

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JOSE LUIS PERALTA,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1846 EDA 2013

Appeal from the Judgment of Sentence entered December 18, 2012,
in the Court of Common Pleas of Bucks County,
Criminal Division, at No(s): CP-09-CR-0007919-2011

BEFORE: SHOGAN, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.:

FILED APRIL 15, 2014

Jose Luis Peralta ("Appellant") appeals from the judgment of sentence imposed after the trial court convicted him of multiple charges, including burglary, criminal trespass, indecent assault, attempted indecent assault, false imprisonment, unlawful restraint, simple assault, and related crimes.¹ We affirm.

The trial court summarized the pertinent facts and procedural history as follows:

The victim in this case was six years old at the time of the offense on trial. She lived in a single-family residence located at 543 Oak Road, in Warrington Township, Bucks County with her parents, her twelve-year-old brother, her

¹ 18 Pa.C.S.A. §§ 3502, 3503, 3126, 901, 2903, 2902, and 2701, respectively.

two-year-old sister, her paternal grandfather, and her paternal aunt and her husband. On the evening of September 3, 2011, the victim's family held a party for family and friends to celebrate the baptism of the youngest child at a local hall they had rented. [Appellant] is not a relative of the victim and did not know the family prior to that day. At the time, [Appellant] lived in Brooklyn, New York, with his uncle Roberto Peralta. The victim's maternal uncle also resided in Brooklyn. This uncle chose to invite his friend, Javier Peralta, to the party. Javier Peralta, in turn, asked his nephew, [Appellant], to come along with him.

After the party, the victim's immediate family remained behind to pack up the food and other items. Afterward, on the drive home, the victim fell asleep in their car. When they arrived home, [Appellant], Javier Peralta, and Roberto Peralta were there. The victim's father had not invited them into his home and was surprised to find them there. "Out of courtesy," he did not tell them to leave. He carried the victim into her brother's bedroom on the ground floor of their home. Her mother changed her from her party dress into her pajamas. When she put her to bed, the victim was wearing underwear, a pajama top, and pajama shorts. When she left the room, [the victim] was asleep and the bedroom window was closed. [The victim's mother] left the bedroom light on and the bedroom door open. Shortly thereafter, she and her husband left the residence to pick up some of the party supplies that another family had taken from the hall after the party. The children remained at the house with the other family members and the Peraltas.

Testimony of the victim's family and evidence obtained from the scene established the following sequence of events. [Appellant] was present when the victim was put to bed in the ground floor bedroom at her residence. After the victim's parents left the home, [Appellant] entered the bathroom next to the [victim's] room and went out the bathroom window. He then made forcible entry into the [victim's] room through the window. [Appellant] turned off the light, locked the door, and removed the [victim's] pajama shorts and underwear while the victim slept. When [the victim] awoke, she found [Appellant] in the room. When she tried to flee he struck her in the face.

Injured, bleeding, and crying, she frantically tried to open the door, smearing blood on the wall and the door in the process. She was ultimately able to escape. [Appellant] fled through the now open bedroom window.

Specifically, the evidence established that after his parents left the residence to retrieve the party items, the victim's brother remained awake. He noticed the door to his bedroom where the victim was sleeping was open and that the light inside the room was on. Later, he saw [Appellant] walk into the hallway where [his] bedroom and the bathroom were located. Five minutes later, he heard screaming from that area. He ran to the bedroom and found that the bedroom door was locked from the inside. He and other family members were unable to force the door open. The family heard the victim yelling and crying on the other side of the door and instructed her to open it. When she finally opened the door, her family saw that she was not wearing her pajama shorts or underwear. She was crying and her hair was disheveled. She was bleeding from her nose and had a lot of blood on her face and pajama top. Her upper lip was swollen and she had a large lump on her forehead. While another family member called 911, the victim's aunt took her into the adjacent bathroom, cleaned off some of the blood and wrapped the victim in a blanket. Family members noticed that the bathroom window that had been previously closed was now open.

The police were initially dispatched to 543 Oak Road for a report of a young girl bleeding at that location. En route, the information was updated to include a reported burglary in progress. Police arrived at the residence within two minutes of being dispatched. The victim's parents returned home as the police were arriving at the scene.

The police immediately spoke to the six-year-old victim. She reported that the man who assaulted her had a ponytail and was wearing a dark shirt. She stated that he fled the residence through the bedroom window. Shortly after their arrival at the scene, the police were notified that a neighbor had reported seeing a person matching the victim's description flee the residence, run across Oak Avenue and continue behind the residence across from the victim's home. After a brief foot chase, the person seen by

the neighbor, later identified as [Appellant], ran into the police who were still responding to the scene. [Appellant] was apprehended at 3:07 AM. He was wearing a dark shirt, jeans and a sneaker on his left foot. His clothes were wet and covered with "debris from bushes and so forth." His hair was in a ponytail. Two baggies of white powder, later identified as cocaine, were found in an Altoids Mints tin seized from his person at his arrest. The victim was taken to Doylestown Hospital.

