PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

* *This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*

PLJ

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Opinions

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Commonwealth of Pennsylvania v. Waylynn Howard

Criminal Appeal—Sufficiency—Intent—Child Car Seats

Defendant challenges sentence of 1 year of probation following convictions relating to the failure to put a three-year-old child into a car seat.

No. CP-02-CR-08615-2017. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—November 26, 2018.

OPINION

On August 1, 2018, this Court, at the conclusion of a stipulated nonjury trial, convicted Appellant, Waylynn Howard, of one count each of Endangering the Welfare of Children and Recklessly endangering Another Person. This Court sentenced Appellant immediately thereafter to one year of probation at the first count and no further penalty at the second count. Appellant filed a Notice of Appeal on August 31, 2018 and a Statement of Matters Complained of on September 25, 2018.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges two errors on appeal. Appellant alleges the evidence was insufficient to establish that Appellant "knowingly endangered the welfare of her daughter or that she violated a duty of care." Appellant further alleges that the evidence was insufficient to establish that Appellant "recklessly endangered her child, or that she placed or may have placed the child in danger of death or serious bodily injury." (Statement of Errors Raised on Appeal at 2)

DISCUSSION

Appellant stipulated that she placed her three-year-old daughter in the back seat of a car unrestrained and without a car seat. Nevertheless, Appellant alleges the Commonwealth failed to present sufficient evidence that Appellant knowingly or recklessly endangered her child.

> In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense *Commonwealth v. Moreno*, 14 A.3d 133 (Pa. Super.2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. *Commonwealth v. Hartzell*, 988 A.2d 141 (Pa. Super.2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. *Moreno, supra* at 136.

Commonwealth v. Koch, 39 A.3d 996, 1001 (Pa.Super.2011).

Appellant argues that the evidence was insufficient to sustain his convictions for endangering the welfare of children pursuant to 18 Pa.C.S.A. § 4304, which provides:

> A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if [s]he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

"Whether particular conduct falls within the purview of the statute is to be determined within the context of the common sense of the community." *Commonwealth v. Retkofsky*, 860 A.2d 1098, 1099 (Pa.Super.2004) (citations and internal quotations omitted).

> The accused must act "knowingly" to be convicted of endangering the welfare of a child. 18 Pa.C.S.A. § 4304. We have employed a three-prong standard to determine whether the Commonwealth's evidence is sufficient to prove this intent element: 1) the accused must be aware of his or her duty to protect the child; 2) the accused must be: "aware that the child is in circumstances that could threaten the child's physical or psychological welfare;" and 3) the accused either must have failed to act or must have taken "action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare."

Retkofsky, 860 A.2d at 1099–110. Appellant violated a duty of care to her three-year-old child by placing her unrestrained in a 1000-2000 pound vehicle careening down a major roadway at a significant rate of speed. This duty of care is codified at 75 Pa.C.S. § 4581, which states:

> any person who is operating a passenger car, and who transports a child under four years of age anywhere in the motor vehicle, including the cargo area, shall fasten such child securely in a child passenger restraint system, as provided in subsection (d).

As Appellant was aware of her duty to protect her child and chose to place her child in harm's way, she is responsible for the logical consequences of her actions. The elements of the offense have been established beyond a reasonable doubt, and Appellant's first claim of error is without merit.

Next, Appellant argues, similarly, that the evidence was insufficient to establish that Appellant recklessly endangered her child. Recklessly Endangering Another Person is defined as follows: "A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S. § 2705. Appellant endangered her child by choosing to place the child inside a vehicle without using proper restraining techniques. As above, the elements of the offense have been established beyond a reasonable doubt and the claim of error is without merit.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

Commonwealth of Pennsylvania v. Thomas Raboin*

Criminal Appeal—Sex Offenses—Evidence—Hearsay—Weight of the Evidence—Forensic Interview—Rebuttal Evidence—Relevance—Tender Years Exception—Prior Consistent Statements

Defendant asserts error in admission of child witness's hearsay testimony under the tender years exception, as well as the admission of the forensic interview into evidence.

No. CP-02-CR-09844-2017. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—November 14, 2018.

OPINION

On March 12, 2018, a jury convicted Appellant, Thomas Raboin, of one count each of Involuntary Deviate Sexual Intercourse with a Child ("IDSI"), Unlawful Contact with a Minor, Indecent Assault Person Less than 13 Years of Age, Endangering the Welfare of a Child, Corruption of Minors and Indecent Exposure.[1] This Court sentenced Appellant on June 11, 2018 to an aggregate sentence of 168 to 416 months incarceration with a five-year probationary tail. Appellant filed a Post-Sentence Motion, which this Court denied on June 19, 2018. Appellant filed a Notice of Appeal on July 6, 2018 and a Statement of Matters Complained of on August 27, 2018.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges seven errors on appeal. In his first error alleged on appeal, Appellant asserts that this Court erred by overruling a defense objection to the Commonwealth's questioning of witness K.B. regarding Appellant's opinion of the cleanliness of her children. (Statement of Errors Raised on Appeal at 2) Next, Appellant alleges that this Court erred in overruling an objection to testimony based on the tender years exception to the hearsay rule. *Id.* Appellant further alleges that this Court erred in permitting a witness to testify as to her feelings for Appellant. *Id.* Appellant further asserts that this Court erred in permitting the same witness to answer the question of whether she was "actively hating" Appellant in 2017. *Id.* In addition, Appellant alleges that this Court erred in permitting the Commonwealth to play a forensic interview in rebuttal that was hearsay and not proper rebuttal evidence. *Id. at 3.* Appellant asserts specific portions of the forensic interview were not admissible as prior consistent statement, were not proper rebuttal and unfairly prejudicial. *Id. at 3-5.* Lastly, Appellant alleges that the verdicts were against the weight of the evidence. *Id. at 5.*

