

2014 PA Super 54

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ALFREDO REYES-RODRIGUEZ,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2121 EDA 2013

Appeal from the PCRA Order entered June 28, 2013,  
in the Court of Common Pleas of Northampton County,  
Criminal Division, at No(s): CP-48-CR-0001684-2006, CP-48-CR-0003501-  
2006, & CP-48-CR-0001683-2006.

BEFORE: ALLEN, STABILE, and STRASSBURGER\*, JJ.

CONCURRING AND DISSENTING OPINION BY ALLEN, J.: **FILED MARCH 18, 2014**

While I concur in the Majority's conclusion that Appellant's first issue is meritless, I cannot agree with its analysis of Appellant's two issues involving the jury instruction given in this case. Thus, I dissent from the Majority's remand for a new trial.

I agree with the Majority's conclusion that the trial court's jury instruction did not inform the jury that reputation evidence is sufficient in and of itself to lead to an acquittal. *Commonwealth v. Sandusky*, 77 A.3d 663, 673 (Pa.Super. 2013) (citing *Neely, supra*). Upon careful review of the trial testimony, however, I agree with PCRA counsel that Appellant did

\*Retired Senior Judge assigned to the Superior Court.

not present proper reputation evidence in support of his defense. **See** Appellant's Brief at 13. The following exchange from the PCRA hearing supports my conclusion:

THE COURT: You didn't ask for [transcription of the] charging conference itself. There is an issue with regard to my charge itself, what it is. Do you want the charging conference?

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[PCRA COUNSEL]: I think, judge, it will be helpful.

THE COURT: I would probably require that it be done anyway, but I might want to see that because one of your objections is to a charge, and you might want to see what the discussion was because I don't recall specifically.

I see that there was some discussion in my charge about character witnesses. I didn't consider the - - in all honesty, I recall their testimony. I didn't really consider them to be classic character witnesses because they really [were] called also for a lot of personal observations. But just because they did render an opinion, they rendered their personal opinion as to [Appellant's] character, the qualities of his character. It was touched upon in my closing - - I mean, in my closing instruction, but I don't recall what was discussed in the charging conference, and you might want to see that for a complete record.

Does that make sense?

[PCRA COUNSEL]: Yes, it does, and I think in the record before the witnesses were called that there was some questions asked about that. And it's my belief that maybe they weren't even called as character witnesses. That's a probability based on your remarks and based on the question.

THE COURT: I'm just saying that they testified as to [whether] they were eyewitnesses to certain events, and they testified to that. But they were also asked other questions, and that testimony came in I recall. But I don't remember, to be quite honest, the charging conference

because I have them before every criminal trial, and they all sort of blend together. There may have been specific discussion, and there may not have been specific discussion. And you might want to see that.

[PCRA COUNSEL]: We appreciate that, judge.

THE COURT: Do you remember the charging conference?

[TRIAL COUNSEL]: It's the same as you. They run together, I don't remember that specific issue during the charging conference.

THE COURT: Okay.

And I don't remember that the ladies were called as character witnesses primarily because often when that happens I do give a cautionary instruction as to what the character witnesses are all about just so the jury understands because it's very, sometimes, technical with regard to the limit and the structure of the questions required. I don't recall that. I haven't seen the transcripts of the trial, but I don't recall that, [PCRA counsel].

[PCRA COUNSEL]: It's not in there, the classic do you know so-and-so? Have you discussed his reputation with the community for law abidedness [sic] with others in the community? What is his reputation? Those classic questions are not there.

THE COURT: Right. That's why I refer to them as hybrid witnesses because in my estimation I think they were hybrid witnesses.

N.T., 12/14/12, at 42-44.

The Majority cites no authority for its conclusion that Appellant's "reputation" in the apartment complex as a "good father," was proper reputation evidence of "his general reputation for the particular trait or traits of character involved in the commission of the crime charged." ***Commonwealth v. Johnson***, 27 A.3d 244, 248 (Pa. Super. 2011). In

**Johnson**, at the PCRA hearing regarding the defendant's claim of ineffectiveness of counsel for failing to present proper character evidence, several family members and the defendant's best friend testified as to the defendant's innocence of the sex offenses charged because "he always acted appropriately around children in the family." **Id.** at 248-49. This Court concluded, however, that "none of [the defendant's] proposed witnesses testified as to [his] general reputation for having chastity as a character trait." **Id.** at 248. Thus, we determined that the proposed witnesses' references to the defendant being a "good man," did not specifically comment on his "reputation for chastity in the community." **Id.** at 249. We further held that "[t]he witnesses' testimony to [the defendant's] specific acts in behaving appropriately around children in their family is not proper character evidence as to his general reputation for chastity in the community." **Id.** at 249-50. **See also Commonwealth v. Lauro**, 819 A.2d 100, 109 (Pa. Super. 2003) (concluding that testimony regarding the defendant's normal relationship with his children did not relate to his general reputation in the community, and was thus inadmissible).

