

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JAMES DUANE BAKER-MYERS	:	
	:	
Appellant	:	No. 1398 WDA 2016

Appeal from the Judgment of Sentence August 19, 2016
 In the Court of Common Pleas of Mercer County Criminal Division at
 No(s): CP-43-CR-0001303-2015

BEFORE: GANTMAN, P.J., BENDER, P.J.E., BOWES, J., PANELLA, J.,
 LAZARUS, J., OTT, J., STABILE, J., DUBOW, J., and MURRAY, J.

OPINION BY DUBOW, J.: FILED MAY 21, 2019

Appellant, James Duane Baker-Myers, appeals from the August 19, 2016 Judgment of Sentence entered in the Mercer County Court of Common Pleas following his jury conviction of Corruption of Minors, graded as a third-degree felony (“COM-Felony”).¹ Appellant claims, inter alia, that the Commonwealth’s evidence was insufficient to convict him of COM-Felony because the jury acquitted him of Rape, Sexual Assault, Aggravated Indecent Assault, and Indecent Assault² (collectively, “the Sexual Offenses”). We are constrained to agree with Appellant and find that the Commonwealth failed to prove an essential element of COM-Felony. We, thus, vacate Appellant’s COM-

¹ 18 Pa.C.S. § 6301(a)(1)(ii).

² 18 Pa.C.S. §§ 3121; 3124.1; 3125; and 3126, respectively.

Felony conviction, and remand for resentencing on the lesser-included offense of COM, graded as a first-degree misdemeanor (“COM-Misdemeanor”).³

Police charged Appellant with the Sexual Offenses arising from the 17-year-old victim’s allegation that, on the evening of July 19, 2015, 20-year-old Appellant sexually assaulted her.

Following a two-day trial, on April 13, 2016, the jury convicted Appellant of COM-Felony. The jury, however, found him not guilty of the Sexual Offenses.⁴

On August 29, 2016, the court imposed a sentence of one to two years’ imprisonment, and a consecutive term of three years’ probation. Additionally, Appellant’s conviction of COM-Felony classified him as a Tier I sexual offender, and required him to comply with the fifteen-year registration and reporting requirements of the Sexual Offender Registration and Notification Act.⁵ Appellant did not file a Post-Sentence Motion.

This timely appeal followed. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant raises the following two issues on appeal:

[1.] Whether the jury’s guilty verdict on the charge of [COM-Felony] was not supported by sufficient evidence since a material

³ 18 Pa.C.S. § 6301(a)(1)(i).

⁴ At trial, the Commonwealth presented the testimony of the victim, her mother, and Pennsylvania State Police Trooper Joseph Morris. Appellant did not present any testimony or other evidence at trial.

⁵ See 42 Pa.C.S. §§ 9799.14(b); 9799.15(a)(1).

element of the offense was the commission of a Chapter 31 offense and Appellant was found not guilty of all four of the [Sexual Offenses] charged[?]

[2.] Whether the jury's guilty verdict on the charge of [COM-Felony] was not supported by sufficient evidence since the evidence failed to establish Appellant's acts constituted a "course of conduct[?]"

Appellant's Brief at 5.

Appellant first claims that the evidence was insufficient to support the jury's guilty verdict on the COM-Felony because in order to convict Appellant of COM-Felony, the jury must convict him of at least one Chapter 31 sexual offense with which the Commonwealth charged him. *Id.* at 14. He concludes that since the jury found Appellant not guilty of the charged Chapter 31 Sexual Offenses, the evidence was insufficient to convict him of COM-Felony. *Id.* at 11. We agree.

It is well settled that "a claim challenging the sufficiency of the evidence is a question of law." *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000). "We review claims regarding the sufficiency of the evidence by considering 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." *Commonwealth v. Miller*, 172 A.3d 632, 640 (Pa. Super. 2017) (internal quotation marks and citations omitted).