SUMMARY OF THE EVIDENCE

Following a competency hearing, in which the eleven-year-old victim in this case, A.W., was deemed to be competent, she testified that Appellant molested her. A.W. testified that in kindergarten through second grade she lived with her mother, sisters, and Appellant, who was her mother's boyfriend at the time. (Transcript of Jury Trial, Mar. 9-12, 2018, hereinafter TT, at 35) Appellant would watch her when her mother had to go to work or school. (TT 37) She testified that Appellant would get in the shower and tell her to get in with him. *Id.* Once inside the shower, "he would sit in the back and I would stand in front of him and he would lick my private." *Id.* She said this happened more than one time. *Id.* She said that she complied with him "because he was much taller and he had once pushed my mother." (TT 38) She testified that when she said "her privates" she meant her vagina. (TT 40) She also testified that Appellant made her "hold his private and push up and down." (TT 41) She testified that his private part was his penis. (TT 42) After she pushed up and down for a while, clear stuff would start coming out. (TT 45) She tried to pull away at times, but Appellant would grab on to her and pull her back in. (TT 55) Appellant told her several times not to tell anyone. (TT 47) She testified that she was afraid that Appellant would hurt her if she talked. (TT 48) Ultimately, she told her mother about what Appellant had done when her mother tried to check her for ticks. (TT 52)

Next, A.W.'s mother, K.B., testified that she began dating Appellant in 2011 and Appellant moved in shortly thereafter. (TT 85) The two parted ways in 2014 when A.W. was in third grade. (TT 89) In the beginning of the relationship, Appellant would cook, help bathe the children, put them to bed, and drive them to and from school. (TT 94) After a while, K.B. observed that Appellant favored E.W. and didn't want much to do with the other two. (TT 95) In one instance, Appellant told the other two children that they were too dirty to touch him. *Id.*

K.B. further testified that on July 1, 2017, following a family reunion where the children had been playing in the woods all day, she noticed that everyone had ticks on them. (TT 99) She thoroughly checked each of her children for additional ticks. (TT 100) K.B. testified that A.W. became adamant that K.B. not undress her. (TT 101) K.B. asked A.W. if something had happened to her that she did not want her own mother to check her for ticks, and A.W. "looked down and away and said no very quietly." K.B. asked if A.W. was sure, and A.W. asked if her sisters needed to be in the room for this conversation. (TT 101-102) Once alone with her mother, A.W. said that "Tommy in Verona" took her into the shower with him and licked her "down there." (TT 102, 107) After A.W. disclosed, K.B. called 911 and reported it to the police. (TT 109) At the time of the disclosure, K.B. had no contact with Appellant and was dating a different individual. (TT 108)

Appellant testified that he was never alone with the kids. (TT 185) He testified that several other people lived in the home and that one of them would usually be home to manage the children's needs. *Id.* In the spring of 2014, he left the residence due to the weight of his parenting responsibilities and other stressors within the relationship. (TT 180, 187) Appellant denied that A.W. was ever in the shower with him and further denied performing any sexual acts on A.W. (TT 189)

DISCUSSION

This Court has reordered Appellant's issues for ease of discussion. In his first error alleged on appeal, Appellant asserts that this Court erred by overruling a defense objection to the Commonwealth's questioning of witness K.B. regarding Appellant's opinion of the cleanliness of her children. "The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error." *Commonwealth v. Shull*, 148 A.2d 820, 845 (Pa. Super. 2016).

Appellant alleged that such evidence was not relevant and the probative value is outweighed by its prejudicial effect.

> The overriding principle in determining if any evidence, including demonstrative, should be admitted involves a weighing of the probative value versus prejudicial effect. We have held that the trial court must decide first if the evidence is relevant and, if so, whether its probative value outweighs its prejudicial effect. *Commonwealth v. Hawk*, 551

> Pa. 71, 709 A.2d 373, 376 (1998). This Commonwealth defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. Relevant evidence may nevertheless be excluded "if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403.

Commonwealth v. Serge, 896 A.2d 1170, 1177 (Pa. 2006), *cert. denied*, 549 U.S. 920 (2006).

This Court permitted the testimony regarding Appellant's statement to K.B. that her other children were dirty. The testimony tended to establish that Appellant showed favoritism toward the child who was the victim in this case. Appellant groomed the victim prior to assaulting her. The probative value was significant in that it both explained the next steps taken and completed the picture of events that followed. The prejudicial effect, that Appellant is seen in a less than ideal light as a parental figure, is relatively slight and outweighed by the probative value of the testimony.

Appellant alleges that his Court erred in overruling Appellant's objection to K.B.'s testimony regarding her feelings for Appellant as irrelevant and unfairly prejudicial. Appellant further alleges that this Court erred by improperly admitting irrelevant and unfairly prejudicial testimony by K.B. as to whether she was "actively hating" Appellant in December 2017. (TT 113) As these issues are substantially similar, they can be addressed together. After Appellant objected to each of these questions, the Assistant District Attorney changed the form of each question. The ADA asked the witness what feelings she had for Appellant prior to the victim's disclosure. The ADA further asked if the witness, prior to any disclosures, had any reason to want to cause Appellant any harm. These questions were relevant to counter an argument of coaching by mother. As this Court stated at trial, "The intent of the question is to seek whether the mother would have had a motive at that point in time to seek revenge against the defendant." (TT 116) Likewise, the question regarding "actively hating" was relevant to the witness' lack of motive.

