NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSE L. CRUZ	:	
Appellant	:	No. 2806 EDA 2024

Appeal from the Judgment of Sentence Entered September 18, 2024
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0004567-2021

BEFORE: BOWES, J., OLSON, J., and STEVENS, P.J.E.*

MEMORANDUM BY BOWES, J.: **FILED NOVEMBER 25, 2026**

Jose L. Cruz appeals from the judgment of sentence of eleven to twenty-two years of imprisonment, followed by five years of probation, imposed after the trial court convicted him of criminal attempt—rape by forcible compulsion, burglary, and ten related offenses. We affirm.

On the afternoon of March 1, 2020, Appellant, who lived upstairs in the same building, entered the first-floor apartment of the victim, J.L.-M. ("Victim") on Lycoming Street in Philadelphia. Once inside, Appellant ignored Victim's demand to leave the apartment, grabbed her by the arms, and threw her onto the couch. Victim attempted to flee but she fell. Appellant climbed on top of her, kneeled on her chest and threatened, "I'm going to make you

* Former Justice specially assigned to the Superior Court.

mine, Bethzadia," which was not her name. As Victim screamed for help and struck him, Appellant bit her inner thigh and around her knees, pulled at the two pairs of pants she was wearing, ripping one pair and pulling it halfway down, and touched her vagina over her clothing. ***See*** N.T. Trial, 5/24/24, at 11-23.

A neighbor, Kevin Shelton, came to the apartment in response to the screaming. He saw Appellant lying on top of Victim, biting her and trying to rip off her clothes. He pulled Appellant away and held him until police arrived. When Philadelphia Police Officer Rigoberto Alvarez arrived, the zipper of Appellant's pants was down. Photographs later admitted at trial depicted bite marks and bruises on Victim's legs. ***Id***. at 20-27, 43-46, 55-57.

In addition to attempted rape and burglary, the Commonwealth charged Appellant with criminal attempt—sexual assault, two counts each of criminal trespass and indecent assault, unlawful restraint, simple assault, recklessly endangering another person, false imprisonment, and harassment. Appellant waived his right to a jury, and the case proceeded to a bench trial at which Victim, Mr. Shelton, and Officer Alvarez testified for the Commonwealth. On cross-examination, Victim testified that she noticed an injury to Appellant's head when he entered the apartment, and the Commonwealth stipulated that Appellant had a scrape on his head before the incident. ***Id***. at 36-37, 71. Victim also testified that Appellant smelled of alcohol, and Mr. Shelton described Appellant as "out of it." ***Id***. at 20, 51-52. The defense presented

no witnesses but introduced Appellant's hospital records, which reflected that he was evaluated after his arrest, including by a CAT scan, and that he had head injuries at that time. ***Id***. at 67-68. As the trial court observed, however, nothing in those records indicated that Appellant's ability to make decisions was impaired. ***See*** Trial Court Opinion, 12/19/25, at 23. The court found Appellant guilty of all charges. ***See*** N.T. Trial, 5/24/24, at 80.

The court held a sentencing hearing for which a pre-sentence investigation ("PSI") report and a mental health evaluation had been prepared. The court also reviewed portions of recordings of telephone calls that Appellant made from prison between his conviction and sentencing. ***See***, N.T. Sentencing, 9/18/24, at 10-13, 21. The Commonwealth read a statement from Victim, who reported that, as a result of the attack, she suffered from post-traumatic stress disorder and depression and had lost her job, her apartment, and custody of her children. ***See id.*** at 4-5. The Commonwealth advised the court that attempted rape carried an offense gravity score of eleven, that Appellant had a prior record score of five, and that the resulting standard-range minimum sentence was seventy-two to ninety months of imprisonment. For burglary, the standard-range minimum sentence was sixty to seventy-two months. The Commonwealth requested consecutive sentences above the aggravated range: ten to twenty years on attempted rape and eight to sixteen years on burglary, for an aggregate sentence of eighteen to thirty-six years of imprisonment followed by probation. ***Id***. at 11-12.

Attempted rape and burglary, as charged here, are each graded as a felony of the first degree, which carries a statutory maximum sentence of twenty years of imprisonment, and the minimum term may not exceed one-half of the maximum. ***See*** 18 Pa.C.S. §§ 905(a), 1103(1), 3121(a), 3502(c)(1); 42 Pa.C.S. § 9756(b)(1). Thus, the Commonwealth's request on attempted rape was the statutory maximum.

