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OPINIONS

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Commonwealth of Pennsylvania v. David Graves, III

Criminal Appeal—Aggravated Assault—Sufficiency of Evidence

Evidence deemed sufficient for Aggravated Assault when Defendant, convicted following a non-jury trial, tells police officer that he is not going to jail, lunges towards officer, and chest bumps him.

No. CC 2020-07043. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—November 18, 2021.

OPINION

This is a direct appeal from the judgment of sentence entered on July 13, 2021, following a non-jury trial that took place at the above-captioned case number on April 14, 2021. At CC. 2020-07043, Mr. Graves was charged with one (1) count of Aggravated Assault (18 Pa.C.S.A. §2702(A)(3)) and one (1) count of Resisting Arrest (18 Pa.C.S.A. §5104). He was convicted at both counts. Sentencing was deferred to allow for the preparation of a Pre-Sentence Report ("PSR"). The court reviewed two Pre-Sentence Reports, one dated June 1, 2021 prepared for this court, as well as an older Pre-Sentence Report, prepared for Judge O'Toole, and dated March 18, 1998. The Defendant was sentenced to two (2) to four (4) years of imprisonment at Count 1, Aggravated Assault. At Count 2, the court declined to impose further penalty.

On August 11, 2021, a Notice of Appeal was filed on behalf of Mr. Graves and, on August 12, 2021, this court issued an Order directing the Defendant to file a Concise Statement of Matters Complained of on Appeal ("Concise Statement"). Defendant's Concise Statement, filed after one extension of time, challenged the sufficiency of evidence supporting his conviction, specifically his conviction of Aggravated Assault.

The Defendant set forth the following allegation of error:

a. The trial court erred in convicting Mr. Graves of Aggravated Assault as the evidence presented at trial was insufficient to establish, beyond a reasonable doubt, that he acted with the specific intent to attempt to inflict bodily injury or cause bodily injury to Officer Wilksmore. Evaluating the entire record, Mr. Graves had been drinking and was yelling from a second floor balcony. When he opened the door as per Officer Wilksmore's directions, Mr. Graves "came in contact" with Officer Wilksmore's chest. While Officer Wilksmore claimed it was a "lunge" or a "chest bump," the act may easily have been a stumble or a loss of balance. Officer Wilksmore also stated that Mr. Graves had elbowed him while he was trying to handcuff him. While Mr. Graves and Officer Wilksmore may have had body-to-body contact, this does not rise to the level that Mr. Graves intended to cause or intentionally or knowingly cause a bodily injury to a police officer in the performance of duty, under 18 Pa.C.S.A. §2702(a)(3).

The Defendant's contention on appeal lacks merit. The court respectfully requests that the Defendant's conviction and sentence be upheld for the reasons that follow.

I. FACTUAL BACKGROUND

On March 13, 2020, Allegheny County Police Officers Brian Wilksmore and Carter Cecotti responded to a call of a domestic dispute at 646 Middle Avenue, Apartment A. (Non-Jury Trial Transcript ("TT"), held 4/14/21, p. 15). The dispatched officers arrived on location at approximately the same time. (TT, p. 15). Officer Wilksmore approached the house to speak to the Defendant, Mr. David Graves III, while Officer Cecotti approached the victim, Defendant's partner, Ms. Diane Harris. (TT, pp. 15, 27). Ms. Harris was several houses down the street from the Defendant's residence. (TT, p. 27). Ms. Harris, who lives with the Defendant at the same address, informed Officer Cecotti that Mr. Graves had been yelling at her and threatening her.

Upon arrival at the Defendant's residence, Officer Wilksmore observed the Defendant standing on a top floor balcony. (TT, p. 15). Officer Wilksmore approached the residence and asked the Defendant to come down to the front door to speak face-to-face. (TT, p. 15). Defendant yelled in reply that he would not speak with Officer Wilksmore and would not be going to jail. (TT, pp. 15-16). In response, Officer Wilksmore assured Defendant that no one was going to jail at this point and that the officers were just making sure "everything was okay." (TT, p. 16). The Defendant merely reiterated his reticence to come down from the balcony, but he responded to Officer Wilksmore knocking on the front door by moving inside and shouting from the top of the residence's stairs. (TT, p. 16). Defendant shouted again that he would not come down to the door, and Officer Wilksmore turned to walk back down the stairs from the front door to his patrol vehicle. (TT, p. 16).