Appellant asserts that this Court erred in permitting K.B. to testify that the child victim told her "Tommy in Verona" (Appellant) had done something to her. K.B. testified that on July 1, 2017, she noticed ticks on her daughters after they had been playing in the woods. (TT 98-99) K.B. stated that A.W. asked her repeatedly not to check her body for ticks. (TT 100) A.W. was adamant that K.B. not undress her. (TT 101) K.B. asked A.W. if something had happened to her. *Id.* A.W. then asked if her sisters needed to be in the room for this conversation. (TT 102) Once K.B. was alone with A.W., K.B. said, "[i]f someone's done something to you, I need to know." *Id.* A.W. replied "Tommy in Verona." *Id.* Appellant objected to the statement on the basis of hearsay. *Id.* This Court stated, "I think it's admissible based on prior consistent statement. The victim testified. Also, prompt report." *Id.* As K.B. continued to testify regarding A.W.'s report to her of Appellant's conduct, counsel for Appellant lodged a continuing objection. (TT 103) The Commonwealth argued that the statements were admissible under 42 Pa.C.S. § 5985.1, the Tender Years Hearsay Act ("TYHA"), otherwise known as the tender years exception to the hearsay rule. (TT 104) Section 5985.1(a) provides, *inter alia*:

> An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing certain enumerated offenses, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if: (1) the court finds, in an in camera hearing,[2] that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and (2) the child either: (i) testifies at the proceeding; or (ii) is unavailable as a witness.

This Court initially denied the hearsay objection based on its understanding of *Commonwealth v. Walter*, 93 A.3d 432 (Pa. 2014). Walter held that in order to determine the admissibility of certain out of court statements made by child victims,

> a trial court must assess the relevancy of the statements and their reliability in accordance with the test enunciated in *Idaho v. Wright*, [497 U.S. 805]. Although the test is not exclusive, the most obvious factors to be considered include the spontaneity of the statements, consistency in repetition, the mental state of the declarant, use of terms unexpected in children of that age and the lack of a motive to fabricate.

Walter, 93 A.3d at 451. *Walter* further states:

> Under TYHA [Tender Years Hearsay Act], the focus is on the truthfulness of the statements, which is assessed by considering the spontaneity of the statements; the consistency in repetition; the mental state of the child; the use of terms unexpected in children of that age; and the lack of a motive to fabricate.

Id.

This Court considered the statements made by A.W. and found that the evidence was relevant and that the time, content, and circumstances of the statement provided sufficient indicia of reliability. Specifically, this Court found the disclosure to K.B. to be spontaneous. This Court further found that A.W. has remained consistent in her statements. While this Court had no concerns with A.W.'s mental state at trial, at the time of disclosure, A.W. was clearly stressed. Lastly, as Appellant had long removed himself from the residence, A.W. lacked a motive to fabricate her testimony. Any error in admitting this statement under the tender years exception to the hearsay rule is harmless in context.

This Court permitted reargument on this issue following the lunch recess. Counsel for Appellant objected that the Commonwealth had failed to provide notice as required to admit statements under the TYHA. (TT 124) This Court did hold a competency hearing anticipating the use of out-of-court statements, but the Commonwealth did fail to file the proper notice under the TYHA. As a result, this Court reconsidered the admissibility of these statements as prior consistent statements, offered not for the truth of the matter asserted but to rehabilitate the credibility of the witness, and ultimately admitted the statements as such. Rule 613(c) of the Pennsylvania Rules of Evidence governs this issue:

> (c) Witness's Prior Consistent Statement to Rehabilitate.
>
> Evidence of a witness's prior consistent statement is admissible to rehabilitate the witness's credibility if the opposing party is given an opportunity to cross-examine the witness about the statement and the statement is offered to rebut an express or implied charge of:
>
> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or

> (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness's denial or explanation.

Pa.R.E. 613(c).

This Court instructed the jury on this matter as follows:

> So, ladies and gentleman, just to be clear, the testimony on direct regarding what K.B. said [A.W.] told her was offered for the limited purpose of assisting you with making a credibility determination regarding [A.W.'s] testimony here today and was not offered and cannot be considered by you for the purposes of the truth of the matters asserted in K.B.'s testimony.

(TT 142-143) In admitting the statements, the Court relied upon *Commonwealth v. Willis*, 552 A.2d 682, 691 (Pa. Super 1988) and *Commonwealth v. Hunzer*, 868 A.2d 498 (Pa. Super. 2005). However, during the pendency of this appeal, *Commonwealth v. Bond*, 190 A.3d 664 (Pa. Super. June 13, 2018) and *Commonwealth v. Hamlett*, 2018 WL 4327391 (Pa. Super. Sept. 11, 2018) (non-precedential), called into question the continuing validity of the *Willis*/*Hunzer* analysis. *Hamlett* stated, "the view set forth by *Willis*/*Hunzer* regarding the introduction of prior consistent statements for purely corroborative purposes 'seems at odds with the express language of Rule 613.'" *Hamlett*. 2018 WL 4327391 at *11, *quoting Bond*, 190 A.3d at *4.

Both the *Bond* and *Hamlett* court then considered whether the error was harmless, and both courts determined that the error was harmless.

