NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DAVID MCDONALD Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 189 EDA 2014

Appeal from the Judgment of Sentence July 18, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0008953-2011

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and OTT, J.

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

David McDonald appeals from the judgment of sentence imposed on July 18, 2013, in the Court of Common Pleas of Philadelphia County. A jury convicted McDonald of one count each of unlawful restraint and simple assault.[1] The jury acquitted McDonald of aggravated assault, attempted involuntary deviate sexual intercourse (IDSI), and attempted sexual assault.[2] McDonald received an aggregate sentence of three and one-half to seven years' incarceration. In this timely appeal, McDonald claims the trial court erred in: (1) allowing reference to a prior conviction for IDSI, aggravated indecent assault and corrupting the moral of a minor, (2) failing

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[1] 18 Pa.C.S. §§ 2902(a)(1) and 2701(a)(1), respectively.

[2] 18 Pa.C.S. §§ 2702(a)(1), 3123(a)(1), and 3124.1, respectively.

to grant a mistrial when the Commonwealth improperly referred to McDonald's post-arrest silence, and (3) imposing a manifestly excessive sentence. After a thorough review of the submissions by the parties, certified record, and relevant law, we affirm.

Briefly, the complaining witness, S.H., testified at trial that in the early morning hours of June 6, 2011, she was in Hunting Park smoking marijuana. At that time of night, the park is largely frequented by drug users and prostitutes. McDonald approached S.H. and told her "he wanted his dick sucked." N.T. Trial, 5/7/2013, at 177. She laughed at him and said she was not into that. ***Id***. at 179. She assumed McDonald thought she was a prostitute. ***Id***. at 235. She got up from the bench she was sitting on and started to leave, at which time he grabbed her by the front of her shirt. ***Id***. at 180. She saw someone who looked like her godfather riding by on a bicycle and tried to call out to him. ***Id***. at 181. McDonald told her that if she called out, he would punch her in the mouth. ***Id***. She tried to back away but stumbled. ***Id***. She tried to call out as she stumbled, but McDonald punched her. ***Id***. at 182. As she fell, he fell on top of her. ***Id***. Her shirt ripped as she was falling. ***Id***. After they were both on the ground, she pulled out a pocketknife and stabbed McDonald in the stomach to get him off her. ***Id***. McDonald punched her in the face multiple times before she escaped. ***Id***. at 182-83. As a result of being punched, S.H. suffered a broken nose, and multiple facial cuts, requiring five stitches. ***Id***. at 184-85. McDonald was apprehended shortly after the assault and was taken to the

hospital for treatment of his abdominal stab wound. He was taken to the same hospital as S.H. and she identified him at the hospital as her assailant.[3]

Prior to trial, the Commonwealth filed a motion in *limine*, seeking to introduce evidence of a prior bad act in order to show a common plan, scheme or design.[4] The prior crime the Commonwealth sought to introduce was described in the Commonwealth's motion as follows:

> On March 10, 2000, [McDonald] approached the complainant [J.N.] in the area of 6th and Rockland Streets in Philadelphia. J.N. had never met [McDonald] before and was not familiar with him. [McDonald] invited J.N. into the hallway area of an

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[3] In its motion *in limine*, ***infra***, the Commonwealth asserted McDonald had exposed himself prior to assaulting S.H. However, S.H. specifically denied that at both the preliminary hearing, which took place before the Commonwealth filed its motion, and at trial.

[4] ***See*** Pa.R.E. 404(b), regarding evidence of prior crimes, wrongs or other acts. Specifically, the rule states:

> (1) Prohibited Uses. Evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion that person acted in accordance with the character.
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> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

Pa.R.E. 404(b)(1),(2).

> apartment building at that location. Once inside, [McDonald] told J.N., age 15 at the time, that he wanted her to "suck his dick." J.N. refused and [McDonald] became angry; he walked over and forced his penis into her mouth. When J.N. moved her head, [McDonald] told her she was making him angry and pushed his penis back into her mouth. [McDonald] told J.N. that he was going to have sex with her when he was done and removed her pants. He then penetrated J.N.'s vagina with his fingers. Before [McDonald] could further his assault of J.N., a neighbor knocked on the door and J.N. was able to break free. She ran from the building and immediately reported the assault to officers across the street.[5]

Opinion, 8/21/2014, at 3.

The Commonwealth argued that the facts of the two crimes were similar enough to demonstrate that when McDonald asked for oral sex and was refused, he would resort to sexual violence. The trial court agreed and allowed reference to the crime, but not to the fact that McDonald pled guilty. At trial, the Commonwealth produced J.N. who testified regarding the details of the sexual assault.

In reviewing claims such as this, we are guided by the following principles:

> Our standard of review with respect to evidentiary rulings has been long established: The trial court's rulings will not be disturbed absent an abuse of discretion. ***See Commonwealth***

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[5] The certified record contains police reports from the 2000 crime. That sexual assault took place between 9:00 and 10:00 A.M. In addition, the police reports indicated J.N. screamed for help and two residents opened their apartment doors and witnessed part of the assault, at which time J.N. escaped. Although the Commonwealth asserted both crimes took place in the Hunting Park section of Philadelphia, J.N. testified her assault took place in the Logan section. N.T. Trial, 5/8/2013, at 151.