As Officer Wilksmore was walking back to his patrol car, the Defendant opened the front door. The officer walked back up the front steps, towards the Defendant, asking what was going on. The Defendant merely said again that he would not be going to jail. (TT, pp. 16-17). It was then that the Defendant lunged at the officer, and their chests connected. (TT, p. 16). In the words of Officer Wilksmore, "he [the Defendant] did what's commonly referred to as a chest bump and he took a step back with fists raised and took a fighting stance." (TT, p. 17).

The Defendant's aggressive conduct led Officer Wilksmore to inform him that he was under arrest and that he should turn around. (TT, p. 17). Rather than comply, Defendant raised his hands further. To avoid being struck, Officer Wilksmore took the Defendant down to the ground. (TT, p. 17). The Defendant continued to struggle, and Officer Wilksmore reiterated that the Defendant should "roll over, put his hands behind his back and stop resisting." (TT, p. 17). During this struggle on the apartment stairs, the Defendant attempted to strike the officer in "the face or neck area" with his elbow (TT, pp.18, 23).

While talking to the Defendant's partner, Officer Cecotti heard Officer Wilksmore repeatedly yelling at the Defendant to stop resisting. He then ran towards the Defendant's residence and observed the Defendant and Officer Wilksmore "fighting on the ground." (TT, p. 28). Officer Cecotti attempted to assist in restraining the Defendant, but the joint efforts of the officers were unsuccessful, leading Officer Cecotti to deploy his taser at the Defendant. (TT, pp. 28-29). Officer Cecotti explained that he deployed the taser to avoid further injuries to the Defendant that could be caused by a continued struggle. (TT, p. 29). The Defendant was charged with aggravated assault and resisting arrest as a result of this encounter.

II. DISCUSSION

The standard of review for challenges to the sufficiency of evidence is well-established. Our appellate court has explained the standard as follows:

As a general matter, our 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. Aquado*, 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).

Additionally, "the trier of fact, who determines credibility of witnesses and the weight to give the evidence produced, is free to believe all, part, or none of the evidence." *Commonwealth v. Brown*, 701 A.2d 252, 254 (Pa. Super. 1997).

In order to sustain its burden of proof for aggravated assault, the Commonwealth must show that the Defendant "attempt[ed] to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty". 18 Pa.C.S.A. §2702(A)(3). Qualifying officers for subsection (c) includes, "[t]he officers, agents, employees and other persons referred to in subsection (a) shall be as follows: (1) Police officer." 18 Pa.C.S.A. §2702(C).

The Defendant contends that this court erred when it found the evidence sufficient to support an aggravated assault conviction. He argues that the Commonwealth failed to prove that he possessed specific intent to attempt to inflict bodily injury or cause bodily injury to Officer Wilksmore. In support of that argument, the Defendant cites his intoxicated state, arguing that what the Commonwealth characterized as a "lunge" might just as reasonably be understood as a "stumble or loss of balance". (Concise Statement p. 3). It must be noted that at no time during the trial of this matter was any evidence presented to substantiate the Defendant's claims that he was intoxicated and that he stumbled or lost his balance, causing him to contact Officer Wilksmore. (TT, pp. 14-29). The only mention of alcohol use at all was a question to Officer Wilksmore about whether the Defendant's partner, Diane, was under the influence of alcohol. (TT, pp. 19-20). There is no evidence of record supporting the Defendant's assertions, and this court declines the tacit invitation to consider facts not of record.

The evidence viewed in the light most favorable to the Commonwealth established beyond a reasonable doubt that the Defendant attempted to cause bodily injury to Officer Wilksmore. 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 Officers Wilksmore and Cecotti was compelling. This court was free to believe all, part, or none of the evidence presented in this case, and it was solely the job of this court, the factfinder here, to evaluate the evidence as a whole and determine the amount of weight to be afforded to the testimony of the witnesses.