> Harmless error exist where: (1) the error did not prejudice the defendant or the prejudice was *de minimus*; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Hamlett, 2018 WL 4327391 at *12 (citing *Commonwealth v. Robinson*, 721 A.2d 344, 350 (Pa. 1998)). Both cases found that the evidence was cumulative of evidence already in the record. This case, like *Bond* and *Hamlett*, turned on the credibility of the child victim. Admission of K.B.'s statements did not prejudice Appellant, inasmuch as counsel for Appellant cross-examined A.W. regarding her statements, including her statements at her forensic interview. As K.B.'s statements were cumulative, any error in admitting the statements was harmless.

Furthermore, at trial, this Court noted that, in the alternative, the statements were admissible, as they were not offered for the truth of the matter asserted, but to establish how and why the delayed report came about and the reason A.W.'s mother called the police and ultimately took her daughter for a forensic interview. (TT 125) Had this Court relied solely on this basis for admission of the statements, it would have instructed the jury not to consider the statements for the truth of the matter asserted, but rather to explain the subsequent course of conduct. This Court did instruct the jury not to consider the statements for the truth of the matter asserted, albeit for a different underlying reason. The distinction from a juror's standpoint is, at best, a *de minimus*.

Appellant further asserts that this Court erred in permitting the Commonwealth to play the forensic interview of the child as rebuttal evidence. Appellant objects to the playing of the interview in its entirety and also lists six specific instances of improper testimony within the forensic interview. "Admission or rejection of rebuttal testimony is within the sound discretion of the trial judge." *Commonwealth v. Miller*, 417 A.2d 128 (Pa. 1980).

Appellant objected to playing the forensic interview generally and specifically to portions of the forensic interview indicating that A.W. was afraid of Appellant hurting her or her sisters, and that her fears were the reasons she entered the shower with him. Appellant similarly objected to references that A.W. was going to tell her mother about the abuse until Appellant found out where the family was residing after Appellant and A.W.'s mother separated. Additionally, Appellant objected to a statement that Appellant would try to hurt her family, and A.W. not wanting her mother to get hurt. Appellant further objected to a reference that Appellant was "really mean," including examples such as his failure to cook for all of the members of the family. Finally, Appellant objected to Appellant's description of Appellant as "scary," that he "would always push my mom" and "hurt her."

This Court permitted the playing of the video in rebuttal as a prior consistent statement. As stated above, the Court relied upon *Willis* and *Hunzer*. This Court would again assert that the harmless error doctrine applies. Admission of the video interview of A.W. does not prejudice Appellant, inasmuch as counsel for Appellant had reviewed the forensic interview during pretrial discovery and had a full opportunity to cross-examine A.W. at trial regarding the reasons for her delay in reporting the sexual assaults.[3] In fact, counsel for Appellant cross-examined A.W. regarding the forensic interview. (TT 67-68, 71, 73). As the forensic interview was cumulative, any error in admitting the interview was harmless.

Appellant alleges that the verdicts were against the weight of the evidence. Appellant alleges that he was not living with the victim at the time the abuse was to have occurred. The standard for a "weight of the evidence" claim is as follows:

> A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court. An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. Thus, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings.

Commonwealth v. Cousar, 928 A.2d 1025, 1035–36 (Pa. 2007).

The trier of fact, while passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part or none of the evidence. *Commonwealth v. Hunter*, 768 A.2d 1136 (Pa. Super. 2001); *appeal denied*, 796 A.2d 979 (Pa. 2001). The jury reasonably found credible the testimony of the victim, A.W. She testified in detail at trial about repeated instances of criminal contact at her house. A.W.'s mother corroborated her testimony and confirmed that Appellant was in the home at the time A.W. testified that the abuse occurred, contrary to Appellant's version of events. Even if the finder of fact concluded that Appellant left the residence in the spring of 2014, it could still conclude, consistent with the testimony, that Appellant had

abused A.W. prior to leaving the residence. Upon further review of the evidence, this Court's sense of justice is not shocked by the jury's verdict in this case, as it was not against the weight of the evidence but rather supported by it.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

Date: November 14, 2018

[1] 18 Pa. C.S. §§ 3123 (b), 6318 (a) (1), 3126 (a) (7), 4304 (a) (1), 6301 (a) (1), and 3127 (a), respectively.

[2] This Court notes that, although it did not conduct a specific *in camera* hearing pursuant to the TYHA, this Court found the statements both relevant and reliable. As such, any error in failing to have the *in camera* hearing would be harmless, as Appellant was not prejudiced by its absence.

[3] Regarding the promptness of A.W.'s complaint, this Court instructed the jury as follows: "The evidence of [A.W.'s] delay in making a complaint does not necessarily make her testimony unreliable but may remove it from the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the delay in making a complaint should be considered in evaluating her testimony and in deciding whether the act or acts occurred at all." (TT 294)

***** *This opinion was redacted by the ACBA staff. It is the express policy of the Pittsburgh Legal Journal not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.*

Commonwealth of Pennsylvania v. Bobby Hall

Criminal Appeal—Sufficiency—Simple Assault—Official Oppression

Defendant, a former correctional officer, was convicted in relation to an incident with an inmate at SCI Pittsburgh.

No. CC 2017-5761. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—October 25, 2018.

OPINION

This is a direct appeal from the judgment of sentence entered on February 28, 2018, following a non-jury trial that took place on February 28, 2018. The Defendant was charged with Simple Assault (18 Pa. C.S.A. §2701(a)(1)) and Official Oppression (18 Pa C.S.A. §5301(1). At the conclusion of trial, this court found the Defendant guilty of both charges. The Defendant waived his right to a Presentence Report and proceeded to sentencing immediately following his convictions.

