

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

STEPHEN THOMPSON

Appellant

No. 1671 MDA 2012

Appeal from the Judgment of Sentence March 23, 2012
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0000989-2011

BEFORE: SHOGAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.:

FILED MAY 20, 2013

Appellant, Stephen Thompson, appeals *nunc pro tunc* from the March 23, 2012 judgment of sentence of a \$300 fine imposed after he was found guilty of the summary offense of harassment.¹ Appellant was also ordered to pay \$1,900.15 restitution to the victim, Matthew Wagner, for medical expenses.² After careful review, we affirm the judgment of sentence.³

The trial court summarized the relevant facts of this case as follows.

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 2709(a)(1).

² The restitution amount was amended by order of the trial court dated September 20, 2012.

³ The Commonwealth has not filed a brief in this matter.

In the early morning hours of June 8, 2011, [Appellant] was at the apartment of [the victim] drinking beer, watching television, and talking. After an hour or two, Appellant and [the victim] got into an argument that developed into a physical altercation. During the argument, both men stood up and Appellant pushed [the victim] in the chest, causing [the victim] to trip over a chair. [The victim] got up, and Appellant pushed him down again. When [the victim] got up a second time, he yelled at Appellant to leave. Appellant grabbed a nearby pedestal fan and began swinging the base of it at [the victim]. [The victim] turned his head away from Appellant and attempted to block the blows with his left arm, but the base of the fan struck [the victim] in the back of the head. [The victim] felt the back of his head and noticed he was bleeding profusely. He yelled at Appellant, "Look what you did to me." Appellant fled, and [the victim] went to the apartment of a neighbor who called 911.

The police responded and spoke to [the victim] briefly before emergency personal arrived and transported [the victim] to the hospital. [The victim] sustained two gashes on his head that required a total of 13 staples and bruising on his left arm.

The police interviewed Appellant. While he admitted striking [the victim] with the base of the fan, he claimed that [the victim] was not the innocent victim but would not provide any details. The officer did not see any injuries on Appellant.

The police charged Appellant with simple assault, a misdemeanor of the second degree. Upon motion of the Commonwealth and without objection from Appellant, the Information was amended to charge harassment graded as a summary offense. The case then proceeded to a summary trial before the [trial c]ourt.

At the summary trial, [the victim] testified that during the verbal disagreement Appellant repeatedly pushed him down and then struck him with the base

of the fan. [The victim] also stated that he did not push Appellant or attack him in any way.

Appellant testified in his own defense. He claimed that during a conversation about whether a UFC fighter was Mexican or not, [the victim] stood up and then he stood up. [The victim] poked him in the chest, and he pushed [the victim] away, causing him to fall backwards. [The victim] got up, got in Appellant's face and poked him in the chest again. Appellant pushed [the victim] down. [The victim] got up and started yelling at Appellant to leave. When Appellant was about five steps outside, [the victim] called his name. Appellant turned around. [The victim] stepped off the stoop with the fan in his hands and jabbed the base at Appellant, scraping his arm. [The victim] lunged at Appellant a second time, causing Appellant to fall backwards and get a "road rash" scrape on his arm. Appellant grabbed the base of the fan and pulled while [the victim] was still holding it. The fan broke into two pieces, with Appellant holding the base and [the victim] holding the top of it. At that point, Appellant started swinging the base of the fan, clipping [the victim] in the back of the head at some point. [The victim] backed up, put his hand to his head and said, "[Appellant], look what you did to me." Then [the victim] backed into his room, grabbed his aluminum baseball bat, and told Appellant to get out. Appellant left with the base of the fan still in his hands. He threw the base of the fan in a dumpster and ran away.

Appellant claimed he showed his injuries to the police when he said [the victim] was not an innocent victim, but he did not take pictures of his injuries because a neighbor told him [the victim] was not pressing charges. He said he did not tell the officer about [the victim] poking him in the chest, because he really didn't want to talk to him until he spoke to a lawyer. He also claimed he retrieved the fan base from the dumpster and gave it to a neighbor to give back to [the victim].

