NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. EDWIN HUERTAS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1696 EDA 2012

Appeal from the Judgment of Sentence February 27, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006682-2011

BEFORE: GANTMAN, J., SHOGAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.: **FILED DECEMBER 23, 2013**

Appellant, Edwin Huertas, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his bench trial convictions for criminal trespass, criminal mischief, and possessing instruments of crime ("PIC").[1] We affirm.

In its opinion, the trial court fully and correctly set forth the relevant facts of this case. Therefore, we have no reason to restate them. Procedurally, on February 27, 2012, the court convicted Appellant of criminal trespass, criminal mischief, and PIC. That same day, the court sentenced Appellant to three years' probation. Appellant timely filed post-sentence motions on March 8, 2012. On May 3, 2012, the court denied relief.

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[1] 18 Pa.C.S.A. §§ 3503; 3304; 907, respectively.

Appellant timely filed a notice of appeal on May 31, 2012. On June 8, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), which Appellant timely filed on June 25, 2012.

Appellant raises two issues for our review:

> WAS NOT THE EVIDENCE INSUFFICIENT TO SUSTAIN THE CONVICTION FOR THE OFFENSE OF CRIMINAL TRESPASS AS THE COMMONWEALTH PRODUCED NO EVIDENCE ON THE ESSENTIAL ELEMENT THAT APPELLANT WAS NOT LICENSED OR PRIVILEGED TO BE ON THE PROPERTY AT ISSUE?
>
> IN THIS CASE INVOLVING A SUSPECT IDENTIFICATION, WAS NOT THE CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE TO SUCH A DEGREE AS TO SHOCK THE CONSCIENCE AND CONSEQUENTLY, DID NOT THE TRIAL COURT ERR IN DENYING APPELLANT'S POST-SENTENCE MOTION FOR A NEW TRIAL ON THOSE GROUNDS?

(Appellant's Brief at 4).[2]

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

> 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

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[2] We have reordered Appellant's issues.

> 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. 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. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, 613 Pa. 642, 32 A.3d 1275 (2011) (quoting ***Commonwealth v. Jones***, 874 A.2d 108, 120-21 (Pa.Super. 2005)). Additionally:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the…verdict if it is so contrary to the evidence as to shock one's sense of justice.
>
> Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003), *cert. denied*, 542 U.S. 939, 124 S.Ct. 2906, 159 L.Ed.2d 816 (2004) (internal citations omitted).

After a thorough review of the record, the briefs of the parties, the applicable law, and the comprehensive opinion of the Honorable Alice Beck

Dubow, we conclude Appellant's issues merit no relief. The trial court opinion discusses and properly disposes of the questions presented. (***See*** Trial Court Opinion, filed August 2, 2012, at 3-5) (finding: **(1)** eyewitness testified that Appellant used crowbar to break into back of Cricket store; court reasonably inferred from testimony that Appellant was not licensed or privileged to enter premises; Commonwealth presented sufficient evidence to sustain Appellant's conviction for criminal trespass; **(2)** eyewitness observed Appellant break into Cricket store using crowbar; Officer Carbonara saw Appellant carrying crowbar while Appellant was walking behind Cricket store; court found testimony of eyewitness and police officer credible;[3] court properly denied Appellant's motion for new trial where verdict was not against weight of evidence).[4] Accordingly, we affirm on the basis of the trial court's opinion.

Judgment of sentence affirmed.

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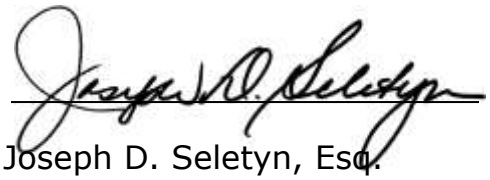
[3] The trial court also found the testimony of Appellant's witnesses not credible. (***See*** Trial Court Opinion at 2.)

[4] The correct citation for ***Commonwealth v. Gordon*** is 477 A.2d 1342 (**Pa.Super.** 1984).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2013

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0006682-2011**
VS.	:	**1696 EDA 2012**
EDWIN HUERTAS	:	

FILED
AUG 02 2012
Criminal Appeals Unit
First Judicial District of PA

OPINION

Following a waiver trial on February 27, 2012 and credible eyewitness testimony, the trial court convicted the Defendant, Edwin Huertas ("Defendant") of Criminal Trespass, Criminal Mischief and Possession of an Instrument of a Crime. The court sentenced the Defendant to two years reporting probation, followed by one year of non-reporting probation. The Defendant appealed.