Defense counsel addressed Appellant's mental health and argued that his prior convictions, which included drug offenses, driving under the influence, and an aggravated assault, were dissimilar to the instant crimes and therefore did not warrant the severity of the guideline ranges. Counsel emphasized that, after a prior conviction, Appellant earned his GED while incarcerated, completed most of a community college program, and worked as a certified drug counselor. Counsel also described Appellant's difficult childhood, during which he witnessed drug and domestic abuse and was removed from his home by child protective services. Finally, counsel requested a mitigated-range sentence of sixty months on attempted rape, with all other sentences to run concurrently, followed by probation and counseling. ***See*** N.T. Sentencing, 9/18/24, at 13-20. In his allocution, Appellant apologized to Victim and stated that he would take advantage of any rehabilitative programs available to him. ***Id***. at 22-23.

The court remarked that there were "much more significant items" for it to consider but stated that it would weigh Appellant's work as a counselor

as mitigation. ***Id***. Initially, the court sentenced Appellant to ten to twenty years of incarceration for the attempted rape followed by five years of probation on the burglary. ***Id***. at 23. After defense counsel informed the court that Appellant had approximately eighteen months of credit for time served, the court added a consecutive term of one to two years of imprisonment to the burglary sentence. ***Id***. at 25-26. The court imposed no further penalty on the remaining ten convictions. Defense counsel did not object to the sentence and proceeded to advise Appellant of his post-sentence and appellate rights. ***Id***. at 25, 30.

Appellant timely filed a post-sentence motion asserting that, given concerns about his mental capacity at an earlier sentencing listing, the court should have ordered a mental health evaluation before sentencing him rather than hearing recordings of prison telephone calls he made between his conviction and sentencing, and that his statutory-maximum sentence for attempted rape was excessive in light of his mitigating circumstances. [1] ***See*** Post-Sentence Motion, 9/29/24, at ¶¶ 4-8. Before the court ruled on that motion, trial counsel filed a notice of appeal on October 17, 2024. Thereafter, the court dismissed the post-sentence motion as moot in light of the pending

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[1] Although Appellant filed his motion eleven days after sentencing, it was timely because the tenth day fell on a Saturday. ***See*** Pa.R.Crim.P. 720(A)(1); 1 Pa.C.S. § 1908.

appeal.[2] The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Trial counsel filed no statement, and therefore the trial court issued an opinion concluding that Appellant had waived all of his claims.

The trial court subsequently appointed new counsel, who asked this Court to remand so that Appellant could file a Rule 1925(b) statement *nunc pro tunc*. Concluding that the complete failure to file a court-ordered Rule 1925(b) statement constituted ineffectiveness per se, we granted the request, remanded for the filing of a statement and a supplemental opinion, and retained jurisdiction. ***See*** Order, 9/22/25; Pa.R.A.P. 1925(c)(3); ***Commonwealth v. Burton***, 973 A.2d 428, 432-33 (Pa.Super. 2009) (*en banc*). Appellant timely filed his statement and the trial court issued a supplemental Rule 1925(a) opinion addressing each claim on the merits and urging us to affirm. ***See*** Trial Court Opinion, 12/19/25, at 10-23.

Appellant presents the following issues for our review, which we have re-ordered for ease of disposition:

> I. Whether the evidence was insufficient to prove beyond a reasonable doubt that [Appellant] possessed the specific intent

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[2] Since Appellant timely filed a post-sentence motion, his October 17, 2024 notice of appeal was premature. ***See*** Pa.R.Crim.P. 720(A)(2). However, the court's October 22, 2024 order disposing of the motion supplied an appealable order, and we treat the notice of appeal as having been filed on that date. ***See*** Pa.R.A.P. 905(a)(5); ***Commonwealth v. Muhammed***, 219 A.3d 1207, 1210 n.5 (Pa.Super. 2019).

> required for attempted rape and related offenses where evidence established he suffered a serious head injury immediately prior to the incident?
>
> II. Whether the court erred in effectively increasing [Appellant's] aggregate sentence after accounting for time credit?
>
> III. Whether the trial court abused its discretion by imposing a statutory-maximum sentence well above the guideline range without stating adequate reasons on the record?

Appellant's brief at 4 (cleaned up).

Appellant's first issue challenges the sufficiency of the evidence of intent for attempted rape.[3] He argues that the Commonwealth's proof of intent rested solely on Victim's testimony, that the evidence showed at most an assault rather than an intent to engage in intercourse by forcible compulsion, and that his head injury undermined any inference of intent. ***See*** Appellant's brief at 13-17.

