NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
JOSEPH EDWARD LONGO JR.,	:	
	:	
Appellant	:	No. 1363 EDA 2013

Appeal from the Judgment of Sentence April 4, 2013
In the Court of Common Pleas of Wayne County
Criminal Division No(s).: CP-64-CR-0000015-2012

BEFORE: PANELLA, MUNDY and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MARCH 03, 2014**

Appellant, Joseph Edward Longo, Jr., appeals from the judgment of sentence entered in the Wayne County Court of Common Pleas following his conviction of aggravated indecent assault[1] and indecent assault[2] after a non-jury trial. We affirm.

At trial, the Commonwealth presented the testimony of the victim, A.R., and A.R.'s mother ("Mother"). Mother testified that at the time of the incident, A.R. was six years old. N.T. Trial, 9/18/12, at 8. Mother further

* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 3125(a)(1), (b).

[2] 18 Pa.C.S. § 3126(a)(7).

testified that A.R. reported to her that Appellant touched her and demonstrated how he had done so by putting her hands in her private area in the front, under her pants, and in her underwear. ***Id.*** at 10-11, 24.

A.R. testified that Appellant touched her in the "wrong places." ***Id.*** at 30. Specifically, A.R. stated that Appellant touched her with his hands and his mouth while they were under the covers in a bed. ***Id.*** at 30-31. She testified that Appellant would usually pull down her pajama pants and put his finger in her private parts, or "downer parts." ***Id.*** at 31-32. She stated that Appellant "pulled [her] pants down to [her] underwear and then kissed [her], like on the lower part" and that she could feel his whiskers. N.T. *In Camera* Testimony, 9/18/12, at 3.[3] A.R. testified that she asked Appellant to stop and he refused. ***Id***.

Appellant offered the testimony of Deirdre Florence and Suzanne Duffy, both of whom were acquainted with Appellant and A.R. They testified that Appellant sought advice from them regarding problems A.R. was having cleaning herself after using the toilet. N.T. Trial, at 42, 44-45. Another defense witness, Dr. Kay Gendron, testified that Appellant was concerned about A.R.'s hygiene. ***Id.*** at 49-51. Appellant himself testified that A.R. had difficulty cleaning herself after using the toilet and that he would have to

[3] A.R. was permitted to testify *in camera*, in the presence of counsel, after becoming visibly distressed and reporting to the trial court that she did not feel well.

wash her. ***Id.*** at 60. He stated that he washed her back, but never her front. ***Id.*** at 60-61.

Appellant denied touching A.R. in the way that A.R. describes. ***Id.*** at 71. Appellant denied putting his hands in A.R.'s underwear, putting a finger in A.R.'s [anus], and putting his mouth in her private area. ***Id.*** at 72-73. Appellant testified that he only touched A.R. to clean her for hygiene reasons. ***Id.*** at 73. Appellant testified that he believed that Mother coached A.R. into making the accusations against him. ***Id.*** at 76.

On September 18, 2012, the trial court found Appellant guilty of aggravated indecent assault of a child and indecent assault. On April 4, 2013, Appellant was sentenced to ten to twenty years' imprisonment and ordered to register as a sexual offender. Appellant did not file a post-sentence motion,[4] but timely filed a notice of appeal on April 30, 2013.[5] On June 13, 2013, Appellant filed a Pa.R.A.P. 1925(b) statement in compliance with the trial court's May 23, 2013 order.

In his brief, Appellant raises four issues:

> Whether the trial court erred in determining that the evidence presented at trial against [Appellant] was contrary to the weight of the evidence with respect to the offense of Aggravated Indecent Assault as charged in Count 2?

[4] Pa.R.Crim.P. 720(A)(1).

[5] Pa.R.Crim.P. 720(A)(3).

> Whether the trial court erred in determining that the evidence presented at trial against [Appellant] was contrary to the weight of the evidence with respect to the offense of Indecent Assault as charged in Count 3?
>
> Whether the trial court erred in determining that the evidence presented at trial against [Appellant] was sufficient to support the verdict of guilty of Aggravated Indecent Assault?
>
> Whether the trial court erred in determining that the evidence presented at trial against [Appellant] was sufficient to support the verdict of guilty of Indecent Assault?