FACTUAL BACKGROUND

On May 25, 2011, Patrick Brennan, the eyewitness, was re-sealing a roof at 4011 Greeby Street in the City of Philadelphia, and saw the Defendant, using a crowbar, try to pry open the door handle of the back entrance of a building. (N.T. p. 8-12) Mr. Brennan, who was approximately twenty feet away from the Defendant, had an unobstructed view of him. (N.T. p. 9) Mr. Brennan was able to see the side of the Defendant's face and the back of his head. (N.T. p. 20)

Mr. Brennan observed the Defendant hit the door handle with a crowbar approximately ten times for approximately three to four minutes. (N.T. p. 13) At one point, Mr. Brennan observed the Defendant leave the building and return to it approximately ten to fifteen minutes later and continue hitting the door handle with the crowbar. (N.T. p. 13)

Over the next three-and-a-half hours, the Defendant left and returned five times, hitting the door handle for approximately five minutes each time. (N.T. p. 14) After the sixth such

incident, the Defendant finally removed the door handle and entered the building. (N.T. p. 14-15) The court found the testimony of Mr. Brennan to be credible.

At 1:40 p.m., Officer Carbonara responded to a radio call and drove to building the Defendant was trying to enter, a Cricket Store on the 6600 block of Frankford Avenue. (N.T. p. 25-27) As Officer Carbonara approached the back of the store, she noticed the Defendant walking along a side street with a crowbar in his right hand. (N.T. p. 27-29) Officer Carbonara then called to the Defendant, patted him down to search him for any other dangerous items, and recovered a screwdriver in his pants pocket. (N.T. p. 29)

About five minutes later, Officer Carbonara walked to the back of the Cricket Store and noticed that the door handle on the rear door was broken off. (N.T. p. 30) Patrick Brennan later identified the man in Officer Carbonara's custody as the man who he saw striking the door handle over the course of the three-and-a-half hours. (N.T. p. 30) The court found the testimony of Officer Carbonara to be credible.

The defense presented two witnesses who testified that the Defendant was with them during the time period in question. (N.T. p. 36-37, 44-45) Nicholas Castrilli testified that the Defendant was with him a little before 11 A.M. while they sat and talked on Mr. Castrilli's stoop at 3412 Tyson Avenue. (N.T. p. 43-44) The Defendant informed Castrilli that he needed a crowbar because he had locked his keys in his car. (N.T. p. 44) Because Castrilli did not have a crowbar, he called Steven Cahill to find out if he had a crowbar. (N.T. p. 44) The court did not find the testimony of Mr. Castrilli to be credible.

Steven Cahill, the defense's other witness, testified that he called his father for a crowbar because his father was a carpenter. (N.T. p. 36-37) Mr. Cahill testified that he obtained the crowbar around 12:30 P.M. and the Defendant left fifteen minutes later. (N.T. p. 37) Both Mr. Cahill and Mr. Castrilli testified that the Defendant did not leave their presence from 10:00 A.M. through 12:45 P.M. (N.T. p. 36-37, 44-45) The court did not find the testimony of Mr. Cahill to be credible.

Defense counsel and the Commonwealth stipulated that if the Defendant's wife were called to testify, she would testify that the Defendant has a reputation in the community as a peaceful, law-abiding, and truthful citizen. (N.T. p. 48)

ISSUES RAISED ON APPEAL

Defendant raises the following issues on appeal:

1. The evidence was insufficient for conviction on all charges, insofar as there was no evidence that appellant was not licensed or privileged to be on the property at issue, and the lack of such license or privilege is an essential element of the crimes of criminal trespass and criminal mischief. Furthermore, without those two charges, the charge of possession of an instrument of crime would also fall, as that charge requires an underlying offense, and none would be left without the trespass and mischief charges.
2. The conviction was against the weight of the evidence to such a degree as to shock the conscience. Consequently, this court erred in denying appellant's post-sentence motion for a new trial on those grounds.