In reviewing a challenge to the sufficiency of the evidence, we must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to establish every element of the offense beyond a reasonable doubt. ***See Commonwealth v. Tejada***,

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[3] As framed in his statement of questions involved, Appellant purported to challenge the sufficiency of the evidence of intent for "attempted rape and related offenses." Appellant's brief at 4. His argument, however, addresses and seeks relief only as to the attempted rape conviction. ***Id***. at 13-17. To the extent Appellant intended to challenge the sufficiency of the evidence supporting any of his remaining eleven convictions, he has not developed that claim, and it is waived. ***See*** Pa.R.A.P. 2119(a); ***Commonwealth v. Johnson***, 985 A.2d 915, 924 (Pa. 2009).

107 A.3d 788, 792 (Pa.Super. 2015). The Commonwealth may sustain its burden by means of wholly circumstantial evidence, and the facts and circumstances it establishes need not preclude every possibility of innocence. ***See id***. at 792-93. The fact-finder is free to believe all, part, or none of the evidence, and we may not reweigh the evidence and substitute our judgment for that of the fact-finder. ***See Commonwealth v. Williams***, 176 A.3d 298, 305-06 (Pa.Super. 2017).

Under the Crimes Code, "[a] person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S. § 901(a). As charged in this case, a person commits rape when he engages in sexual intercourse with a complainant "[b]y forcible compulsion." 18 Pa.C.S. § 3121(a)(1). Forcible compulsion is "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S. § 3101. The intent to commit rape may be inferred from the defendant's conduct in light of all the attendant circumstances. ***See Commonwealth v. Chance***, 458 A.2d 1371, 1374 (Pa.Super. 1983). Moreover, a complainant's testimony alone, if believed by the fact-finder and if it establishes each element of the offense, is sufficient to sustain a conviction for a sexual offense; it need not be corroborated. ***See*** 18 Pa.C.S. § 3106; ***Commonwealth v. Diaz***, 152 A.3d 1040, 1047 (Pa.Super. 2016).

Viewed in the light most favorable to the Commonwealth, the evidence amply established Appellant's intent to commit rape. According to the

testimony of Victim, the neighbor who stopped Appellant, and the responding officer, Appellant entered Victim's home uninvited, threw her onto the couch, pinned her with his knees on her chest, and told her, "I'm going to make you mine." ***See*** N.T. Trial, 5/24/24, at 16-18. He then bit her inner thighs, pulled at her pants, ripping one pair and pulling it halfway down, and touched her vagina with his hand over her clothing. He stopped only because the neighbor pulled him away, and when police arrived, the zipper of his pants was down. ***Id***. at 19-23, 46, 55-57.

Contrary to Appellant's characterization, this conduct was plainly sexual in nature, and the trial court, sitting as fact-finder, could reasonably infer that Appellant's objective was to engage in sexual intercourse with Victim by forcible compulsion and that he took a substantial step toward that end. ***See Commonwealth v. Faison***, 297 A.3d 810, 830-31 (Pa.Super. 2023) (evidence sufficient where defendant pinned victim against wall and forcibly removed her pants while repeatedly saying he wanted to have sex with her). Nor did the evidence of Appellant's head injury compel a different result. The Commonwealth stipulated only that Appellant had a scrape on his head before the incident, and nothing in the record established that the injury impaired his capacity to form intent. ***See*** N.T. Trial, 5/24/24, at 71. The weight to be given that evidence was for the fact-finder. Accordingly, Appellant's sufficiency challenge fails.

Appellant's remaining two issues challenge the discretionary aspects of his sentence, which are not reviewable as of right. To invoke our jurisdiction,

Appellant must have filed a timely notice of appeal, preserved the issue at sentencing or in a post-sentence motion, included a Rule 2119(f) statement in his brief, and raised a substantial question. ***See Commonwealth v. Bowens***, 265 A.3d 730, 762-63 (Pa.Super. 2021) (*en banc*).

Appellant timely appealed and included a Rule 2119(f) statement. However, he did not preserve all of his sentencing claims. Appellant's second issue, that the court abused its discretion by imposing an additional consecutive term of one to two years of imprisonment on burglary after learning of his time credit, is waived because he neither challenged it during sentencing nor included it in his post-sentence motion, which merely recited that the court had modified the sentence in the history of the case but did not contest the modification. ***See*** Post-Sentence Motion, 9/29/24, at ¶ 3. Indeed, he raised this claim, which sounds in discretion rather than legality, for the first time in his Rule 1925(b) statement. ***See Commonwealth v. Watson***, 835 A.2d 786, 791 (Pa.Super. 2003) (holding that a challenge to the discretionary aspects of a sentence is waived unless it is raised at sentencing or in a post-sentence motion). Accordingly, he has not preserved this issue for our review.