When police inspected the scene, the bathroom window and screen were open but undamaged. Forcible entry had been made through the bedroom window. The window was open. The screen was torn open. Police found and photographed scuff marks below that bedroom window. Police found [Appellant's] right sneaker below the window inside the bedroom. As the victim struggled to find and open the door after the assault, she transferred her blood onto the wall, the door, the door frame and the door jamb. Blood was found on the victim's pajama top. Bloody paper towels were found on the floor.

[Appellant] was interview[ed] on the morning of his arrest. After, [sic] being read his **Miranda** warnings, [Appellant] agreed to talk without an attorney present. During that interview, [Appellant] told the police that the victim was his niece, that he was at her residence for a party and that he first saw her at her home. After he was confronted with the fact that his sneaker had been found in the bedroom where the [victim] was attacked, [Appellant] told police that while at the residence, he went to the bathroom, walked past the bedroom where the victim was sleeping and saw a Hispanic male he identified as a gang member from Norristown in the room. He stated that he confronted the man, the two scuffled and the "gang member" went out the window. He stated that he gave chase and lost his shoe. [Appellant] did not respond when asked on multiple occasions how he knew the individual was a Hispanic male gang member from Norristown.

Ten days later, on September 14, 2011, the victim appeared at the child advocacy center to be interviewed. The investigating officer noted that [the victim] was afraid to have the door to the interview room shut. When she was left alone, [the victim] began to draw. Unprompted,

she drew a picture of her assailant, depicting him with a ponytail. When interviewed, she stated that she was sleeping and woke up without her pajama bottoms and underwear [on]. When she tried to get up, she was punched in the nose and head.

On September 4, 2011, [Appellant] was charged with attempted rape of a child, attempted involuntary deviate sexual intercourse with a child, attempted aggravated indecent assault of a child, [as well as the charges indicated above]. On December 5, 2011, a preliminary hearing was held. All charges were held for court.

On March 21, 2012, [Appellant] filed a petition for writ of habeas corpus challenging the sufficiency of the evidence presented at the preliminary hearing. On April 2, 2012, the [trial court] granted [Appellant's] habeas corpus petition as to the charges of attempted rape of a child; attempted involuntary deviate sexual intercourse with a child; attempted aggravated assault of a child; and indecent assault – forcible compulsion.

On April 15, 2012, [Appellant] entered a guilty plea to the remaining charges. On April 25, 2012, [Appellant] filed a motion to withdraw his guilty plea. On July 31, 2012, the [trial court] granted that motion.

On November 9, 2012, [Appellant] waived his right to a trial by jury and a [bench] trial was held[.] [Appellant] was found guilty of all remaining charges.

Trial Court Opinion, 10/3/13, at 1-6 (citations and footnotes omitted).

On December 18, 2012, the trial court imposed an aggregate term of 17½ - 40 years of imprisonment, followed by a 2 year probationary term. On December 27, 2012, Appellant filed post-sentence motions, including a request for reconsideration of his sentence. The trial court held an evidentiary hearing on February 22, 2013, after which the court denied Appellant's motion for sentence reconsideration. By order dated May 23,

2013, the trial court vacated the sentence it had imposed for indecent assault, **see** 18 Pa.C.S.A. section 3502(d), thereby reducing Appellant's aggregate sentence to 15 - 30 years of imprisonment. That same date, the trial court denied Appellant's remaining post-sentence motions. This timely appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues:

A. DID THE TRIAL COURT ERR IN IMPOSING A SENTENCE THAT EXCEEDED THE SENTENCING GUIDELINES LACKING ADEQUATE REASONS TO JUSTIFY THE STATUTORY MAXIMUM WHICH DID NOT TAKE INTO ACCOUNT [APPELLANT'S] CIRCUMSTANCES AND REHABILITATIVE NEEDS BUT ONLY FOCUSED ON THE NATURE OF THE OFFENSE?

B. DID THE TRIAL COURT ERR WHEN IT CONVICTED [APPELLANT] OF UNLAWFUL RESTRAINT WHEN THERE WERE NO ACTIONS SO INHERENTLY DANGEROUS THAT EXPOSED THE VICTIM TO ACTUAL DANGER OF SERIOUS BODILY INJURY?

C. DID THE TRIAL COURT ERR IN FINDING [APPELLANT] GUILTY OF CRIMINAL ATTEMPT INDECENT ASSAULT WHEN THE VICTIM REPEATEDLY DENIED THAT SUCH CONDUCT OCCURRED?