Appellant also called his son as a witness to testify about the scrapes he sustained on his arm and elbow and retrieving the base of the fan from the dumpster and giving it to a neighbor to return to [the victim]. Appellant's daughter also testified regarding the scrapes and cuts on his arms.

Trial Court Opinion, 11/20/12, at 1-3.

As noted, on March 23, 2012, the trial court found Appellant guilty of the summary offense of harassment. That same day, the trial court sentenced Appellant to a \$300 fine and ordered him to pay restitution to the victim for his medical expenses. Appellant did not file any post-sentence motions. Appellant requested that his counsel file an appeal on his behalf, but no such appeal was ever filed. Thereafter, on June 21, 2012, Appellant filed a petition for leave to file an appeal *nunc pro tunc*. Following a hearing, the trial court concluded that Appellant was denied his right to appeal, and reinstated his appeal rights on August 22, 2012. This appeal followed.⁴

On appeal, Appellant raises the following issue for our review.

1. Whether the verdict issued was against the weight of the evidence since the credibility of the lead witness was in question?

Appellant's Brief at 4.

"A true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be

⁴ Appellant and the trial court have complied with Pa.R.A.P. 1925.

believed.” ***Commonwealth v. Lewis***, 911 A.2d 558, 566 (Pa. Super. 2006) (citation omitted). Where the trial court has ruled on a weight claim, we do not “consider the underlying question of whether the verdict is against the weight of the evidence.” ***Commonwealth v. Wall***, 953 A.2d 581, 586 (Pa. Super. 2008), *appeal denied*, 963 A.2d 470 (Pa. 2008). Rather, “[our] review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.” ***Commonwealth v. Tharp***, 830 A.2d 519, 528 (Pa. 2003), *cert. denied*, ***Tharp v. Pennsylvania***, 541 U.S. 1045 (2004). “The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact.” ***Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003) (citations omitted), *cert. denied*, ***Champney v. Pennsylvania***, 542 U.S. 939 (2004). Moreover, this Court will only reverse the trial court’s verdict if it “is so contrary to the evidence as to shock one’s sense of justice.” ***Commonwealth v. Cruz***, 919 A.2d 279, 282 (Pa. Super. 2007), *appeal denied*, 928 A.2d 1289 (Pa. 2007).

Prior to addressing the merits of Appellant’s weight claim, we must first ascertain whether he has properly preserved this issue for appellate review. Pennsylvania Rule of Criminal Procedure 607 provides, in pertinent part, that a claim the verdict was against the weight of the evidence “shall be raised with the trial judge in a motion for a new trial: (1) orally, on the

record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion.” Pa.R.Crim.P. 607(A). “The purpose of this rule is to make it clear that a challenge to the weight of the evidence must be raised with the trial judge or it will be waived.” ***Commonwealth v. McCall***, 911 A.2d 992, 997 (Pa. Super. 2006).

Upon careful review, we conclude that Appellant has failed to comply with Rule 607. Specifically, Appellant failed to point to the portion of the record that indicates he moved for a new trial on weight of the evidence grounds, or filed a post-sentence motion raising a weight of the evidence claim. As our examination reveals that no such motion was filed, we conclude Appellant’s challenge to the weight of the evidence is waived. ***See Commonwealth v. Ferguson***, 866 A.2d 403, 409 (Pa. Super. 2004) (finding a weight of evidence claim waived where the issue was not presented in a post-sentence motion and the appellant did not cite to the record to show it was raised at trial), *appeal denied*, 885 A.2d 40 (Pa. 2005).

Accordingly, for the foregoing reasons, we affirm the March 23, 2012 judgment of sentence.

Judgment of sentence affirmed.

J-S25023-13

Judgment Entered.

Mary A. Straybill
Deputy Prothonotary

Date: 5/20/2013