer Smith testified as follows:

N.T., Page 34

> **Q.** Can you tell His Honor how you came in contact with the defendant?
>
> **A.** I was walking through the house looking for the defendant looking in the house for a black male, approximately six feet tall, black hoodie. While I was walking through the house, I noticed the defendant hiding behind the dining room table.
>
> **Q.** When you say he was hiding, what was he doing?
>
> **A.** He was crouching down behind the dining room table and the light was off in the dining room. I had my flashlight on walking through the house and noticed him crouching behind a dining room table.
>
> **Q.** How long were you in the house before you noticed him behind the dining room table proximate?
>
> **A.** Three to five minutes.
>
> **Q.** Had you walked past the dining room table prior to noticing [him] behind that table?
>
> **A.** Yes.
>
> **Q.** How many other officers were in the property at that time?
>
> **A.** Three plus myself, four officers total.
>
> * * *

On cross-examination, Officer Smith testified that no taser was recovered from the Defendant, but he also testified that he did not search the house for the taser. He also corrected the

> amount of money recovered from the Defendant to $243.00, consisting of two $100.00 bills, two $20.00 bills and three $1.00 bills.
>
> Based upon the testimony of the victim and the police officer, both of whom were determined to be credible in their testimony, the Defendant was found guilty on all charges. The Court determined that the Commonwealth met its burden in meeting all elements of the crimes charged.

Trial Court Opinion, 12/17/12, at 2–4, 6 (line references omitted).

Appellant was convicted at a bench trial on May 10, 2012, of robbery, theft by unlawful taking, possession of an instrument of crime ("PIC"), use of an incapacitation device, terroristic threats, simple assault, and recklessly endangering another person ("REAP"). The trial court sentenced Appellant on July 31, 2012, to an aggregate term of imprisonment of three to six years followed by three years of probation. This timely appeal followed.

Appellant raises the following three issues on appeal:

> A. Was not the evidence insufficient to prove reckless endangerment where there was no actual risk of death or serious bodily injury from a taser?
>
> B. Should not the sentence for terroristic threats have merged with the robbery sentence?
>
> C. Should not the sentences for theft, simple assault, and reckless endangerment have merged with the robbery sentence?

Appellant's Brief at 2.

Appellant challenges the sufficiency of the evidence supporting his conviction of REAP under 18 Pa.C.S.A. § 2705. In reviewing the sufficiency

of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to prove every element of the offense beyond a reasonable doubt. ***Commonwealth v. Rivera***, 983 A.2d 1211 (Pa. 2009). It is within the province of the fact-finder to determine the weight to be accorded to each witness's testimony and to believe all, part, or none of the evidence. ***Commonwealth v. Cousar***, 928 A.2d 1025 (Pa. 2007). The Commonwealth may sustain its burden of proving every element of the crime by means of wholly circumstantial evidence. ***Commonwealth v. Hansley***, 24 A.3d 410 (Pa. Super. 2011). Moreover, as an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the fact-finder. ***Commonwealth v. Ratsamy***, 934 A.2d 1233 (Pa. 2007).

Appellant alleges that the Commonwealth failed to prove "that [Appellant] had an actual present ability to inflict harm and not merely apparent ability to do so." Appellant's Brief at 8. Appellant suggests that while the victim may have believed that the taser could harm him, the Commonwealth must prove that there actually existed a "substantial risk of death or . . . serious, permanent disfigurement, or protracted loss or impairment of any bodily member or organ." ***Id.*** at 7, 10. According to

Appellant's "Internet research," a taser is not capable of causing such extreme harm. ***Id.*** at 10–12.

We reject Appellant's claim that there existed no actual risk of death or serious bodily injury to the victim. REAP is defined as follows:

> **§ 2705. Recklessly endangering another person**
>
> A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

18 Pa.C.S.A. § 2705. Bodily injury and serious bodily injury are defined as follows:

> **§ 2301. Definitions**
>
> Subject to additional definitions contained in subsequent provisions of this article which are applicable to specific chapters or other provisions of this article, the following words and phrases, when used in this article shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:
>
> **"Bodily injury."** Impairment of physical condition or substantial pain.
>
> * * *
>
> **"Serious bodily injury."** 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.A. § 2301. We have stated:

> To sustain a conviction under Section 2705, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so. Danger, not merely the apprehension of danger, must be

> created. The *mens rea* for recklessly endangering another person is "a conscious disregard of a known risk of death or great bodily harm to another person."