The Defendant was sentenced to two (2) years of probation at each count, ordered to run concurrently. A No Contact Order was imposed, prohibiting the Defendant from having contact with inmates Michael Miller and Jamie Painter. The Defendant was ordered to pay court costs.

A post-sentence motion was filed by the Defendant on March 12, 2018. On March 16, 2018, appellate counsel entered her appearance on the record. On March 23, 2018, the Defendant's trial counsel sought leave to withdraw from representation. His request was granted that same day. A supplemental post sentence motion was filed on May 14, 2018. The motion was heard and denied on June 19, 2018. This timely appeal followed.

On August 1, 2018, this court issued an Order pursuant to Pa.R.A.P.1925(b), directing the Defendant to file a Concise Statement of Matters Complained of on Appeal ("Concise Statement") no later than August 24, 2018. On August 24, 2018, the Defendant filed a timely Concise Statement and raised the following allegations of error on appeal:

> a. There was insufficient evidence to support the conviction for simple assault where the medical report stated that Michael Miller did not suffer any injuries and the Commonwealth failed to establish that Hall intended or attempted to cause any injury to Michael Miller, and the trial court erred in denying the post-sentence motion raising this claim.
>
> b. There was insufficient evidence to support the conviction for official oppression where the Commonwealth failed to establish that Michael Miller was mistreated by Hall in his capacity as a corrections officer where, (a) Michael Miller did not appear for trial and offer any supporting testimony; (b) the Commonwealth failed to offer into evidence any written prison policies and procedures to establish Bobby Hall's conduct was unlawful; and (c) the Commonwealth failed to establish whether Hall knowingly and illegally acted in bad faith in response to Michael Miller spitting in his face, and the trial court erred in denying the post-sentence motion raising this claim.

(Concise Statement, pp. 2-4).

The Defendant's contentions are without merit. This court respectfully requests that the Defendant's convictions and sentences be upheld for the reasons that follow.

I. FACTUAL BACKGROUND

On the evening of December 10, 2016, the Defendant, a Pennsylvania State Department of Corrections Officer ("CO"), was working as a "control booth officer" (also known as a "bubble control officer") on the A-200 Block at the State Correctional Institution at Pittsburgh ("SCI Pittsburgh"). (Trial Transcript ("TT"), 2/28/18, pp. 12-14, 100). As a CO, the Defendant was

responsible for "provid[ing] security for the prison, inmates, and staff." (TT, p. 11). It is also the duty of a CO to ensure inmate compliance with the rules and regulations of the Department of Corrections, as well as ensure staff compliance with the code of ethics. (TT, pp. 11, 12). As a control booth officer, the Defendant was responsible for overseeing that "all passes are issued out, all movements are being made at all times," and that "cell doors are being opened properly at all times." (TT, p. 14). On December 10, 2016, the Defendant was working the same shift as his co-worker, CO John Bezts. (TT, pp. 12-13). The shift began at 14:00 hours (or 2 p.m.). (TT, pp. 12-13).

At approximately 6:50 p.m., CO Bezts was preparing to perform cell compliance checks in the pod, which was a therapeutic community for drug and alcohol treatment. (TT, pp. 14-16, 74). The Defendant specifically asked CO Bezts to conduct a compliance check of a cell which belonged to Inmate Michael Miller and his cellmate, Jamie Painter. (TT, pp. 15-16, 31, 55, 57). Unbeknownst to CO Bezts, the Defendant requested the compliance check of Inmate Miller's cell because the Defendant and Miller had gotten into an argument about "yard time" shortly before the compliance checks. (TT, pp. 56-58). CO Bezts agreed to perform the check. (TT, pp. 15-16, 31). CO Bezts, along with another corrections officer, CO Mitchell, were inside of the cell conducting the compliance check when Inmate Miller commented to CO Bezts that Bezts was only performing the compliance check "because of that fat ass in the [ ] control center." (TT, pp. 16, 58). CO Bezts warned Inmate Miller to watch what he said about the officers in front of other corrections officers. (TT, p. 16). Inmate Painter also told Inmate Miller "to be quiet because Officer Bezts was just doing his job." (TT, p. 16).

After completing the compliance check and discovering contraband in the form of two small portable radios, CO Bezts returned to the control booth and relayed the results of his search to the Defendant. (TT, pp. 16-17, 31-32, 58). CO Bezts also told the Defendant that "Inmate Miller called him a fat ass." (TT, pp. 17, 33-34). The Defendant became very angry. (TT, p. 17). He asked CO Bezts whether Inmate Miller "actually said that," and CO Bezts confirmed that he did. (TT, p. 17). The Defendant's "face turned red, and he bolted out of the control booth." (TT, p. 17). CO Bezts did not know why the Defendant had left the control booth, but he observed the Defendant walking very quickly towards Inmate Miller's cell, which was closed and secured at that time. (TT, pp. 17-20, 36). CO Bezts testified that there was no reason, according to his training and experience, for the Defendant to leave the control booth at that time. (TT, p. 18).

CO Bezts watched from near the vestibule door of his pod as the Defendant approached Inmate Miller's cell. (TT, pp. 19, 36). CO Bezts could not understand exactly what the Defendant was saying to Inmate Miller, but he was able to hear the Defendant "hollering, screaming at Inmate Miller," and "using profanity", describing the Defendant as "upset and irate." (TT, pp. 19-20, 36, 58). The Defendant was the only person that CO Bezts heard using profanity. (TT, pp. 20, 22). According to Inmate Painter, Inmate Miller "looked at Officer Hall and said: Your problem is, you fat fuck, you get no p*ssy, zero p*ssy." (TT, p. 58). At this point, the Defendant turned to CO Bezts and told him to "[o]pen the fucking door, open the fucking door now". (TT, pp. 20, 38-39, 58). CO Mitchell, who was inside of the control booth at that time, reluctantly opened the cell door for the Defendant. (TT, pp. 20, 40).