The crux of the Defendant's sufficiency challenge hinges on the reliability and accuracy of Officers Wilksmore and Cecotti to determine if Defendant's actions were intentional or a result of his alleged intoxication, of which there is no evidence of record. The Commonwealth presented the testimony of Officer Wilksmore, who testified regarding his six and a half years of experience having dealt with violent individuals "[m]ultiple times." (TT, p. 15). Officer Wilksmore was also deeply familiar with the Defendant, testifying that he "had multiple encounters with Mr. Graves for the same type of situation." (TT, p. 17). Given this context, the court properly determined that the testimony of Officer Wilksmore reliably established the specific intent of the defendant when "he did what" is commonly referred to as a chest bump and he took a step back with fists raised and took a fighting stance." (TT, p. 17).

At trial, the court acknowledged the unusual nature of the assaultive action in this case but nevertheless concluded "[a]nd, you know, while we can all think of chest bumps as what the NFL players do after a touchdown and they jump up and will chest bump each other, when it is with force, it's a different story. And then, when you add on to that that we have Mr. Graves instigating with the chest bump." (TT, p. 37) (Emphasis Added). The Defendant's actions were intentional, unnecessarily escalated a "volatile situation," and the circumstances surrounding those actions were sufficient to prove that he, at the very least, attempted to cause bodily injury to Officer Wilksmore. (TT, P. 18).

The Commonwealth may establish the requisite intent for aggravated assault using surrounding circumstances by indicating such circumstances which reasonably suggest that a defendant intended to cause injury. *Commonwealth v. Marti*, 2001 PA super 194, 779 A.2d 1177, 1183 (Pa. Super. 2001). Here, defendant not only lunged and chest bumped Officer Wilksmore, but he further indicated his aggressive intent by falling back into a "fighting stance." (TT, p. 17). Coupled with his repeated assertions that he would not be going to jail, it is clear that the Defendant intended to physically challenge the officers. His contact with Officer Wilksmore was intended cause injury to an officer that he assumed was present to arrest him and take him to jail.

The Defendant's challenge is essentially an attempt to retry his case on appeal. Respectfully, this is not a case where 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. Watley*, 81 A.3d 108, 115 (Pa Super. 2013). Properly viewing the evidence in the light most favorable to the Commonwealth, and, drawing all reasonable inferences in its favor, the evidence was sufficient to prove that Defendant, beyond a reasonable doubt, acted with specific intent to attempt to inflict bodily injury or cause bodily injury to Officer Wilksmore, as required for a conviction of Aggravated Assault.

III CONCLUSION

The Defendant's allegations of error on are without merit. Based on the foregoing, sufficient evidence was presented to support the Defendant's conviction for aggravated assault. As a result, Defendant's sufficiency argument with regard to his conviction for aggravated assault on a police officer lacks any merit. The Defendant's conviction should, therefore, be upheld.

BY THE COURT:

/s/Lazzara, J.

Date: November 18, 2021

Commonwealth of Pennsylvania v. Darrick Bailey

Criminal Appeal—Sentencing—Consecutive Sentences—Abuse of Discretion—Pre-Sentence Report—Statutory Sentencing Factors

Trial court sentenced defendant to consecutive sentences for Indecent Assault and Simple Assault following a plea agreement to the charges but not sentence. Defendant appealed alleging that the sentence was manifestly excessive. Trial court relied upon its right to exercise discretion and obligation to consider the Pre-Sentence Report and the sentencing factors set forth at 42 Pa.C.S.A. §9721(a)

No. CC 13646-2019. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—April 7, 2022.