Commonwealth v. Klein, 795 A.2d 424, 427–428 (Pa. Super. 2002) (quoting ***Commonwealth v. Hopkins***, 747 A.2d 910, 915–916 (Pa. Super. 2000) (citations and quotation omitted)).

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

Commonwealth v. Cordoba, 902 A.2d 1280, 1289–1290 (Pa. Super. 2006) (citing 18 Pa.C.S.A. § 302(b)(3)).

Clearly, pointing a taser at the face of the victim created a risk of serious bodily injury and indicated that Appellant had the present ability to inflict harm. It was unnecessary for the Commonwealth to prove that Appellant actually caused death or serious bodily injury. Rather, the Commonwealth was required to show that Appellant placed the victim in such danger. ***Id***.

We conclude that the circumstances surrounding Appellant's actions presented an actual, foreseeable risk of danger. ***See Commonwealth v. Reynolds***, 835 A.2d 720, 729 (Pa. Super. 2003) (evidence sufficient to support conviction for REAP where, even if gun were not loaded, the

circumstances surrounding the defendant's actions presented an actual, foreseeable, risk of danger.) Appellant disregarded a known risk of great bodily harm to Mr. Ahmed when he accosted him in the dark, thrust a taser within inches of Mr. Ahmed's face, and threatened to use it unless Mr. Ahmed emptied his pockets and surrendered his cash. N.T., 5/10/12, at 13–16. Appellant's actions, including his explicit threat to subject Mr. Ahmed to electrocution in the delicate tissues of the face or eyes, constituted reckless endangerment. Notwithstanding Appellant's suggestion that a taser cannot cause serious bodily harm or death,[1] he nevertheless concedes that a taser

[1] While Appellant is dismissive of the trial court's reference to 18 Pa.C.S.A. § 908, we are not. That section provides, in pertinent part:

> **§ 908. Prohibited offensive weapons**
>
> **(a) Offense defined.**--A person commits a misdemeanor of the first degree if, except as authorized by law, he makes repairs, sells, or otherwise deals in, uses, or possesses **any offensive weapon**.

18 Pa.C.S.A. § 908 (final emphasis added). The definition of an offensive weapon includes a "**taser** or other electronic or electric weapon or other implement **for the infliction of serious bodily injury** which serves no common lawful purpose." ***Id***. (emphasis added). Thus, our legislature clearly defined a taser as an object capable of inflicting serious bodily injury. Further, case law interpreting this section and commenting on its constitutionality also has referenced the items listed therein as being capable of "infliction of serious bodily injury and which serve no common lawful purpose . . . ." ***Commonwealth v. Hitchon***, 549 A.2d 943 (Pa. Super. 1988). We believe this classification by the legislature, although not controlling herein, provides guidance. ***See Commonwealth v. Ferrer***, 423 A.2d 423, 425 n.3 (Pa. Super. 1980) (While definition in statute was not applicable to the appellant's crime, it nevertheless provided "a useful guide

transmits electric current through a person in voltages high enough to cause pain, spasms, disorientation, loss of muscle control, and other physiological effects. Appellant's Brief at 10. He underscores that "since it has a **fairly high voltage**, the charge will pass through heavy clothing and skin." ***Id***. at 11 (emphasis added). Indeed, he admits that "the charge is not intense enough to damage the [victim's] body **unless it is applied for extended periods of time**." ***Id***. at 11 (emphasis added). The potential for serious bodily harm or death clearly exists with the use of a taser on the human body.

