NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROBERT SPURGEON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1407 EDA 2014

Appeal from the Judgment of Sentence March 12, 2014
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-3053-2013

BEFORE: BOWES, MUNDY, AND FITZGERALD* JJ.

MEMORANDUM BY BOWES, J.: **FILED JULY 31, 2015**

Robert Spurgeon appeals from the judgment of sentence of seven to fourteen years imprisonment that the trial court imposed after he was convicted of involuntary deviate sexual intercourse ("IDSI"), aggravated indecent assault, and indecent assault. We affirm.

The victim, C.H., testified as follows.[1] In 2013, she lived in Bensalem with two of her three children. Appellant was a family friend whom C.H. had known for many years. The victim was divorced and, on February 14, 2013,

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[1] The trial court reported that Appellant did not order the trial transcript. Appellant has since rectified this oversight, and it is available for our review in the reproduced record. Where the accuracy of a document is undisputed and contained in the reproduced record, we may consider it. ***Commonwealth v. Brown***, 52 A.3d 1139, 1145 n.5 (Pa. 2012).

* Former Justice specially assigned to the Superior Court.

arranged to meet some friends at a local bar. Appellant was also there, and he was buying drinks for everyone. After her friends failed to arrive, the victim decided to leave to go to another bar. Appellant jumped into her vehicle, and said that he wanted to accompany her. Since she knew Appellant well, the victim agreed, and she and Appellant stayed at the second bar until it closed at 2:00 a.m. When Appellant told C.H. that he was going to have to call a cab to get home, she offered to give him a ride.

The victim drove to her townhouse so that Appellant could telephone the cab from there. Appellant entered the townhouse and asked to use the bathroom. As C.H. was showing Appellant the location of that room, he began to grope her buttocks and to pull off her shirt. C.H. resisted Appellant's sexual advances, and she testified, "We had a bit of a struggle. I'm begging him to call a cab, to leave." N.T. Trial, 10/2/13, at 55. As Appellant did not cease his activities, C.H. ran to use the telephone, but Appellant, who had disrobed, grabbed her from behind.

The victim reported that the events that ensued consisted of the following: "[H]e's pushing me down on the bed, holding my arms down like backwards on the side of bed. And we had a bit of a struggle, and he grabbed me in my crotch area, making me say that my P___ was his, making me say that while he was squeezing that area over and over." ***Id***. at 55-56. The victim continued that she was "[s]till struggling a bit" but that Appellant "overpowered me, holding my arms back, prying open my legs and he had

his head in between my legs." ***Id***. at 56. Appellant then placed his tongue in her vagina. C.H. stated that she was "begging him to stop. Please stop. Why are you doing this?" ***Id***.

C.H. continued that Appellant next "grabbed like my hips, my thigh, yanking towards him, all of the above, and I was able to sit upright, and then he tried to get me to perform oral sex on him by pushing the back of my head while he was standing." ***Id***. at 57. Appellant then penetrated C.H.'s vagina with his penis while holding her arms so that she could not resist him. C.H. testified that she continued to beg Appellant to stop. Finally, Appellant attempted to sodomize the victim. ***Id***. at 58. At one point, C.H. was able to grab her telephone and started to record the attack. The recording was played to the jury. The trial court reported that, during the recording, the victim was crying and begging Appellant to stop his assault. At trial, C.H. explained that she did not scream because her children were in the house, and she did not want them to see her being assaulted by Appellant.

The victim testified that, after the sexual assault, she was in pain. Appellant, who told C.H. that his wife was out of town, slept in the victim's home until the next morning, when he left in a cab. The victim called her sister and then the police. Appellant was arrested and admitted having sex with the victim and that she had said no.

Based upon this evidence, Appellant was convicted of IDSI, aggravated indecent assault, and indecent assault but was acquitted of rape and sexual assault. The matter proceeded to sentencing, where it was established that Appellant had convictions for carrying an unlicensed firearm, receiving stolen property, possession of a controlled substance with intent to deliver, and driving under the influence. Appellant received a standard range sentence of seven to fourteen years imprisonment for IDSI and a concurrent standard range sentence of five to ten years incarceration for aggravated indecent assault. This appeal followed denial of Appellant's post-sentence motion. He raises these issues for our review:

> I. Is the appellant entitled to an arrest of judgment with regard to his conviction for Aggravated Indecent Assault, Indecent Assault, and Involuntary Deviate Sexual Intercourse since the Commonwealth failed to sustain its burden of proving the appellant's guilty of this crime beyond a reasonable doubt?
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> II. Is the appellant entitled to a new trial with regard to his conviction for Aggravated Indecent Assault, Indecent Assault, and Involuntary Deviate Sexual Intercourse, since the verdict of guilty is against the weight of the evidence?
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> III. Did the trial court abuse its discretion in permitting Commonwealth to strike a potential juror of Jewish heritage?
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> IV. Did the trial court abuse its discretion in imposing a sentence that was excessive?

Appellant's brief at 4.

