

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Commonwealth of Pennsylvania v. Davina McNeal, Mariani, J.Page 95
Criminal Appeal—Burglary—Sufficient Evidence

Court found evidence was sufficient to convict Defendant of Burglary when she dropped her children off for a custody exchange at her ex-husband's house. Upon ex-husband's new girlfriend answering the door, Defendant punched the new girlfriend and pushed her into the house.

Commonwealth of Pennsylvania v. Flecia Harvey, Todd, J.Page 96
Criminal Appeal—Destruction of Survey Monument—Sufficient Evidence

Court found evidence was sufficient to convict Defendant of Destruction of Survey Monument when she removed flags and stakes that a surveyor placed on her neighbor's property.

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OPINIONS

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Commonwealth of Pennsylvania v. Davina McNeal*Criminal Appeal—Burglary—Sufficient Evidence*

Court found evidence was sufficient to convict Defendant of Burglary when she dropped her children off for a custody exchange at her ex-husband's house. Upon ex-husband's new girlfriend answering the door, Defendant punched the new girlfriend and pushed her into the house.

No. CC 01624-2021. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—June 13, 2022.

OPINION

This is a direct appeal in which the defendant appeals the Judgment of Sentence of February 1, 2022. After a non-jury trial, the defendant was found guilty of two counts of Burglary and one count of Simple Assault. At one count of Burglary, this Court sentenced the defendant to a five-year term of probation. No further penalty was imposed at the remaining count. This timely appeal followed and the defendant alleges that the evidence was insufficient to convict her of Burglary because it did not demonstrate that she had the requisite intent to commit a crime at the time she entered the victim's residence.

The evidence adduced at trial established the following:

On October 23, 2022, the defendant went to the residence of Mya Meriweather, the girlfriend of Derrick Hundley, the defendant's ex-husband. The defendant went there for the purpose of dropping her children off for a custody exchange. Ms. Meriweather and the defendant had a prior aggressive history due to previous threats made by the defendant to Ms. Meriweather and Ms. Meriweather had informed the defendant that she was not welcome at her residence. Unbeknown to Ms. Meriweather on this date, the defendant brought her children to Ms. Meriweather's residence to drop them off with Mr. Hundley. The children were supposed to be dropped off at the street corner. That evening, Ms. Meriweather heard a knock on her front door. She opened the door and saw Mr. Hundley's two children and the defendant. Ms. Meriweather told the children to come inside the residence. The defendant was irritated that Ms. Meriweather did not greet her and she asked Ms. Meriweather if she had a "fucking problem." Ms. Meriweather told the defendant she did not like her and asked her to leave. Instead of leaving, the defendant punched Ms. Meriweather in the head, pushed Ms. Meriweather into the house and entered the house while continuing to assault Ms. Meriweather. She told Ms. Meriweather that she wasn't leaving and Ms. Meriweather knew the defendant "wanted her." The defendant also told Ms. Meriweather that she was going to kill and shoot Ms. Meriweather. The defendant continued to punch and kick Ms. Meriweather. She also choked Ms. Meriweather. Ms. Meriweather felt as though she began to lose consciousness. The next thing Ms. Meriweather remembered was Mr. Hundley and her friend running down the stairs. Ms. Meriweather sustained various physical injuries as a result of the assault.

Defendant challenges the sufficiency of evidence relative to each count of burglary claiming that the evidence was insufficient to prove that she intended to commit a crime at the time she entered Ms. Meriweather's residence. The standard of review for sufficiency of the evidence claims is well settled:

the standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proof [of] proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all the evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Lehman, 820 A.2d 766, 772 (Pa. Super. 2003). In addition, "[a]ny doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances." Commonwealth v. Cassidy, 668 A.2d 1143, 1144 (Pa. Super. 1995). Title 18 Pa.C.S. § 3502 provides:

- ((a) Offense defined.--A person commits the offense of burglary if, with the intent to commit a crime therein, the person:
- (1)(i) enters a building or occupied structure, or separately secured or occupied portion thereof, that is adapted for overnight accommodations in which at the time of the offense any person is present and the person commits, attempts or threatens to commit a bodily injury crime therein;
 - (ii) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present;