OPINION

This is a direct appeal wherein the defendant, Darrick Bailey, appeals from the judgment of sentence of September 24, 2021 which became final upon the denial of the defendant's post-sentencing motions on October 5, 2021. The defendant was originally charged with Rape, Sexual Assault, Criminal Attempt – Involuntary Deviate Sexual Intercourse and Indecent Assault. The Commonwealth of Pennsylvania amended the Information in this case to add a charge of Simple Assault. Pursuant to a plea agreement, the defendant pled guilty to Indecent Assault and Simple Assault. Sentencing was left to the discretion of this Court. As to the Indecent Assault conviction, this Court imposed a term of imprisonment of not less than 18 months nor more than 38 months. At the Simple Assault conviction, this Court sentenced the defendant to a term of imprisonment of not less than 12 months nor more than 24 months to be served consecutive to the sentence imposed at the Indecent Assault charge. Defendant's aggregate term of imprisonment of not less than 30 months nor more than 63 months was ordered to be served consecutively to the sentence imposed at CP-02-CR-14153-2019 (a term of imprisonment of not less than 42 months nor more than 84 months). Defendant filed a timely Notice of Appeal. He also filed a timely Concise Statement Of Matters Complained Of On Appeal claiming that his sentence was manifestly excessive for a number of reasons and that this Court failed to consider the relevant information prior to imposing sentence. As set more fully below, the defendant is incorrect.

At the defendant's guilty plea, he acknowledged the following facts were true: On October 14, 2018, the victim and a friend spent the night at another friend's house. At some point that evening, the defendant arrived at the residence. The victim and the defendant fell asleep at different locations in the residence. As the victim slept, she was awakened by the defendant trying to remove her pants and underwear. The victim resisted the defendant and told him "no" and "stop." Instead of listening to the victim, the defendant forced the victim to the floor. Despite the victim's efforts to push the defendant from her, the defendant forcefully penetrated the victim with his penis and raped her. The defendant ejaculated inside the victim and DNA testing confirmed that the defendant was the person who raped the victim.

Couched in a number of different arguments, the defendant essentially claims that the sentence imposed by this Court was too harsh. This is simply incorrect. A sentencing judge is given a great deal of discretion in the determination of a sentence, and that sentence will not be disturbed on appeal unless the sentencing court manifestly abused its discretion." *Commonwealth v. Boyer*, 856 A.2d 149, 153 (Pa. Super. 2004), citing *Commonwealth v. Kenner*, 784 A.2d 808, 811 (Pa. Super. 2001) appeal denied, 568 Pa. 695, 796 A.2d 979 (2002); 42 Pa.C.S.A. §9721. An abuse of discretion is not a mere error of judgment; it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. See *Commonwealth v. Flores*, 921 A.2d 517, 525 (Pa. Super. 2007), citing *Commonwealth v. Busanet*, 817 A.2d 1060, 1076 (Pa. 2002).

Furthermore, the "[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." *Boyer*, supra, quoting *Commonwealth v. Moore*, 617 A.2d 8, 12 (1992). Discretion is limited, however, by 42 Pa.C.S.A. §9721(b), which provides that a sentencing court must formulate a sentence individualized to that particular case and that particular defendant. Section 9721(b) provides: "[t]he court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense, as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant" *Boyer*, supra at 153, citing 42 Pa.C.S.A. §9721(b). Furthermore,

In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigative report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

Boyer, supra at 154, citing *Commonwealth v. Burns*, 765 A.2d 1144, 1150-1151 (Pa. Super. 2000) (citations omitted).

In fashioning an appropriate sentence, courts must be mindful that the sentencing guidelines "have no binding effect, in that they do not predominate over individualized sentencing factors and that they include standardized recommendations, rather than mandates, for a particular sentence." *Commonwealth v. Walls*, 592 Pa. 557, 567, 926 A.2d 957, 964 (2007). A sentencing court is, therefore, permitted to impose a sentence outside the recommended guidelines. If it does so, "the sentencing court must state its reasons for the sentence on the record." *Boyer*, supra at 154, citing 42 Pa.C.S.A. § 9721(b). The sentencing judge can satisfy the

requirement that reasons for imposing sentence be placed on the record by indicating that he or she has been informed by the presentence report; thus properly considering and weighing all relevant factors. Boyer, *supra*, citing Burns, *supra*, citing Commonwealth v. Egan, 451 Pa.Super. 219, 679 A.2d 237 (1996). The Superior Court has made clear,

[w]here [PSI] reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

A [PSI] report constitutes the record and speaks for itself. In order to dispel any lingering doubt as to our intention of engaging in an effort of legal purification, we state clearly that [sentencing courts] are under no compulsion to employ checklists or any extended or systematic definitions of their punishment procedure. Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed. This is particularly true, we repeat, in those circumstances where it can be demonstrated that the judge had any degree of awareness of the sentencing considerations, and there we will presume also that the weighing process took place in a meaningful fashion.