CO Bezts observed the Defendant enter Inmate Miller's cell. (TT, p. 20). Since he was the only officer on the unit equipped with "OC spray," a chemical spray used to break up inmate altercations, CO Bezts decided to proceed to Inmate Miller's cell, number 2013, and stand outside of the cell. (TT, pp. 20-21, 23). The Defendant had been arguing at the cell door for approximately one minute or less before CO Bezts headed up to the cell. (TT, p. 36). In fact, the Defendant was already inside of the cell before CO Bezts went up the steps leading to the cell door. (TT, p. 40). However, during the entire incident, CO Bezts only lost sight of the Defendant for approximately three (3) to four (4) seconds. (TT, p. 40).

When CO Bezts approached the cell, he observed Inmate Miller sitting at the edge of his bed on the bottom bunk, facing the desk. (TT, pp. 22, 58-59). His cellmate, Inmate Painter, was also inside of the cell, standing by the desk against the wall. (TT, pp. 22, 55, 58-59). CO Bezts saw the Defendant enter the cell and start pointing at Inmate Miller. (TT, p. 23). The Defendant continued to scream and use profanity while Inmate Miller "just sat there" on the bed. (TT, p. 23).

At no time did CO Bezts see Inmate Miller spit on the Defendant. (TT, p. 22). He did, however, see the Defendant clench his right fist and hit Inmate Miller in the face. (TT, p. 23). CO Bezts then saw the Defendant hit Inmate Miller in the chest with an open-handed back-hand while Inmate Miller was still sitting on the edge of the bed. (TT, p. 23). CO Bezts saw the Defendant lean forward onto Inmate Miller and grab him by the neck with both hands. (TT, pp. 23-24). According to Inmate Painter, the Defendant grabbed Inmate Miller "up by the throat and put him down on the bunk and smacked him in the mouth and called him a p*ssy. He smacked [him] a couple times and said: You're a p*ssy, bitch. Say it now. Say something to my face now, bitch." (TT, p. 59).

Approximately one minute later, the Defendant stood up, turned towards CO Bezts, and asked him for his handcuffs. (TT, pp. 23-24, 41, 59). He told CO Bezts to "call it in as a staff assault because he got spit on." (TT, pp. 24, 40-41). CO Bezts gave the Defendant his handcuffs, but stayed outside of the cell. (TT, pp. 24, 51). CO Bezts did not "call it in as a staff assault" because he "did not see Inmate Miller spit on" the Defendant. (TT, p. 41). Instead, he simply requested "assistance up in Alpha 200, B side." (TT, pp. 41-42). Inmate Painter testified that Inmate Miller never spit on the Defendant and never attempted to assault him in any way. (TT, p. 63).

The Defendant ordered Inmate Miller to stand up so that he could place Miller in handcuffs. (TT, pp. 24-25). As he was removing Inmate Miller from the cell, the Defendant had his hands behind Inmate Miller's back and was using force to push him out of the cell. (TT, p. 25). Inmate Painter saw the Defendant swing Inmate Miller around, causing Inmate Miller to hit the side of his head on the corner of a shelving unit and fall. (TT, pp. 25-26, 59). CO Bezts testified that "it looked like [Inmate Miller] either "slipped on the blanket or [was] pushed from behind." (TT, p. 25). Inmate Painter testified that he heard the Defendant say, "you slipped on the rug," but noted that "there was no rug or object on the floor whatsoever." (TT, p. 59).

Inmate Miller appeared to be "fidgeting" at that point, perhaps indicating resistance, and so CO Bezts showed him his OC spray can and told him that if he complied with the orders then he would be taken to the medical unit. (TT, p. 26). Per the policy of the Department of Corrections, Inmate Miller was escorted out of the cell by the Defendant and CO Bezts. (TT, pp. 26, 75). When they arrived in the vestibule area of the pod, the Defendant shoved Inmate Miller into a member of the response team, telling the responder to "[g]et this mother fucker out of here. He spit on me." (TT, pp. 27, 42, 75). Inmate Miller was then taken to the medical unit. (TT, pp. 27, 75). Upon examination, medical personnel did not observe any visible injuries to Inmate Miller. (TT, p. 78).

CO Bezts proceeded to complete an incident report outlining his own actions in relation to the incident that had just occurred. (TT, pp. 27-28, 42, 44-45, 50). He then returned to his pod and apologized to Inmate Painter and the other inmates "for what they observed and heard" on his pod. (TT, p. 29). Inmate Painter was "upset" about the incident but he told CO Bezts, "you had nothing to do with this." (TT, p. 29). He also told CO Bezts, "[Y]ou better do the right thing." (TT, p. 61).

II. DISCUSSION

A. The evidence presented at trial was sufficient to support the Defendant's convictions for Simple Assault and Official Oppression.