Our standard of review for Appellant's first contention, which pertains to the sufficiency of the evidence, is well-settled:

> Whether, viewing all the evidence admitted at trial in the light most favorable to the Commonwealth as the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the 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. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

Commonwealth v. Gonzalez, 109 A.3d 711, 716 (Pa.Super. 2015) (citation omitted).

Appellant's specific position is that the Commonwealth failed to prove that he used forcible compulsion for purposes of his IDSI conviction and that it did not establish a lack of consent for the two assault offenses.[2] Appellant's brief at 13-14. IDSI is committed, *inter alia*, when a "person engages in deviate sexual intercourse with a complainant by forcible compulsion . . . ." 18 Pa.C.S. § 3123(a)(1). "In order to prove the 'forcible compulsion' component" of the offense of IDSI, the Commonwealth is "required to establish beyond a reasonable doubt that appellant used either

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[2] We decline the Commonwealth's invitation to find Appellant's sufficiency challenge waived due to the lack of specificity in his Pa.R.A.P. 1925(b) statement. Appellant conceded that he had sex with the victim on the night in question. The issue at trial was whether that activity was consensual. Thus, the statement was sufficient to alert the trial court as to the nature of Appellant's sufficiency claims, and it addressed the positions in its opinion.

physical force, a threat of physical force, or psychological coercion, since the mere showing of a lack of consent does not support a conviction for Rape and/or IDSI by forcible compulsion." ***Commonwealth v. Brown***, 727 A.2d 541, 544 (Pa. 1999) (citing ***Commonwealth v. Berkowitz,*** 641 A.2d 1161 (Pa. 1994)).

C.H. testified that, throughout the assault, she told Appellant that she did not want to have sex and to leave. She specifically stated that she struggled with Appellant, that he overpowered her, and that he physically forced open her legs to perform oral sex. Thus, Appellant used actual physical force to overcome the victim's resistance. The evidence viewed in the light most favorable to the Commonwealth overwhelmingly establishes that the act of IDSI was performed by forcible compulsion; therefore, we reject this sufficiency challenge. ***See Commonwealth v. Eckrote***, 12 A.3d 383, 387 (Pa.Super. 2010) (where victim said that she would not have sex with defendant, forcible compulsion was established when defendant ordered victim to remove her pants and engaged in sex with her while she tried to push him away from her, and they were parked in an area unfamiliar to the victim).

An individual commits aggravated indecent assault, *inter alia*, if, "without the complainant's consent," he "engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law

enforcement . . . .” 18 Pa.C.S. § 3125(a)(1). A person is “guilty of indecent assault if the person has indecent contact with the complainant. . . . and the person does so without the complainant's consent[.]” 18 Pa.C.S. § 3126(a)(1).

As noted, Appellant suggests that there was no evidence of a lack of consent. The victim unequivocally evidenced her lack of consent by her continually asking Appellant to leave and to stop. She also struggled with him while he overpowered her and pinned her arms so that she could no longer resist his attack. Appellant admitted to police that the victim said no during the attack, but that he penetrated her after she voiced her objection since he was already in the middle of coitus. Appellant’s challenge to his aggravated indecent assault and indecent assault convictions is meritless.

Appellant also suggests that his convictions for IDSI, aggravated indecent assault, and indecent assault are infirm since the jury acquitted him of rape, thereby finding that he did not commit sexual intercourse by force. Appellant’s brief at 15. Our Supreme Court has long held that “juries may reach inconsistent verdicts” and that, concomitantly, “we may not interpret a jury acquittal as a specific factual finding with regard to the evidence.” ***Commonwealth v. Moore***, 103 A.3d 1240, 1247 (Pa. 2014). Simply put, inconsistent verdicts are not grounds for reversal. ***Id***. Thus, the fact that Appellant was acquitted of rape cannot be interpreted as either a finding that

he did not use forcible compulsion for purposes of IDSI or a finding that the victim consented.

Appellant's second challenge is to the weight of the evidence supporting his convictions. Our standard of review in this context is extremely limited and well-ensconced:

> 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. ***[Commonwealth v.] Widmer***, 744 A.2d [745,] 751–52 [Pa. 2000]; ***Commonwealth v. Brown***, 538 Pa. 410, 648 A.2d 1177, 1189 (1994). 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. ***Widmer***, 744 A.2d at 752. 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.'" ***Id.*** at 320, 744 A.2d at 752. 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." ***Brown***, 648 A.2d at 1189.
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> 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:
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> > 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. ***Brown***, 648 A.2d at 1189. 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. ***Commonwealth v. Farquharson***, 467 Pa. 50, 354

> A.2d 545 (1976). 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.

***Widmer**,* 744 A.2d at 753.

Commonwealth v. Antidormi, 84 A.3d 736, 758 (Pa.Super. 2014) (quoting ***Commonwealth v. Clay***, 64 A.3d 1049, 1054–55 (Pa. 2013)).

Appellant first repeats his assertion that his acquittal of rape encompassed a finding that he did not use force during the assault. Appellant's brief at 21-22. We reject his position in that the law, as outlined *supra*, does not permit us to overturn one conviction based upon a jury's acquittal in connection with another offense.