> ***v. Thompson***, 779 A.2d 1195, 1200 (Pa. Super. 2001), *appeal denied,* 567 Pa. 760, 790 A.2d 1016 (2001). The trial court abuses its discretion if "it misapplies the law or [rules] in a manner lacking reason." ***Commonwealth v. Rega***, 856 A.2d 1242, 1244 (Pa. Super. 2004)(citation omitted).
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> Rule 404(b) of the Pennsylvania Rules of Evidence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Pa.R.E., Rule 404(b)(1), 42 Pa. Cons. Stat. Ann. However, "[e]vidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, . intent, preparation, plan, [or] knowledge...." Pa.R.E., Rule 404(b)(2), 42 Pa. Cons. Stat. Ann. Therefore, evidence of other crimes or acts may be admitted if such evidence proves "a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others." Leonard Packel and Anne Bowen Poulin, Pennsylvania Evidence § 404–9(a) (2d Ed. 1999). A common scheme may be relevant to establish any element of a crime, where intent may be shown through a pattern of similar acts. ***See Commonwealth v. Strong***, 825 A.2d 658, 665 (Pa. Super. 2003), *appeal denied,* 577 Pa. 702, 847 A.2d 59 (2004), *cert. denied,* 544 U.S. 927, 125 S.Ct. 1652, 161 L.Ed.2d (2005).
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> The degree of similarity is an important factor in determining the admissibility of other crimes or bad acts under this exception. ***See Commonwealth v. Luktisch***, 451 Pa.Super. 500, 680 A.2d 877, 879 (1996) (finding testimony of prior sexual abuse upon other children in the same family relevant to demonstrate a common scheme); ***Commonwealth v. Smith***, 431 Pa.Super. 91, 635 A.2d 1086, 1089-1090 (1993) (holding evidence of prior crimes was admissible to show a recurring sequence of acts by defendant).
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> Furthermore, the importance of the intervening time period "is inversely proportional to the similarity of the crimes in question." ***Commonwealth v. Miller***, 541 Pa. 531, 548-550, 664 A.2d 1310, 1319 (1995).

Commonwealth v. Einhorn, 911 A.2d 960, 967 (Pa. Super. 2006).

Accordingly, based upon ***Einhorn***, while the crimes need not be "so unusual and distinctive as to be like a signature,"[6] the "degree of similarity" is still a hallmark. The longer the time between the crimes, the more similar the crimes need be. After reviewing the certified record, we agree with McDonald that these crimes took place 11 years apart and the claimed similarities are too vague to make the prior crime relevant and admissible.[7] The major similarity between the crimes is that McDonald asked each for oral sex in the same crude manner.[8] Therefore, the trial court abused its discretion in allowing reference to the prior sexual assault.

Nonetheless, McDonald is not entitled to relief on this claim, as the error was harmless. "[A]n error may be harmless where the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of

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[6] ***Commonwealth v. Hawkins***, 626 A.2d 550 (Pa. 1993). The ***Hawkins*** "like a signature" standard, put forth by McDonald as the relevant standard, is used when the prior crimes are being used to help prove the identity of the perpetrator. Accordingly, McDonald's reliance on the "like a signature" standard is misplaced, since identity of the accused is not at issue.

[7] In the motion in *limine*, some of the similarities claimed by the Commonwealth were: both victims were females, both were African-American, both were strangers to McDonald, both were at least ten years younger than McDonald (J.N. was a 15 year old minor; S.H. was 29), both occurred in the morning (10:00 A.M. and 3:00 A.M.), both denied McDonald's demand for oral sex.

[8] We note as well that although the Commonwealth listed 13 points of similarity between the crimes, the testimony elicited from J.N. at trial did not highlight these alleged similarities. Rather, the majority of the testimony concerned the details of the sexual assault inflicted upon J.N.

the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict." ***Commonwealth v. Strong***, 836 A.2d 884, 887 (Pa. 2003) (quoting ***Commonwealth v. Story***, 383 A.2d 155, 166 (Pa. 1978)). The Rule 404(b) evidence was put forth to help the jury understand McDonald's intent to sexually assault S.H. However, the jury acquitted McDonald of all charges related to the allegations of sexual assault. Furthermore, given the abundance of evidence related to simple assault and unlawful restraint, McDonald cannot credibly claim his convictions were improperly influenced by the tainted evidence. Therefore, the error in allowing reference to the prior sexual assault was harmless in light of the jury's verdict of acquittal on the attempted IDSI and attempted sexual assault charges.

Next, McDonald claims the trial court erred in failing to grant a mistrial after the Commonwealth, in its closing argument, improperly made reference to McDonald's post-arrest silence.[9] This claim fails for a number of reasons.

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[9] Specifically, the Assistant District Attorney stated:

> [W]hen [the] police come, shine a light on him and they approach in full uniform, what does he say? Help me. Somebody stabbed me.