The appellate court employs a *de novo* standard of review for challenges to the sufficiency of evidence. *Commonwealth v. Neysmith*, - - - A.3d - - - -. 2018 WL 3153691, at *4 (Pa. Super. 2018). Our appellate courts have explained this standard as follows:

> [O]ur standard of review of sufficiency claims requires that we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." *Commonwealth v. Brewer*, 876 A.2d 1029, 1032 (Pa. Super. 2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." *Id.*; *see also Commonwealth v. Aguado*, 760 A.2d 1181, 1185 (Pa. Super. 2000) ("[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence"). Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. *See Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. 2001).
>
> The Commonwealth may sustain its burden by means of wholly circumstantial evidence. *See Brewer*, 876 A.2d at 1032. Accordingly, "[t]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence." *Id.* (quoting *Commonwealth v. Murphy*, 795 A.2d 1025, 1038–39 (Pa. Super. 2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld. *See Brewer*, 876 A.2d at 1032. *Commonwealth v. Rahman*, 75 A.3d 497, 500-01 (Pa. Super. 2013) (quoting *Commonwealth v. Pettyjohn*, 64 A.3d 1072 (Pa. Super. 2013)) (citations omitted).

It is clear that "the evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented." *Commonwealth v. Brown*, 52 A.3d 320, 323 (Pa. Super. 2012). "Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail." *Id.* at 323.

Simple Assault

In order to sustain its burden of proof for a simple assault, the Commonwealth must show that the Defendant "attempt[ed] to cause or intentionally, knowingly or recklessly cause[d] bodily injury to another.]" 18 Pa.C.S. § 2701(a)(1). "Bodily injury" is defined as "[i]mpairment of physical condition or substantial pain." 18 Pa.C.S. § 2301. "The Commonwealth need not establish that the victim actually suffered bodily injury; rather, it is sufficient to support a conviction if the Commonwealth establishes an attempt to inflict bodily injury." *Commonwealth v. Richardson*, 636 A.2d 1195, 1196 (Pa. Super. 1994). "This intent may be shown by circumstances which reasonably suggest that a defendant intended to cause injury." *Id.* at 1196 (internal citations omitted).

The Defendant contends that this court erred when it found the evidence sufficient to support a simple assault conviction. He argues that the Commonwealth failed to prove that he intended to cause injury to Michael Miller. In support of that argument, the Defendant cites to the medical report, which did not note any visible injuries on Inmate Miller. (Concise Statement p. 2). This contention has no merit.

The evidence viewed in the light most favorable to the Commonwealth established beyond a reasonable doubt that the Defendant, at the very least, attempted to cause bodily injury to Michael Miller. This court sat as the fact-finder during trial, and, as such, the issue of credibility was solely for this court to resolve. After carefully studying the tone and demeanor of the witnesses, the court found that the testimony of CO Bezts was compelling, consistent, and carried with it the "ring of truth."

To summarize, CO Bezts observed that the Defendant become irate after learning that Inmate Miller had called him a "fat ass." (TT, p. 17). He further observed that the Defendant's face turned red after learning of the comment, and then he watched the Defendant abruptly, and inexplicably, leave his post, storm over to Inmate Miller's cell, scream profanities at him through the door, and demand that the cell door be opened. (TT, pp. 17-20). Moreover, CO Bezts personally observed the Defendant enter the cell and hit Inmate Miller twice -- first with a closed fist to the face, and then a second strike to the chest. (TT, p. 23). CO Bezts saw the Defendant lean over Inmate Miller, who was still sitting on his bed, and grab him by the neck with both of his hands. (TT, pp. 22-23). Punching a person with a closed fist in the face, striking a person forcefully in the chest and placing both hands around a person's neck are clear attempts to cause injury to another.

CO Bezts' testimony was found to be truthful by this court for several reasons. First, CO Bezts had his eyes on the Defendant for all but four (4) seconds of the incident, during which time he never saw Inmate Miller spit on the Defendant, but he did witness the Defendant's assaultive behavior, both verbally and physically, toward Inmate Miller. (TT, pp. 22, 40). Second, CO Bezts had no motive or reason to fabricate his testimony, as he had never met Inmate Miller until the day of the incident. Also, he no longer worked at SCI Pittsburgh, and, as such, was not trying to cover for or protect Inmate Miller. (TT, pp. 11, 29). CO Bezts' testimony also was substantially corroborated by Inmate Painter, especially with respect to key points regarding the incident, including the general narrative, the specifics of the interaction, the number of times that the Defendant hit Inmate Miller, the fact that the Defendant grabbed him by the neck, and the fact that the Defendant was incessantly swearing at Inmate Miller. (TT, p. 59). Inmate Painter was inside of the cell immediately prior to, and during the assault, and he also testified that he never saw Inmate Miller spit on the Defendant. (TT, p. 63). He did, however, see the Defendant hit Inmate Miller in the mouth more than once. (TT, p. 59). Lastly, the fact that CO Bezts would offer testimony that adversely affected a colleague makes his testimony even more believable.

The Defendant testified at trial, and he offered a different account of the events of that day. However, this court did not find the Defendant's testimony to be credible at all. For example, this court did not believe the Defendant's claim that he was spit on. Two of the three people present during the incident testified that Inmate Miller never spit on the Defendant. Further, the fact that the Defendant supposedly waited three (3) hours before seeking medical attention after exposure to a potential infection-carrying

substance defied credibility. (TT, pp. 80-81). Frankly, the court believed that the spitting claim was an after-the-fact justification that was contrived to explain away his behavior. Additionally, after watching the Defendant testify, it was easy for this court to see how his temperament had led him to such an emotional over-reaction to Inmate Miller's comment. Essentially, the Defendant's own demeanor lent substantial credibility to the testimony of CO Bezts and Inmate Painter. The Defendant's behavior of charging over to the cell after learning that Inmate Miller had called him an offensive name, demanding that the cell be opened, towering over the inmate while punching him in the face and hitting him in the chest, grabbing his neck, and swearing at him, all support a finding of intent, and attempt, to cause bodily injury.