Appellant's Brief at 4.

Appellant's first two issues raise claims of error regarding the weight the trial court gave to the evidence presented. The right of a defendant to raise a weight of the evidence claim is governed by Pa.R.Crim.P. 607, which provides, *inter alia*, that

> (A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:
>
> (1) orally, on the record, any time before sentencing;
>
> (2) by written motion at any time before sentencing; or
>
> (3) in a post sentence motion.

Pa.R.Crim.P. 607(A).

Our review of the record indicates Appellant failed to raise his weight of the evidence claims either orally or in writing prior to sentencing and Appellant did not file a post-sentence motion. Although Appellant included

issues challenging the verdict on weight of the evidence grounds in his 1925(b) statement and the trial court addressed those issues in its Pa.R.A.P. 1925(a) opinion, we cannot overlook his failure to preserve these issues as required by Pa.R.Crim.P. 607. ***See Commonwealth v. Sherwood***, 982 A.2d 483, 494 (Pa. 2009). Accordingly we find Appellant's first and second issues waived. ***See id.***

For ease of disposition, we address Appellant's third and fourth issues together. Appellant claims the Commonwealth presented insufficient evidence to support a guilty verdict for aggravated indecent assault and indecent assault. He avers that there was no evidence that proved beyond doubt that any contact that took place between him and A.R., his granddaughter, occurred for the purpose of sexual arousal. Appellant's Brief at 9-10. We find no relief is due.

This Court has stated:

> 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 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 evidence actually received must be considered.

Commonwealth v. Filer, 846 A.2d 139, 140 (Pa. Super. 2004). "Moreover, it is within the province of the fact-finder to resolve all issues of credibility, resolve conflicts in evidence, make reasonable inferences from the evidence, and believe all, none, or some of the evidence presented." ***Commonwealth v. Bishop***, 742 A.2d 178, 189 (Pa. Super. 1999) (citation omitted).

Appellant was convicted of one count of aggravated indecent assault of a child and one count of indecent assault. Aggravated indecent assault is defined, in relevant part, as follows:

> (a) Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:
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> > (1) the person does so without the complainant's consent;
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> * * *
>
> (b) Aggravated indecent assault of a child.—A person commits aggravated indecent assault of a child when the person violates subsection (a)(1), (2), (3), (4), (5) or (6) and the complainant is less than 13 years of age.

18 Pa.C.S. § 3125(a)(1), (b).

The crime of indecent assault is defined, in relevant part, as follows:

> (a) A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:
>
> * * *
>
> (7) the complainant is less than 13 years of age;

18 Pa.C.S. § 3126(a)(7).

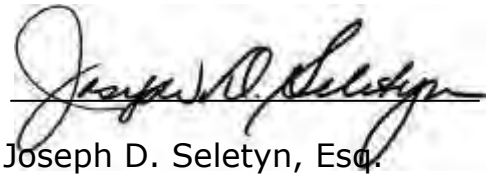
In ***Bishop***, this Court held that the Commonwealth established the elements of aggravated indecent assault and indecent assault through testimony and visual aids establishing that the defendant's tongue and finger penetrated the victim's vagina. ***Bishop***, 742 A.2d at 189-90. The ***Bishop*** Court concluded that the jury's belief in the testimony of the victim and the testimony of the adults the victim entrusted in the details of her ordeal was sufficient to sustain the defendant's conviction. ***Id.***

In light of this Court's holding in ***Bishop***, and after reviewing the evidence and testimony of record, we conclude that there was ample evidence supporting the trial court's findings. It was reasonable for the trial court to infer from A.R.'s description of the nature of the touching and her testimony that the touching took place in bed, that the contact was made for the purpose of arousing Appellant's sexual desire, and Appellant was acting without a legitimate hygienic purpose. ***See id.*** at 189; ***see also Filer***, 846

A.2d at 141-42 (finding victim's testimony that defendant digitally penetrated her vagina was sufficient evidence to conclude that defendant was guilty of aggravated indecent assault). Accordingly, we find no relief is due on Appellant's challenge to the sufficiency of the evidence. ***See Bishop***, 742 A.2d at 190; ***Filer***, 846 A.2d at 141-42.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/3/2014