As set forth in the record when this Court issued its verdict, the relevant inquiry in this case is whether the defendant committed, attempted to commit or threatened to commit a bodily injury crime or intended to commit any other crime when she entered Ms. Meriweather's residence. The defendant claims that the evidence only established her intent to facilitate a custody exchange. Her claim is wholly without merit because the evidence in this case sufficiently established that the defendant intended to commit an assault when she entered Ms. Meriweather's residence. While there is no question that a custody exchange occurred, the defendant used the custody exchange as an opportunity to assault Ms. Meriweather. The credible evidence established that the defendant punched and pushed her way into Ms. Meriweather's residence and violently assaulted Ms. Meriweather inside her residence. The defendant warned Ms. Meriweather that Ms. Meriweather knew the defendant wanted to assault her and she threatened to kill and shoot her. Ms. Meriweather has previously told the defendant she was not welcome at the residence and the defendant had previously sent threatening text messages or voicemails to Ms. Meriweather. In this Court's estimation, there is no question that the defendant entered Ms. Meriweather's residence with the intent to assault her. She also made various threats, including terroristic threats. Thus, this evidence was sufficient to convict the defendant of two counts of Burglary.

For the foregoing reasons, the Judgment of Sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: April 12, 2022

Commonwealth of Pennsylvania v. Flecia Harvey

Criminal Appeal—Destruction of Survey Monument—Sufficient Evidence

Court found evidence was sufficient to convict Defendant of Destruction of Survey Monument when she removed flags and stakes that a surveyor placed on her neighbor's property.

No. CC 2021-01843. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Todd, J.—June 27, 2022.

OPINION

This is an appeal by Defendant, Flecia Harvey, after she was found following a non-jury trial on October 21, 2021 of Destruction of a Survey Monument in violation of 18 Pa.C.S.A. § 3312(a)(2) at Count 1 and Simple Trespass in violation of 18 Pa.C.S.A. § 3503(b.1)(1)(iii) at Count 3. Defendant was found not guilty of Scattering Rubbish in violation of 18 Pa.C.S.A. §6501(a)(1) at Count 2. Defendant was sentenced on October 26, 2021 to one year probation at Count 1 and a concurrent sentence of 90 days probation at Count 3. Defendant's post trial motions were denied by an order of March 17, 2022. Defendant filed a Notice of Appeal to the Superior Court on April 20, 2022. On April 27, 2022 an order was entered directing Defendant to file a Concise Statement of Matters Complained of on Appeal. On May 18, 2022 Defendant filed her Concise Statement that set forth the following:

"a. The evidence was insufficient to sustain the conviction at Count 1 – Destruction of a Survey Monument because the Commonwealth did not establish, beyond a reasonable doubt, that:

i. Ms. Harvey damaged or removed "any survey monument or marker" as defined in § 3312. (1) First, the evidence did not establish that when Ms. Harvey removed the surface-level flags and stakes, she removed a "survey monument or marker" as opposed to "a temporary marker or placeholder." As defined in § 3312, "any survey monument or marker" does not include a "wooden stake." The other object removed, a flag, is temporary like a "wooden stake," and is unlike iron pins, concrete monuments, trees and the other more permanent markers that the statute designates as a "survey monument or marker."

(2) Second, the evidence did not establish that a professional land surveyor placed the surface-level objects that Ms. Harvey removed. The survey that was admitted into evidence was from March 2018, but Ramin Fashandi testified that he had a survey done on April 25, 2020, around the time of the allegations. No survey from that date was admitted into evidence. While the March 2018 survey had a seal designating it was done by professional land surveyors, it was not established that the people who worked on the Fashandi property in April 2020 (and who placed the flags and wooden stakes) were "professional land surveyors," as defined by § 3312, as opposed to assistants or other employees.

ii. Ms. Harvey had the intent of calling into question a boundary line (as opposed to just annoying her neighbors) when she removed the surface level markers.

iii. Ms. Harvey acted willfully or maliciously. b. The evidence was insufficient to sustain the conviction at Count 3: Criminal Trespass/Simple Trespasser, 18 Pa. C.S.A. §3503(B.1)(1)(i). The Commonwealth