The Defendant's reliance on the medical report is unavailing, as it has already been noted that there is no requirement that an actual injury be sustained to prove a simple assault. *Richardson, supra*, at 1196. Thus, the fact that no injuries were observable on Inmate Miller within minutes of the incident does not preclude a finding that the Defendant specifically intended to cause such injury when he punched Miller in the face, hit him in the chest, and grabbed him by the neck. The court also notes that it would be reasonable to infer that Inmate Miller felt pain from the assault, and that the lack of testimony regarding pain does not preclude a finding that the Defendant caused bodily injury. *See Commonwealth v. Jorgenson*, 492 A.2d 2 (Pa. Super. 1985), *rev'd. on other grounds*, 517 A.2d 1287 (Pa. 1986) (jury may infer that twice striking a person across the face causes pain even if there is not testimony of pain). *Commonwealth v. Barnett*, 384 A.2d 965, 968 (Pa. Super. 1978) (where appellant struck one officer with his fists and struggled with another officer, evidence was sufficient to prove appellant "at least attempted a simple assault upon both officers").

In any event, the Defendant's actions were intentional, and the circumstances surrounding those actions were sufficient to prove that he, at the very least, attempted to cause bodily injury. This court was free to believe all, part, or none of the evidence, and the evidence, viewed in the light most favorable to the Commonwealth as verdict-winner, was more than sufficient to find, beyond a reasonable doubt, that the Defendant had a specific intent to cause bodily injury to Inmate Miller.

Official Oppression

The Official Oppression statute states, in relevant part, that: "[a] person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor of the second degree if, knowing that his conduct is illegal, he subjects another to arrest, detention, search, seizure, *mistreatment*, dispossession, assessment, lien or other infringement of personal or property rights. 18 Pa.C.S.A. §5301(1). "The statute was broadly drafted to include all opportunities for oppressive use of official power." *Commonwealth v. Checca*, 491, A.2d 1358, 1366 (Pa. Super. 1985). The official oppression statute was intended "to reach numerous situations wherein an official engages in wrongdoing while acting in his official capacity." *Id.* at 1367. The statute "applies to . . . *aggressive action against the individual.*" *Id.* at 1366 (emphasis added).

The Defendant argues that this court erred in finding that the evidence was sufficient to sustain a conviction for Official Oppression. He argues that the Commonwealth failed to prove that Inmate Miller was mistreated by the Defendant in his capacity as a corrections officer because Inmate Miller did not appear for trial and because the Commonwealth "failed to offer into evidence any written prison policies and procedures" to establish that the Defendant's "conduct was unlawful." (Concise Statement, pp. 2-3). The Defendant also argues that the Commonwealth failed to establish whether the Defendant "knowingly and illegally acted in bad faith in response to Michael Miller spitting on his face . . . ." (Concise Statement, p. 3). This contention also lacks merit.

As an initial matter, Inmate Miller's absence at trial did not preclude a conviction because the testimony of the two (2) eyewitnesses who directly observed the Defendant's conduct was more than sufficient to prove the charge. Furthermore, this court did not require evidence of any formal policies or procedures to comprehend that an on-duty corrections officer physically assaulting an inmate without sufficient justification is unlawful. It must be pointed out that there was no suggestion at any time that the Defendant was off-duty or not within the scope of his employment duties as a corrections officer when this incident occurred. The court notes, however, that there was testimony regarding how the Defendant violated prison policy and procedure when he left the control booth without a legitimate reason and when he entered the cell without first asking the inmates to exit. (TT, pp. 18, 27-28).

In any event, the circumstances surrounding the assault were more than sufficient to prove that the Defendant abused his power as a corrections officer and mistreated Inmate Miller. The assault occurred in a small, 8x10 cell, in an area that was outside the ambit of the surveillance cameras. (TT, pp. 60-61, 74). It is reasonable to infer that, because the assault occurred in such small quarters, out of public view, the threatening nature of the entire interaction was significantly heightened. (TT, pp. 36-37). Further, Inmate Miller was seated on the edge of his bed when the Defendant entered the cell and began hitting, grabbing, and swearing at him, and Miller remained seated during the assault. (TT, pp. 23, 58-59). There was also a substantial physical disparity between the Defendant and Inmate Miller, since the Defendant was "a big guy" and Inmate Miller was only 5'4" and 140 pounds. (TT, pp. 23-24, 59).

As noted earlier, this court did not believe the Defendant's testimony that Inmate Miller spit on him. To the contrary, the court believed that the only thing which provoked the Defendant's aggressive, hostile and physically abusive conduct was the fact that he was called an offensive name. The Defendant's behavior is precisely the kind that the statute was designed to encompass. While Inmate Miller may have hurt the Defendant's feelings, certainly the Defendant did not require a manual or policies and procedures to inform him that his brutish, aggressive and violent response to name-calling was unlawful. The Defendant abused his position as a corrections officer when he left his post without justification, demanded entry into Miller's cell, and committed an assault therein simply because he was angry or offended that he was called a name. Accordingly, the evidence presented by the Commonwealth was sufficient to prove beyond a reasonable doubt that the Defendant mistreated Inmate Miller while acting in his official capacity. This court respectfully requests that the Defendant's contentions be rejected on appeal.

III. CONCLUSION

The Defendant's allegations of error on appeal are without merit. Based on the foregoing, sufficient evidence was presented to support the Defendant's convictions for simple assault and official oppression. The Defendant's convictions should, therefore, be upheld.

BY THE COURT:
/s/Lazzara, J.

Date: October 25, 2018