We also are persuaded by the Commonwealth's contention that even if we accepted the authority of Appellant's promotional materials regarding the potential safety of the use of a taser, in this situation, those safety parameters are non-existent:

> [T]he safety claims of defendant's not-of-record Internet sources are narrowly and specifically qualified. They say that a taser can be safe if it is used by a trained law enforcement officer for the sole purpose of temporarily incapacitating a dangerous criminal suspect so that the suspect can be arrested and handcuffed. [Appellant], however, is not a trained law enforcement officer, he was not confronted with a dangerous criminal suspect, and he had no intention of temporarily incapacitating Mr. Ahmed for the sole purpose of handcuffing him pursuant to a lawful arrest. Unlike a police officer using a taser in a limited manner for justifiable purposes, [Appellant] had a wholly unjustified purpose (robbery) and no particular reason to use care or apply safety training in his attack. As even [Appellant] concedes, the effects

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by listing the crimes the legislature intended to include in the identical phrase used in an analogous context.").

> of being tased escalate rapidly within seconds: those who are tased escape permanent injury only because lawful, trained users employ tasers carefully and briefly. [Appellant's] act of thrusting a taser at Mr. Ahmed's face pursuant to a robbery was not a careful or designed-for use of the weapon pursuant to a lawful purpose . . . .

Commonwealth Brief at 5–6. Based upon our review of the evidence, and in light of our standard of review, we conclude the Commonwealth presented sufficient evidence to support Appellant's conviction for REAP.

Appellant additionally raises two issues regarding his sentence. The first claim is whether Appellant's conviction of terroristic threats should have merged with robbery for purposes of sentencing. A claim that sentences should have merged is "a non-waivable challenge to the legality of the sentence." ***Commonwealth v. Lomax***, 8 A.3d 1264, 1267 (Pa. Super. 2010) (citing ***Commonwealth v. Martz***, 926 A.2d 514, 525 (Pa. Super. 2007)).

The sentence imposed upon Appellant was as follows:

> Count I. Robbery: thirty-six to seventy-two months of imprisonment.
>
> Count II. Theft by unlawful taking: three years of probation, consecutive to Count I.
>
> Count III. PIC: three years of probation, concurrent with Count II.
>
> Count IV. Use of incapacitation device: thirty-six to seventy-two months of imprisonment, concurrent with Count I.
>
> Count V. Terroristic threats: three years of probation, concurrent with Count II.

> Count VI. Simple assault: three years of probation, concurrent with Count II.
>
> Count VII. REAP: three years of probation, concurrent with Count II.

Order, 7/31/12, at 1–2.

A person is guilty of robbery "if, in the course of committing a theft, he: inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury." 18 Pa.C.S.A. § 3701(a)(1)(iv). "An act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft or in flight after the attempt or commission." 18 Pa.C.S.A. §3701(a)(2). Thus, to prove a robbery when there is no infliction of bodily injury, the Commonwealth must prove that the defendant, in the course of committing a theft, threatened another with immediate bodily injury, or intentionally put another in fear of immediate bodily injury.

A person commits terroristic threats "if the person communicates, either directly or indirectly, a threat to: commit any crime of violence with intent to terrorize another." 18 Pa.C.S.A. § 2706(a)(1). In order to prove a violation of this provision, the evidence must show: (1) that a threat to commit a crime of violence was made; and (2) that the threat was communicated with the intent to terrorize. ***Commonwealth v. Hudgens***, 582 A.2d 1352, 1357 (Pa. Super. 1990). Assault is a crime of violence. ***Id***.

Appellant argues that the two statutes have the common elements of communication of threats, with the robbery statute requiring an additional element, a theft context for the threat.

Mr. Ahmed described the robbery as follows:

> While she was upstairs, I was approached by Mr. Patton right there. I was approached in such a way that I literally didn't know until he was there until he was maybe five feet away from me. So it felt as though maybe he was in the shadows. And when he approached me, he approached me with a taser to my face. He basically said "Give me your money. Empty your pockets. Don't tell anybody upstairs about what happened. Don't tell anybody about what happened at all or I'm going to come for your family."

N.T., 5/10/12, at 13–14.