N.T. 5/9/2013, at 108.

First, although McDonald objected to the Commonwealth's comment, and the objection was sustained, no mistrial was ever requested. Accordingly, the issue has been waived. ***See Commonwealth v. Strunk***, 953 A.2d 577, 579-80 (Pa. Super. 2008) (following objection, failure to request remedy constitutes waiver). Next, the offending comment did not address post-arrest silence; the objected to portion of the Commonwealth's closing argument made reference to a pre-arrest, non-***Mirandized***,[10] blurted-out comment. This issue was not preserved in McDonald's Pa.R.A.P. 1925(b) statement, so the issue has been waived.[11] ***See Commonwealth v. Thornton***, 791 A.2d 1190, 1192 (Pa. Super. 2002) (failure to include issue in 1925(b) statement constitutes waiver). Finally, we agree with the trial court's assessment that the ruling that sustained the timely objection prevented the prosecutor from mentioning any post-arrest silence, assuming that would have been the next comment made, and "any inference that could have been taken from the prosecutor's comments did not rise to the

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[10] ***Miranda v. United States***, 86 S.Ct. 1602 (1966).

[11] McDonald's Pa.R.A.P. 1925(b) statement claimed:

> That appellant was denied a fair trial and due process of law by the Court's denial of appellant's motion for mistrial after the prosecutor in her closing remarks made reference to appellant's post-arrest silence.

Pa.R.A.P. 1925(b) Statement, 3/25/2014, at ¶ 2.

level of prejudicing the jury to the extent that a true verdict could not be rendered." Trial Court Opinion, 9/23/2014, at 3.

Finally, McDonald argues his three and one-half to seven year sentence is manifestly excessive in that the trial court failed to consider several mitigating factors and focused, instead, only on the seriousness of the crimes.[12] This claim represents a challenge to the discretionary aspects of his sentence. Such claims are not automatically reviewable; rather the defendant must demonstrate his claim raises a substantial question as to the appropriateness of the sentence. A substantial question exists where there is a colorable argument the sentence is: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process. ***See Commonwealth v. Phillips***, 946 A.2d 103 (Pa. Super. 2008). Here, as noted above, McDonald claims the trial court improperly focused only on the nature of the crime, without consideration of mitigating circumstances. This claim raises a substantial question, allowing for appellate review. ***See Commonwealth v. Boyer***,

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[12] The Commonwealth has objected to the deficient nature of McDonald's Pa.R.A.P. 2119(f) statement, and claims his challenge to the discretionary aspects of his sentence has been waived. While the required 2119(f) statement is not a model of clarity, we have, nonetheless, discerned McDonald's claim and will not find waiver.

856 A.2d 149, 152 (Pa. Super. 2004). Our standard of review for such claims is clear:

> [S]entencing is vested in the discretion of the trial court, and will not be disturbed absent a manifest abuse of that discretion. [***Commonwealth v.***] ***McAfee***, 849 A.2d [270] at 275 (Pa. Super. 2004). An abuse of discretion involves a sentence which was manifestly unreasonable, or which resulted from partiality, prejudice, bias or ill will. ***Id.*** It is more than just an error in judgment. ***Id.***

Commonwealth v. Malovich, 903 A.2d 1247, 1252-53 (Pa. Super. 2006).

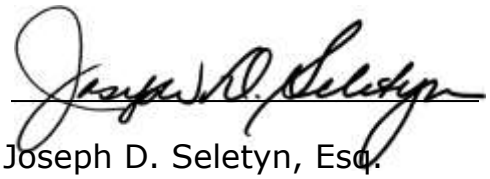
We begin this analysis by noting that the trial court received and reviewed the pre-sentence report, mental health evaluation, Commonwealth's sentencing memorandum and letters sent on behalf of McDonald. Where the trial court is in possession of such documentation, it is presumed to have been aware of and to have considered all relevant information contained therein. ***See Commonwealth v. Leatherby***, ___ A.3d ___, 2015 PA Super 90, at *8 (4/21/2015). Accordingly, McDonald's contention that the trial court focused solely on the nature of the crime to the exclusion of mitigating factors is untenable. Our review of the sentencing transcript confirms that the trial court voiced extreme concern over the nature of the crime. However, the trial court also specifically noted McDonald's extensive criminal history. This history included a 27-year record of 11 arrests, seven convictions (including aggravated assault, burglary and involuntary deviate sexual intercourse) and 22 violations of probation. This history demonstrated to the court an extremely dangerous

person who was a continuing menace to society. ***See*** N.T. Sentencing, 7/18/2013, at 24.

Accordingly, it is evident the trial court read and considered the presentence report, mental health evaluation and submissions by the parties, and took into account not only the specifics of the present crime but also the ongoing threat McDonald posed to society, as well as the need for rehabilitation. ***See*** 42 Pa.C.S. §9721(b). Here, the trial court properly considered the relevant sentencing factors and we discern no abuse of discretion in the imposition of a three and one-half to seven year term of incarceration for the crimes of simple assault and unlawful restraint. Therefore, McDonald is not entitled to relief on this issue.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015