Appellant's third issue comprises three facets, which are preserved only in part. He first faults the court for failing to acknowledge the guideline ranges and to reference the PSI report at sentencing. ***See*** Appellant's brief at 8, 10-11. This assertion is waived because he failed to raise it during sentencing or in his post-sentence motion. ***See*** Post-Sentence Motion, 9/29/24, at ¶¶ 4-8.

He also contends that the court did not consider the mental health evaluation in fashioning his sentence. ***See*** Appellant's brief at 8. Appellant raised a related challenge in the post-sentence motion, *i.e.*, that no mental health evaluation was ordered and that, given concerns about his mental capacity at the August 16, 2024 sentencing listing, the court abused its discretion by failing to order one and instead reviewing telephone conversations Appellant made from prison between his conviction and sentencing. ***See*** Post-Sentence Motion, 9/29/24, at ¶¶ 5-6. To the extent that this claim is preserved, and presuming for the sake of argument that it raises a substantial question, the contention is belied by the record. As noted, the court ordered a mental health evaluation along with the PSI report, the evaluation was completed on August 8, 2024, and the court referenced it at the sentencing hearing. ***See*** N.T. Sentencing, 9/18/24, at 24. Appellant does not explain why that evaluation, completed eight days before the August 16, 2024 listing, was inadequate or what a further evaluation would have revealed. Furthermore, we discern no abuse of discretion in the court's decision to review Appellant's prison telephone conversations before sentencing him, as those statements bore on his character and rehabilitative needs. ***See*** 42 Pa.C.S. § 9721(b). Accordingly, this aspect of his claim warrants no relief.

Appellant also contends that his statutory-maximum sentence for attempted rape, imposed well above the aggravated range, was excessive and not justified by sufficient reasons in light of his mitigating circumstances. ***See*** Appellant's brief at 4, 8-10. He preserved this claim in his post-sentence

motion. ***See*** Post-Sentence Motion, 9/29/24, at ¶ 7. Moreover, it raises a substantial question. ***See Commonwealth v. Corey-McCoy***, ___ A.3d ___, 2026 WL 2871151 (Pa.Super. Sept. 23, 2026) ("This Court has held that sentencing outside the aggravated range recommended by the Sentencing Guidelines without sufficient justification from the sentencing court . . . raises a substantial question."). Therefore, we address the merits of this claim.

We review this type of sentencing claim for an abuse of discretion, which is more than a mere error of judgment. A sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will. ***See Commonwealth v. Walls***, 926 A.2d 957, 961 (Pa. 2007). As the court sentenced outside the guidelines, we may vacate the sentence only if it is unreasonable in light of the factors set forth in 42 Pa.C.S. § 9781(d). ***See id***. at 963-64. Where the court had a PSI report, we presume that it was aware of and weighed the relevant information and we may not reweigh the sentencing factors. ***See Commonwealth v. Macias***, 968 A.2d 773, 778 (Pa.Super. 2009).

Here, the court was informed of the applicable guideline ranges, had a PSI report and a mental health evaluation, heard counsel's mitigation presentation and Appellant's allocution, and expressly identified as mitigation Appellant's work as a counselor and the abuse he suffered as a child. ***See*** N.T. Sentencing, 9/18/24, at 11-23, 30. It also considered Victim's account of the lasting harm she suffered, and knew of Appellant's prior record score

of five, which reflected thirteen adult arrests, nine convictions, and five probation or parole violations contrary to his claim that he was a "first-time offender." ***Id***. at 4-5, 11. The court found that Victim's statement, the violence of an attack in her own home, and Appellant's record warranted a sentence above the guidelines. ***See*** Trial Court Opinion, 12/19/25, at 16, 19. Further, it imposed a below-guideline term on burglary and no further penalty on the remaining ten convictions. Appellant's disagreement with the weight the court gave his mitigating circumstances does not establish an abuse of discretion. No relief is due.

For the reasons stated above, Appellant has presented no challenges to his convictions or sentence that merit relief from this Court. Accordingly, we affirm his judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/25/2026