Commonwealth v. Watson, 228 A.3d 928, 936 (Pa. Super. 2020) (quotation marks omitted) (second-fourth brackets in original) (citing Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. 1988)). See also Commonwealth v. Conte, 198 A.3d 1169, 1177 (Pa. Super. 2018).

Moreover, the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court. Commonwealth v. Lloyd, 878 A.2d 867, 873 (Pa. Super. 2005), appeal denied, 585 Pa. 687, 887 A.2d 1240 (2005) (citing Commonwealth v. Hoag, 665 A.2d 1212, 1214 (Pa. Super. 1995). Title 42 Pa.C.S.A. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. Commonwealth v. Marts, 889 A.2d 608, 612 (Pa. Super. 2005) (citing Commonwealth v. Graham, 661 A.2d 1367, 1373 (1995)). "In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." Commonwealth v. Perry, 883 A.2d 599 (Pa. Super. 2005), quoting Commonwealth v. Wright, 832 A.2d 1104, 1107 (Pa.Super.2003); see also Commonwealth v. L.N., 787 A.2d 1064, 1071 (Pa.Super.2001), appeal denied 569 Pa. 680, 800 A.2d 931 (2002).

The record in this case supports the sentence imposed by this Court. The aggregate sentence imposed exceeded the aggravated range of the sentencing guidelines. This Court reviewed the presentence report and considered the contents of that report in imposing sentence. This Court was persuaded that the sentence imposed was appropriate based on the totality of circumstances surrounding the offenses of conviction and the defendant's personal history.

This Court considered the fact that the defendant accepted responsibility by pleading guilty in this case. While the Court did consider the defendant's acceptance of responsibility, this Court also considered the fact that the defendant committed a violent, sexual attack on a vulnerable victim. The victim testified at sentencing about the emotional and physical devastation imposed by the defendant on her. She requires medication to deal with the flashbacks and panic attacks brought on by the defendant's conduct. She was physically injured by the defendant. The defendant also physically threatened the victim's boyfriend in an effort to dissuade the victim from pursuing criminal charges in this case. The impact on the victim was severe and this Court considered that impact in imposing sentence.

This Court also believed that an important component of the sentence was to ensure that the public was protected from further crimes of the defendant for a substantial period of time. This Court considered the defendant's age and criminal history noted that the defendant has been provided with other opportunities to conform his conduct to the law but he chose not to do so. The defendant has a long criminal history dating back to 2003. His prior convictions include strangulation, intimidation of witnesses, multiple convictions for simple assault (domestic and sexually related), firearms offenses, recklessly endangering another person as well as summary offenses. The defendant has demonstrated that he continues to commit crimes over the last 20 years and shows no inclination to stop. Moreover, his two most recent criminal convictions have escalated into very violent encounters with females.

The defendant has also demonstrated that he is not responsive to probationary supervision or amenable to any type of treatment within the state probationary system. He was on probation at the time of the instant offense and that did not deter the defendant from continuing a pattern of violent criminal activity. As set forth in the presentence report, the defendant has been placed on probation numerous times Allegheny County and in Centre County. He has repeatedly violated the terms of probation and committed the crimes in the instant case while on probation. Simply put, probation or other treatment programs would not achieve the goals of sentencing or properly punish the defendant.

For the reasons set forth herein, in this Court's view, the aggregate sentence beyond the aggravated range was the appropriate sentence. Accordingly, the sentence should not be disturbed.

BY THE COURT:
/s/Mariani, J.

Date: April 7, 2022