D. DID THE TRIAL COURT ERR IN FINDING [APPELLANT] GUILTY OF BURGLARY AND CRIMINAL TRESPASS WHEN THE RESIDENTS PERMITTED [HIM] TO ENTER AND REMAIN IN THE RESIDENCE?

E. DID THE TRIAL COURT ERR IN FINDING [APPELLANT] GUILTY OF SIMPLE ASSAULT AND FALSE IMPRISONMENT WHEN THE VICTIM NEVER IDENTIFIED [HIM] AS THE ACTOR IN THE CRIME?

Appellant's Brief at 4-5. We will address Appellant's claims in the order presented.

Appellant first challenges the discretionary aspects of his sentence.

This Court has summarized:

Appellant challenges the discretionary aspects of sentencing for which there is no automatic right to appeal. This appeal is, therefore, more appropriately considered a petition for allowance of appeal. Two requirements must be met before a challenge to the judgment of sentence will be heard on the merits. First, the appellant must set forth in his [or her] brief a concise statement of matters relied upon for allowance of appeal with respect to the discretionary aspects of his [or her] sentence. Pa.R.A.P. 2119(f). Second, he or she must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b)[.]

The determination of whether a particular case raises a substantial question is to be evaluated on a case-by-case basis. Generally, however, in order to establish that there is a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.

Commonwealth v. Marts, 889 A.2d 608, 611-12 (Pa. Super. 2005) (footnote and citations omitted).

In the present case, Appellant has failed to include in his brief a concise statement pursuant to Pa.R.A.P. 2119(f). The Commonwealth objects to Appellant's failure to include a Pa.R.A.P. 2119(f) statement, and argues that Appellant's sentencing claim is waived. We agree.

This Court has held:

[W]hen the appellant has not included a Rule 2119(f) statement and the [Commonwealth] has not objected, this Court may ignore the omission and determine if there is a substantial question that the sentence imposed was not appropriate, or enforce the requirements of Pa.R.A.P. 2119(f) *sua sponte*, i.e., deny allowance of appeal. However, this option is lost if the [Commonwealth] objects to a 2119(f) omission. In such circumstances, this Court is precluded from reviewing the merits of the claim and the appeal must be denied.

Commonwealth v. Kiesel, 854 A.2d 530, 533 (Pa. Super. 2004); ***see also Commonwealth v. Robinson***, 931 A.2d 15, 22 (Pa. Super. 2007).

In the present case, Appellant has failed to include in his brief a statement pursuant to Pa.R.A.P. 2119(f), and the Commonwealth has objected to the omission. Accordingly, we may not review the merits of Appellant's appeal. ***Kiesel, supra.***²

Appellant's remaining issues challenge the sufficiency of the evidence supporting several of his convictions. Our standard of review is well settled:

² Absent waiver, the record refutes Appellant's sentencing claim. The trial court fully explained the reasons it chose to deviate from the sentencing guidelines both at sentencing and again when denying Appellant's motion for sentence reconsideration. Appellant's true claim challenges the weight the trial court assigned legitimate sentencing factors. Such a challenge does not raise a substantial question. ***See generally Commonwealth v. Griffin***, 804 A.2d 1 (Pa. Super. 2002).

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to 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. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Jones, 886 A.2d 689, 704 (Pa. Super. 2005) (citations omitted).

As charged in the criminal information, a person is guilty of unlawful restraint “if he restrains another unlawfully in circumstances exposing him to risk of serious bodily injury[.]” 18 Pa.C.S.A. § 2902(a)(1). Referring to the victim’s preliminary hearing testimony, Appellant claims that he did not expose her to the risk of serious bodily injury. Although he acknowledges the trial court’s conclusion that his conduct caused the victim to bleed severely and that she lost a “serious” amount of blood, he notes that “the medical records do not mention severe loss of blood or any required treatment for this reason.” Appellant’s Brief at 20 (citation omitted).

The trial court rejected Appellant's claim, and reasoned:

In entering the verdict, this court specifically found that [Appellant's] conduct exposed the victim to the risk of serious bodily injury, noting the youth of the victim, the disparity in size between the victim and [Appellant], and the fact that [Appellant] struck her in the head more than once with such force that the victim suffered substantial blood loss. The fact that the victim's medical records did not document bleeding does not prove that she did not, in fact, bleed. Photographs of the victim, photographs of the scene and the testimony of the victim's family provided substantial proof that the [victim] experienced significant blood loss.

Trial Court Opinion, 10/3/13, at 8-9 (citations omitted).