Additionally, the burden is on the Commonwealth to prove every element of a crime beyond a reasonable doubt. *Commonwealth v. Miner*, 735 A.2d 225, 231 (Pa. 2000). It follows generally then, that if a jury finds a

defendant not guilty, then the jury has found that the Commonwealth failed to establish the elements of the crime beyond a reasonable doubt.

Turning to the elements of COM-Felony, the jury, in order to convict a defendant of COM-Felony, must find the following:

Whoever, being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree.

18 Pa.C.S. § 6301(a)(1)(ii) (emphasis added). In other words, the jury must find, *inter alia*, that a defendant acted “in violation of Chapter 31 (relating to sexual offenses).” *Id.*

While we have not identified any authority directly on this issue, a review of an analogous case, *Commonwealth v. Magliocco*, 883 A.2d 479 (Pa. 2005), guides our analysis. In *Magliocco*, a jury convicted the defendant of Ethnic Intimidation, but did not convict him of Terroristic Threats. The Ethnic Intimidation statute requires, *inter alia*, that the Commonwealth prove that the defendant committed Terroristic Threats and did so “with malicious intention toward the race, color, religion[,] or national origin of another individual or group of individuals[.]” 18 Pa.C.S. § 2710(a). The Supreme Court concluded that since the Commonwealth charged and prosecuted Appellant with the predicate offense of Terroristic Threats, but failed obtain a conviction, the evidence was insufficient to convict the defendant of Ethnic Intimidation. *Id.* at 493.

Analogously, in the instant case, the Commonwealth charged and prosecuted Appellant for COM-Felony and the Sexual Offenses, but failed to obtain a conviction on any of the Sexual Offenses. By acquitting Appellant of the Chapter 31 Sexual Offenses, the jury found that the Commonwealth had failed to establish beyond a reasonable doubt that Appellant acted “in violation of Chapter 31.” Thus, because the jury found that Appellant had not acted “in violation of Chapter 31,” an essential element of COM-Felony, the Commonwealth was unable to establish every element of COM-Felony. See *Magliocco*, supra at 493 (reiterating that to “secure a conviction for any crime, the Commonwealth must prove all necessary elements beyond a reasonable doubt.”); see also *Miller*, 172 A.3d at 640. Accordingly, we vacate Appellant’s COM-Felony conviction.⁶

Since we have vacated the COM-Felony conviction, we must address the issue of re-sentencing on remand. This Court in *Commonwealth v. Kelly*, 102 A.3d 1025 (Pa. Super. 2014) (en banc), made clear that subsection (a)(1)(i) of the COM statute, COM-Misdemeanor, is a lesser-included offense of subsection (a)(1)(ii), COM-Felony. *Kelly*, 102 A.3d at 1032-33. Thus, we conclude that we must vacate Appellant’s COM-Felony conviction,⁷ but that his COM-Misdemeanor conviction remains valid as a lesser-included offense.

⁶ In light of our disposition, we need not reach the merits of Appellant’s second issue.

⁷ This disposition also vacates the SORNA registration requirement imposed as a result of the COM-Felony conviction.

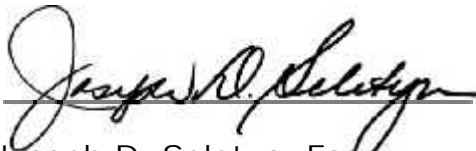
Id. at 1032, citing *Commonwealth v. Sims*, 919 A.2d 931, 938 (Pa. 2007) (it is “the settled law in Pennsylvania . . . that a defendant may be convicted of an offense that is a lesser-included offense of the crime actually charged.”).

Judgment of Sentence affirmed in part and vacated in part. Case remanded for resentencing on COM-Misdemeanor. Jurisdiction relinquished.

President Judge Emeritus Bender, Judge Panella, Judge Lazarus, and Judge Ott join the Opinion.

Judge Stabile files a dissenting opinion in which President Judge Gantman, Judge Bowes, and Judge Murray join.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/21/2019