The trial court determined Appellant's final threat, which was separate and distinct from the threat of physical harm from the taser, that Appellant would "come for [Mr. Ahmed's] family" if Mr. Ahmed told anyone about the robbery, was a "separate event that occurred after the robbery had taken place." Trial Court Opinion, 12/17/12, at 8. This threat of future harm to the victim's family "falls outside of any merger and is a separate offense permitting a separate and distinct sentence apart from the sentence for the robbery." ***Id***.

Appellant contends that contrary to the trial court's conclusion, there was no separation in time or place of the threat; *i.e.*, "[t]he visual threat

from the taser was contemporaneous with the verbal threat." Appellant's Brief at 15. Thus, he maintains that terroristic threats merged with robbery.

Section 9765 of our Judicial Code provides:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S.A. § 9765. "The statute's mandate is clear. It prohibits merger unless two distinct facts are present: 1) the crimes arise from a single criminal act; and 2) all of the statutory elements of one of the offenses are included in the statutory elements of the other." ***Commonwealth v. Baldwin***, 985 A.2d 830, 833 (Pa. 2009). ***Accord Commonwealth v. Wade***, 33 A.3d 108 (Pa. Super. 2011) (42 Pa.C.S.A. § 9765 prohibits the merger of sentences unless a strict two-part test is met; the convictions must be based on a single criminal act, and all of the statutory elements of one of the offenses must be included in the statutory elements of the other); ***Commonwealth v. Baker***, 963 A.2d 495, 509 (Pa. Super. 2008) (we assess "whether the charges arose out of a single set of facts and whether all of the statutory elements of one offense coincide with the statutory elements of the other offense.").

The doctrine of merger is a rule of statutory construction designed to determine whether the legislature intended for the punishment of one

offense to encompass that of another offense arising from the same criminal act or transaction. ***Commonwealth v. Collins***, 764 A.2d 1056, 1057 (Pa. 2001). Our Supreme Court has recognized:

> The question of when sentences should merge is not an easy problem . . . . Analytically, the problem concerns whether a single criminal plan, scheme, transaction or encounter, which may or may not include many criminal acts, may constitute more than one crime, and if it may constitute several crimes, whether each criminal conviction may be punished separately or whether the sentences merge.

Commonwealth v. Anderson, 650 A.2d 20, 21 (Pa. 1994). Our Supreme Court explained:

> Our concern . . . is to avoid giving criminals a "volume discount" on crime. If multiple acts of criminal violence were regarded as part of one larger criminal transaction or encounter which is punishable only as one crime, then there would be no legally recognized difference between a criminal who robs someone at gunpoint and a criminal who robs the person and during the same transaction or encounter pistol whips him in order to effect the robbery. But in Pennsylvania, there is a legally recognized difference between these two crimes. The criminal in the latter case may be convicted of more than one crime and sentences for each conviction may be imposed where the crimes are not greater and lesser included offenses.

Anderson, 650 A.2d at 22. ***See also Commonwealth v. Belsar***, 676 A.2d 632, 634 (Pa. 1996) (merger not to be "volume discount" for multiple criminal acts).

The instant record belies Appellant's contention that these two crimes merge for sentencing under these facts. ***See Anderson***, 650 A.2d at 24 n.3 ("[A]ny merger analysis must proceed on the basis of its facts."). Our

review of the notes of testimony compels our conclusion that there was a separate threat clearly meant to terrorize Mr. Ahmed subsequent to, and apart from the contemporaneous threat to discharge the taser unless the victim gave Appellant all of his money. As noted above, Mr. Ahmed testified that Appellant pointed the taser at his face and told him to empty his pockets and hand over his cash. On cross-examination, defense counsel himself elicited the following testimony.

> **Q.** [By defense counsel] **After** you handed the money over, you went right upstairs?
>
> **A.** [Mr. Ahmed] **After I handed the money over**, [Appellant] went back to the side of the wall putting himself back in the shadows so I couldn't see his face. And he told me to walk upstairs, do not explain the situation to anybody. And, as I said, he threatened my family.