Consistent with the foregoing, the testimony of Appellant's three neighbors in this case did not equate to proper reputation evidence. The fact that Appellant took the girls on rides in his truck, and provided for them financially, may have been characterized by the neighbors as Appellant being a "good father." Such testimony, however, does not relate to Appellant's general reputation in the community for the "particular character

traits” involved in the commission of the sex offenses with which Appellant was charged. This is especially true when, on cross-examination, each witness conceded that their testimony was based largely on their observations and personal opinions. **See, e.g.**, N.T. 4/11/07 (Rebecca Walser agrees that she based her testimony on her personal belief that Appellant was a good father).

Thus, unlike the Majority, I find that Appellant’s second issue claiming ineffectiveness of counsel for failing to call proper character witnesses at trial is of arguable merit. With regard to this claim, trial counsel testified at the PCRA hearing as follows:

[BY PCRA COUNSEL]:

As I understand it, you called three neighbors at trial on April 11, 2007. . . .

Do you have a recollection of why you called them?

[TRIAL COUNSEL]: Well, in part because they were able to testify to [Appellant’s] good character, and the fact that he was a good father. And they also had some specific observations. And I believe one of them was more than character evidence. They heard a statement that one of the juveniles made against [Appellant] that gave [the juvenile] a motive to lie, and that [Appellant] was perhaps disciplining them, or separating the girl from the older teenaged boy. And [the juvenile] had given a comment in response which supported the motive for her to fabricate a story against [Appellant]. We had talked about the potential witnesses, and the public defender’s office prepared a private detective to go and talk to both those witnesses and anyone else in that apartment complex, or in their circle of friends to call as potential witnesses.

[PCRA COUNSEL]: With regard to witnesses, you heard [Appellant's] testimony with regard to family members testifying as to his good character as well as coworkers.

Do you ever remember discussing those with him?

[TRIAL COUNSEL]: I recall that [Appellant] did have adult children. So, that's the first time I'm hearing about it now, many years later. So, that is something I do remember that they [sic] did have adult children. I do not recall any specific conversation about calling that adult child as a character witness.

[PCRA COUNSEL]: What about coworkers?

[TRIAL COUNSEL]: I knew [Appellant] had a good employment history. I don't know that there were - - this is the first time I'm hearing that there were any character witnesses that would have been providing real evidence. I seem to recall that [Appellant] was a truck driver and that he - - he wasn't necessarily working with someone, so to speak, when he's out on the road.

N.T., 12/14/12, at 36-37.

Unfortunately for Appellant, although he mentioned family members and coworkers who could provide proper reputation testimony, he did not present them as witnesses at the PCRA hearing. Thus, Appellant has failed to establish prejudice. **See *Johnson***, 27 A.3d at 247 (holding that defendant failed to show prejudice because his proposed character witnesses did not offer admissible reputation testimony at the PCRA hearing). Because Appellant was not entitled to a jury instruction on the importance of reputation evidence, any shortcoming in the trial court's instruction was

harmless error.<sup>1</sup> **See Commonwealth v. Moran**, 5 A.3d 273, 283 (Pa. Super. 2010) (applying the harmless error doctrine to challenged jury instructions); **see also In re Vososki**, 842 A.2d 345, 346 (Pa. Super. 2004) (reiterating that this Court is not limited by the trial court's reasoning, and may affirm on any basis).

Finally, given its proposed disposition, the Majority does not reach Appellant's last issue, which claims that trial counsel was ineffective for failing to challenge and properly preserve his claim regarding the consecutive nature of his sentence. In his direct appeal, we found that although Appellant's sentencing claim was not properly preserved, the claim nevertheless failed to raise a substantial question. **See Commonwealth v. Reyes-Rodriguez**, 32 A.3d 280 (Pa. Super. 2011), unpublished memorandum at 14-15. Contrary to Appellant's assertion, his sentencing claim was addressed in his direct appeal. **See** 42 Pa.C.S.A. 9544 (a) (discussing previous litigation under the PCRA); **see also Commonwealth v. Reed**, 971 A.2d 1216 (Pa. 2009) (citation omitted) (explaining that "[w]here a decision rests on two or more valid grounds equally valid, none may be relegated to the inferior status of *obiter dictum*").

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<sup>1</sup> There is no indication in the record that trial counsel requested an instruction on reputation evidence.

In sum, given the evidence Appellant presented in his defense, he was not entitled to an instruction regarding reputation evidence, and therefore, any shortcoming in the trial court's instruction was harmless error. In addition, by failing to call witnesses at the PCRA hearing who would have offered proper reputation evidence, Appellant has failed to establish his claim that trial counsel was ineffective for failing to present proper reputation evidence. Finally, because this Court has already rejected Appellant's challenge to the consecutive nature of his sentence, his sentencing issue is without merit.

For all these reasons, I would affirm the PCRA court's order denying Appellant post-conviction relief.