Background

This matter arises out of a charges filed against Defendant stemming from an incident on April 25, 2020 in which it was alleged that Defendant removed survey markers that were placed by a professional surveyor to mark an easement related to a common driveway. At trial the Commonwealth presented the testimony of Ramin Fashandi who testified that he resided at 6393 Saltsburg Road in Penn Hills and that he was having a survey performed for his property for purposes of separating easements that he and Defendant had for a common driveway leading to their respective homes. (T., pp. 10 -11) Fashandi testified that in order for him and Defendant to access their homes they had to cross over a third parcel of land and they each had a 12 ½ foot easement across the property for a driveway. (T., p. 11) Fashandi testified that he was having the survey done so he could have his portion of the driveway paved with concrete. Fashandi testified that he approached Defendant about the project, but Defendant had no interest in participating. (T., p. 11) Fashandi identified a survey, which was admitted into evidence, which was completed on March 20, 2018 by Donald R. Housley, Sr. Registered Professional Land Surveyor, of R.F. Mittal of Mittal Associates, Inc. (T., p. 12, Ex. 1) Fashandi testified that the surveyor put "pins and flags in the driveway, and then he pulled off of those 12 ½ foot and set stakes and flags going up in the grass." (T., p. 13) He testified that pins were put in the middle dividing the easement and his side of the driveway and that flags were also placed in the grass area along the driveway outlining his 12 ½ foot easement. (T. p. 14) Fashandi further testified that the surveyor installed the flags and pins to outline his easement and that they were markers that the surveyor put into the ground. (T., p. 14) Fashandi testified that after the surveyor placed the pins, stakes and flags that day:

"When Ms. Harvey came home, she said that I put – she said I had installed the flags and the pins, and it wasn't done by a registered surveyor. And it's not true. It's not right, and it doesn't mean anything and started to rip stuff out and throw stuff." (T., p. 14)

He further testified that the materials she removed were the "flags and stakes" that the surveyor had put in the ground to outline the property lines. (T., p. 14) Fashandi testified that he then videoed Defendant as she removed the stakes and flags, and the video was admitted into evidence. (T., p. 15, Ex. 2) Fashandi also testified that the video showed Defendant walking on his property, after she had been advised not to come onto the property, as she removed the stakes and flags and throwing them onto his property.

On cross examination Fashandi testified that although the original survey by Mr. Housley was done on March 20, 2018 that the surveyors returned on April 25, 2020 specifically to place markers to identify outline his 12 ½ foot easement on the driveway. (T., p. 20)

The Commonwealth also called Holly Fashandi who identified various still shots from a surveillance video taken on the day of the incident which show the surveyors placing the flags and stakes that Defendant later removed that day. (T., pp. 29 -31)

Defendant called Jeffrey Horneman, a licensed surveyor, who testified that in surveying he will “set something that can be recovered that is not going to be disturbed, and usually it’s magnetic so we can come out with a metal detector, and we can find it again.” (T., p. 36.) In some cases it is 18 inch rebar that is put down in the ground but in asphalt he uses, “magnails.” He also testified that “sometimes I would put a stake within a foot saying, hey. Near here is my corner pin because they’re usually set flush. I want the landowner to be able to see where it is.” (T., p. 38) Mr. Horneman also testified that he conducted a survey in August of 2020, months after the incident, and was able to locate survey markers “along the driveway.” (T., pp. 37 -38) Mr. Horneman testified that wooden stakes are used as “witness markers” to aid in the location the metal markers that are placed into the ground. This testimony establishes that the witness markers are in addition to the metal markers put into the ground and are not temporary markers. (T., p. 39)

Discussion

In her concise statement, Defendant asserts that the evidence does not support the finding that she damaged or removed “any survey monument or marker” as defined in the statute.

18 Pa.C.S.A. §Provides in pertinent part 3312 provides in pertinent part as follows:

a) Offense defined.

(2) A person commits a misdemeanor of the second degree if he willfully or maliciously cuts, injures, damages, destroys, defaces or removes any survey monument or marker in order to call into question a boundary line.

(c) Affirmative defense. — It is an affirmative defense to any prosecution for an offense under this section that the survey monument or marker was improperly placed by a professional land surveyor.

(d) Definitions. —

As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Professional land surveyor.” —As defined under the act of May 23, 1945 (P.L.913, No.367), known as the Engineer, Land Surveyor and Geologist Registration Law.