Our review of the record supports the trial court's conclusion. Appellant's true argument is that the Commonwealth could only prove "bodily injury." See Appellant's Brief at 20-21. A plain reading of the criminal statute, however, requires only a risk of serious bodily injury. We agree with the trial court's conclusion that the evidence presented by the Commonwealth sufficiently supported Appellant's unlawful restraint conviction. ***See Commonwealth v. Moody***, 441 A.2d 371, 374 (Pa. Super. 1982) (holding sufficient evidence supported the defendant's unlawful restraint conviction after he forcibly restrained a twelve-year-old girl in a cellar against her will, and he struck her and touched her, despite the girl's resistance).

Appellant next claims that the evidence was insufficient to convict him of criminal attempt indecent sexual assault because the victim repeatedly "denied that she had been touched in an inappropriate manner." Appellant's

Brief at 22 (citation omitted). Our review of the record supports the Commonwealth's assertion that this claim is waived because Appellant did not challenge the sufficiency of the evidence supporting this conviction in his Pa.R.A.P. 1925(b) statement. **See** Pa.R.A.P. 1925(b)(4). Because the trial court did not address Appellant's claim, he inappropriately raises it for the first time on appeal, the claim is waived, and we need not consider it further. **See generally**, Pa.R.A.P. 302(a).

In his next issue, Appellant asserts that the evidence was insufficient to support his convictions of both burglary and criminal trespass because the residents of the victim's house gave him permission to enter and remain on the premises. The record refutes Appellant's claim.

A person commits the crime of burglary if, "with the intent to commit a crime therein, the person . . . enters a building . . . in which at the time of the offense any person is present[.]" 18 Pa.C.S.A. § 3502(a). It is a defense to a prosecution for burglary if, at the time of the commission of the offense, "[t]he actor is licensed or privileged to enter." 18 Pa.C.S.A. § 3502(b). A person commits the crime of criminal trespass if, "knowing that he is not licensed or privileged to do so, he . . . enters, gains entry by subterfuge or surreptitiously remains in any building . . . or . . . breaks into any building." 18 Pa.C.S.A. § 3503(a)(i) & (ii).

The trial court found no merit to Appellant's challenges, explaining:

No one invited [Appellant] into the home. He merely accompanied other family members. Even assuming this could be construed as permission to be in the home, this court properly found that permission expired when [Appellant] went out the bathroom window and surreptitiously re-entered the home through the bedroom window. [Appellant's] intent at that time is beyond question.

Trial Court Opinion, 10/3/13, at 8 (citation omitted).

Once again, our review of the record supports the trial court's conclusions. At trial, both of the victim's parents testified that neither Appellant nor anyone else had permission to enter the bedroom where the victim was sleeping. **See** N.T., 11/9/12, at 97-97; 116. In support of his argument, Appellant fails to differentiate between his initial entrance into the house with other family members and his re-entry into the victim's bedroom. Appellant's claim, in essence, that he had permission to enter the bedroom where the victim was sleeping by ripping the screen and entering through the bedroom window is specious. **See Commonwealth v. Corbin**, 446 A.2d 308, 311 (holding that a person who is privileged to be on the premises may still be convicted of burglary if he would not reasonably be expected to be present). Although Appellant claims that no one testified that they saw him enter the bathroom, the trial court, as fact finder, can infer this fact from the circumstantial evidence presented. **Jones, supra**.

In his final sufficiency challenge, Appellant asserts that the Commonwealth's evidence was insufficient to convict him of simple assault and false imprisonment because the victim never identified him as the

perpetrator of these crimes. The trial court rejected Appellant's claim, and observed:

Contrary to [Appellant's] assertion, there was overwhelming evidence identifying him as the perpetrator of these crimes. [Appellant] was in the home prior to the assault, matched the description of the actor given by the victim and was found hiding in the neighborhood immediately after the assault. At the time he was apprehended, he was wearing one sneaker; his other sneaker was found in the victim's bedroom.

Trial Court Opinion, 10/3/13, at 9.

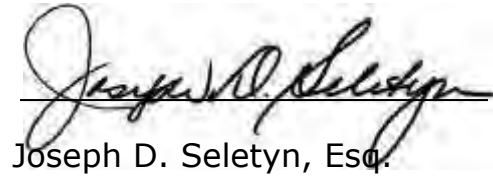
As noted above, when reviewing a sufficiency challenge, all of the evidence presented must be viewed in a light most favorable to the Commonwealth as verdict-winner, and the finder of fact, when passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. ***Jones, supra***. In making his argument, Appellant inappropriately focuses on the victim's general description of her attacker, as well as the fact that no blood was found on his clothing. Upon review, we agree with the trial court's conclusion that the evidence identifying Appellant as the perpetrator of the assault was overwhelming. Thus, Appellant's sufficiency challenge fails.

In sum, because Appellant's challenge to the discretionary aspects of his sentence is waived and otherwise without merit, and the record refutes his sufficiency challenges, we affirm his judgment of sentence.

Judgment of sentence affirmed.

Judge Shogan concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014