Appellant also maintains that the verdict is against the weight of the evidence because the recording proved that C.H. was only upset "with the words Appellant used during the sexual acts, not what he did." Appellant's brief at 23. He suggests that, since the recording did not establish forcible compulsion or a lack of consent while the sexual acts were occurring, his convictions are against the weight of the evidence. First, we note that C.H. stated that she viewed the phone and began the recording only after the IDSI and nonconsensual intercourse. Her testimony was clear and unequivocal that she verbally and physically resisted Appellant's commission of oral sex, vaginal intercourse, and attempted sodomy. The jury was permitted to credit that testimony. ***Commonwealth v. Page***, 59 A.3d

1118, 1130 (Pa.Super. 2013) ("A determination of credibility lies solely within the province of the factfinder."); ***Commonwealth v. Blackham***, 909 A.2d 315, 320 (Pa.Super. 2006) ("The weight of the evidence is exclusively for the finder of fact, which is free to believe all, part, or none of the evidence, and to assess the credibility of the witnesses. . . . It is not for this Court to overturn the credibility determinations of the fact-finder."). Given C.H.'s testimony, we cannot conclude that the trial court committed an abuse of discretion in finding that the verdict herein did not shock its sense of justice.

Appellant's third allegation is that the trial court improperly allowed the Commonwealth to use a peremptory challenge against a potential juror of Jewish heritage. Appellant is a member of the same ethnic group, and he relies upon ***Batson v. Kentucky***, 476 U.S. 79 (1986). If a trial court's finding that there was not a ***Batson*** violation is supported by the record and free of legal error, we must affirm. ***See Commonwealth v. Towles***, 106 A.3d 591, 602 (Pa. 2014).

To establish a *prima facie* ***Batson*** claim, the defendant must prove that he is a member of a cognizable racial or ethnic group and that the prosecution used a peremptory challenge to remove a member of that group. ***Commonwealth v. Uderra***, 862 A.2d 74 (Pa. 2004). If a prosecutor proffers a neutral explanation, unrelated to the juror's race, sex, or ethnic background, the trial court is free to reject the defendant's

challenge to the Commonwealth's use of the peremptory challenge. ***Towles***, ***supra***. If "a prosecutor has offered a . . . neutral explanation for the peremptory challenge . . . and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot." ***Id***. at 600 n.4.

In this case, Appellant objected, on the ground that he is Jewish, to the Commonwealth's decision to strike a juror with a surname that appeared to be Jewish. N.T. Trial, 10/1/13, at 44. Appellant noted that the juror was qualified to serve. The Commonwealth responded that the juror's ethnic background and religion "was not taken into consideration during the strike." ***Id***. at 45. The prosecutor noted that, on his questionnaire, the potential juror indicated that he had a master's degree and was a lawyer. The district attorney explained that as a "matter of rule I do not favor any individuals who have legal backgrounds on jury panels because, from my experience, I believe they have trouble separating their legal experience from being able to just apply the facts to the law as it's explained to them in a situation like this. That's why I don't want him on the jury." ***Id***. The trial court accepted this explanation and did not reinstate the juror. The district attorney's explanation as to why the juror was struck was logical and non-discriminatory in nature. Thus, the trial court's finding that a ***Batson*** violation did not occur is supported by the record and free from legal error, and we must reject this ***Batson*** challenge.

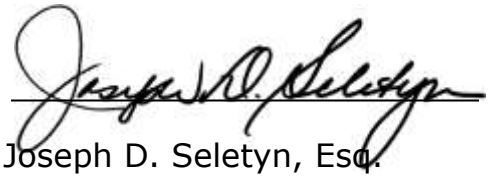
Appellant's final position is that, even though he received a standard range sentence on the IDSI and a concurrent sentence as to the aggravated sexual assault, the trial court abused its discretion by imposing an excessive sentence. This contention relates to the discretionary aspects of the sentence imposed. "An appellant is not entitled to the review of challenges to the discretionary aspects of a sentence as of right" and must invoke our jurisdiction. ***Commonwealth v. Samuel***, 102 A.3d 1001 (Pa.Super. 2014). To properly obtain Superior Court jurisdiction over a discretionary-aspect-of-sentence allegations, the defendant must file a timely appeal, preserve the sentencing issue at the sentencing hearing or in a post-sentence motion, include a Pa.R.A.P. 2119(f) statement in his brief, and, in that Pa.R.A.P. 2119(f) statement, establish that there is a substantial question that the sentence is not appropriate either under the Sentencing Code or the norms that underlie sentencing. ***Id.;*** Pa.R.A.P. 2119(f) ("An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in a separate section of the brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence.").

In this case, Appellant's brief does not contain the Pa.R.A.P. 2119(f) statement. "The Commonwealth objects to this omission," and it maintains "Appellant's challenge to the discretionary aspects of sentence should, respectfully, be precluded from review." Commonwealth's brief at 28. It is

settled that: "If a defendant fails to include an issue in his Rule 2119(f) statement, and the Commonwealth objects, then the issue is waived and this Court may not review the claim." ***Commonwealth v. Robinson***, 931 A.2d 15, 19 (Pa.Super. 2007). Therefore, Appellant's final claim is waived.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015