“Survey monument or marker.” —Any object adopted or placed by a professional land surveyor to define the boundaries of a property, including, but not limited to, natural objects such as trees or streams, or artificial monuments such as iron pins, concrete monuments, set stones or party walls. The phrase does not include a wooden stake placed by a professional land surveyor as a temporary marker or placeholder. 18 Pa.C.S. § 3312

Specifically, Defendant argues that the testimony, videos and the photographs only establish that she removed “wooden stakes” and “flags” and that the wooden stakes do not qualify as a survey monument or marker because the statute specifically excludes a “wooden stake.” However, the statute excludes a “wooden stake” only if it is used as a “temporary marker or placeholder.” The evidence in this case is that Mr. Fashandi was having the survey done by a professional surveyor in order to establish the outline or perimeter of his easement for his driveway. The evidence establishes that all of the items placed by the surveyor, pins, flags and stakes were to outline the easement and there was no evidence that they were temporary. In fact the testimony of the Defendant’s witness, Mr. Horneman establishes that the wooden stakes are not “temporary makers” but are used as “witness markers” to aid in the location of the metal makers that are pounded in the ground and may only be found by a metal detector. He also testified that the stakes or markers are placed so the “landowner can see where it is.”

Defendant also asserts that the flags that she removed are temporary “like” a “wooden stake,” however, the statute does not exclude the flags that Defendant removed that were being used to define the perimeter of the easement which Mr. Fashandi was having surveyed.

Defendant also argues that the evidence does not establish that the individuals who placed the stakes, flags and makers on April 25, 2020 were professional land surveyors as opposed to “assistants or other employees” of the professional land surveyor, Mr. Housley, who performed the survey in March of 2018. The evidence clearly establishes that the makers were placed pursuant to the survey by the professional surveyor whose seal appeared on the survey from March of 2018. The requirement of the statute relates to the placement of a marker by a professional surveyor, as opposed to a landowner or some other untrained person, who attempts to place a maker without any training or basis to do so. It is not meant to distinguish between the professional surveyor and his or her assistant that places the maker at the direction of or based on the property or other lines established by the professional surveyor. Defendant’s argument on this issue is meritless.

Defendant also argues that the evidence did not establish that she removed the makers in order to call into question a boundary line, as opposed “just annoying her neighbor.” Mr. Fashandi testified that:

“When Ms. Harvey came home, she said that I put – she said I had installed the flags and the pins, and it wasn’t done by a registered surveyor. And it’s not true. It’s not right, and it doesn’t mean anything and started to rip stuff out and throw stuff.” (T., p. 14)

Clearly her intent was to call into the question the boundary line regarding the easements in the driveway and this evidence was sufficient to establish this element of the offense. Finally, it is clear that she acted willfully and maliciously in removing the markers.

Defendant also argues that the evidence was insufficient to convict her of trespass in violation of 18 Pa.C.S.A. § 3503 (b.1) (1)(i) which involves trespassing for the purpose of threatening or terrorizing the owner or occupant of the premises. Simple Trespass is defined in 18 Pa.C.S.A. §3503 as follows:

(b.1) Simple trespasser.

(1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place for the purpose of:

(i) threatening or terrorizing the owner or occupant of the premises;

(ii) starting or causing to be started any fire upon the premises; or

(iii) defacing or damaging the premises.

(2) An offense under this subsection constitutes a summary offense.

At the trial the Commonwealth moved to amend the complaint to add a count of simple trespass and the ADA stated that the amendment was to add “3503B.1III graded as a summary.” (T., pp. 3-4) The motion was granted, and Defendant was found guilty of a violation of §3503 (b.1)(1)(iii), based on the evidence, which clearly established she trespassed on the victim’s property knowing she was not privileged to do so and defaced or damaged the property. That finding was specifically stated when the verdict was announced. (T., p. 3 10/26/21) Defendant was not convicted under §(b.1)(1)(i) involving threatening or terrorizing conduct. The sentencing order of October 26, 2021 and the docket contain obvious clerical errors which had no impact on the sentence imposed and the order and the docket can be corrected based on the inherent authority of the court to correct obvious clerical errors. Commonwealth v. Young, 695 A.2d 414 (Pa. Super. 1997)

BY THE COURT:

/s/Todd, J.