N.T., 5/10/12, at 28. Appellant is not entitled to only one sentence where he engaged in two distinct criminal acts. ***See Commonwealth v. Melvin***, 548 A.2d 275, 280–281 (Pa. Super. 1988) (terroristic threats did not merge with robbery where, after defendant completed the robbery, he ordered people remaining in the store to get into the back room or he would shoot them. "Although the terroristic threat and the robbery occurred during the same episode, each act was a separate and distinct injury . . . ."). ***Cf. Commonwealth v. Walls***, 449 A.2d 690, 695 (Pa. Super. 1982) (offense of terroristic threats merged with robbery because evidence presented established there were no additional facts with which to support the

terroristic threat charge other than those facts which were part and parcel of the robbery charge, *i.e.*, threatening victim with a gun in the course of committing a theft.).

Here, Appellant committed two separate and distinct criminal acts. First, Appellant robbed Mr. Ahmed. After the robbery was complete, he terrorized him by threatening Mr. Ahmed's family if he told anyone about the robbery. Appellant has failed to distinguish between his actions of forcing the victim to hand over his cash at the threat of being shot with the taser, and his action in threatening the victim's family if the victim told anyone about the robbery. We find no error in the trial court's refusal to merge the convictions of terroristic threats and robbery for sentencing purposes under these facts.

Finally, Appellant proffers a three-sentence argument stating that since the trial court acknowledged that the sentences for theft, simple assault, and REAP should have merged with robbery for purposes of sentencing, the sentences for those crimes must be stricken. The trial court acknowledged that the convictions for simple assault and REAP should have merged with robbery, but it incidentally failed to address theft. Trial Court Opinion, 12/17/12, at 7. Inexplicably, however, the trial court, although agreeing that the above-identified crimes merged for sentencing purposes, represented that it had not sentenced Appellant separately for those crimes

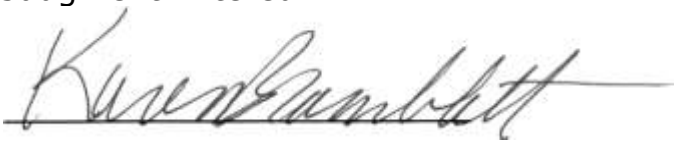
that merged. The record belies this conclusion. While the sentencing transcript has not been included in the record certified to us on appeal, the sentencing order is included, as we noted in our discussion of the prior issue. The Commonwealth does not address the issue in its brief, Commonwealth Brief at 2, but case law supports the merger of these sentences. ***See Walls***, 449 A.2d at 693 (theft and REAP merge with robbery); ***Commonwealth v. Welch***, 435 A.2d 189, 190 (Pa. Super. 1981) (simple assault merges with robbery); ***Commonwealth v. Eberts***, 422 A.2d 1154, 1156 (Pa. Super. 1980) (REAP merges with robbery).

The question we are thus faced with is whether we may merely amend the sentence directly or must remand for resentencing. "[W]here a case requires a correction of sentence, this [C]ourt has the option of either remanding for resentencing or amending the sentence directly." ***Commonwealth v. Klein***, 795 A.2d 424, 430–431 (Pa. Super. 2002). In other words, if we can vacate the illegal sentence without upsetting the trial court's overall sentencing scheme, we need not remand for resentencing. ***Commonwealth v. Thur***, 906 A.2d 552, 570 (Pa. Super 2006). On the other hand, where the sentence vacated will affect the sentence imposed by the court, we must remand. ***Commonwealth v. Williams***, 550 A.2d 579 (Pa. Super. 1988).

We believe the more prudent action in this case is to remand for resentencing. The sentencing court indicated that the probationary terms for PIC and terroristic threats were to be served concurrently with the probationary sentence for theft. The sentence for theft, however, which we have determined should have merged, had been imposed consecutively to the robbery term of imprisonment. Thus, it is unclear whether the remaining probationary terms are to be served concurrently or consecutively to the sentence for robbery once the sentence imposed for theft is vacated. As our disposition today upsets the overall sentencing scheme, we hereby vacate the July 31, 2012 judgment of sentence and remand for resentencing.

Judgment of sentence vacated. The case is remanded to the trial court for resentencing in accordance with this Memorandum. Jurisdiction is relinquished.

Judgment Entered.



Prothonotary

Date: 10/4/2013