BASIS FOR TRIAL COURT'S DECISION

The trial court found the testimony of Mr. Brennan, the eyewitness, and Officer Carbonara to be credible and thus, concluded that it was the Defendant who was at the Cricket Store and the Defendant, over a three hour period, attempted to break into the Cricket Store and eventually entered it.

A. The Commonwealth Proved that the Defendant Did Not Have Permission to Enter the Premises.

In order to convict the Defendant of Criminal Trespass, the trier of fact must find that the Defendant "knowing that he is not licensed or privileged to do so, . . . breaks into any building or occupied structure or separately secured or occupied portion thereof." 18 Pa.C.S.A. §3503.

The Supreme Court of Pennsylvania has held that the trier of fact may infer from a defendant's manner of entry that a defendant does not have a license or privilege to enter a

building. Commonwealth v. Gordon, 329 Pa. 42, 55 (1984). For example, a defendant who entered a school by removing a metal grate and plywood boards that covered a broken window did not have permission or a license to enter the school. Id. at 51. See also, Commonwealth v. Woods, 432 Pa. Super. 428, 433 (Pa. Super. Ct. 1994) (The Superior Court found that the defendant lacked permission to enter his estranged wife's home because the defendant forcibly broke into his wife's home.)

In the instant case, trial court found credible the eyewitness testimony that the Defendant used a crowbar over three and half hours to break into the back of the building. The trial court inferred from this testimony that the Defendant did not have permission to enter the premises. Consequently, the Commonwealth proved beyond a reasonable doubt that the Defendant did not have permission to enter the building.

B. The Trier of Fact Had Sufficient Evidence to Convict the Defendant of Criminal Mischief.

To convict the Defendant of Criminal Mischief, the trier of fact must find that the Defendant "intentionally damages real or personal property of another." 18 Pa.C.S.A.§ 3304 (a)(5). The trial court found the testimony of Mr. Brennan credible that it was the Defendant who over three hours used a crowbar to open the back door of the building. The testimony of Officer Carbonara that he saw the Defendant carrying a crowbar shortly after Mr. Brennan saw the Defendant break into the premises corroborated this conclusion. From this testimony, the trier of fact properly found that the Defendant intentionally damage the property of another.[1]

C. The Trier of Fact Properly Convicted the Defendant Guilty of Possession of Instrument of Crime.

The Defendant contends that trial court could not convict the Defendant of Possession of an Instrument of Crime because it did not attach to a criminal conviction. The trial court properly convicted the Defendant of Criminal Trespass and Criminal Mischief using a crowbar, an

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[1] The Defendant argues that the Commonwealth failed to establish that the Defendant did not have consent from the owner to be on the property and thus, could not be guilty of Criminal Mischief. The Superior Court, however, has held that lack of consent is not an essential element of the criminal mischief statute in Pennsylvania. Commonwealth v. Zambelli, 695 A.2d 848, 850 (Pa. Super. Ct. 1997).

instrument of crime. Consequently, the trial court properly convicted the Defendant of the charge of Possession of an Instrument of Crime.

D. The Trial Court Properly Denied the Motion for New Trial.

The Defendant claims that this court erred in denying his Motion for a New Trial on the grounds that the conviction was against the weight of evidence to such a degree as to shock the conscience. When reviewing a post-sentence Motion for a New Trial, the trial judge must "determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." Commonwealth v. Widmer, 560 Pa. 308, 320 (2000). A new trial should not be granted based upon a conflict in testimony or because another judge could have ruled differently on the same set of facts. Id. at 319-20.

This trial court properly found the testimony of Mr. Brennan and Officer Carbonara to be credible and thus, properly convicted the Defendant of the charges. Mr. Brennan saw the Defendant break into the Cricket Store and Officer Carbonara saw the Defendant with a crow bar and screwdriver walking behind the building. Therefore, the court had credible testimony that proved beyond a reasonable doubt that the Defendant committed the crimes and the trial court properly denied the Motion for a New Trial.

CONCLUSION

Based on the foregoing, the Superior Court should affirm the Judgment of Sentence and the denial of Motion for a New Trial.

BY THE COURT

J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0006682-2011**
	:	
VS.	:	**1696 EDA 2012**
	:	
EDWIN HUERTAS	:	

PROOF OF SERVICE

I hereby certify that I am this 2nd day of August, 2012, serving the foregoing Opinion upon the persons indicated below, by first class mail:

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ALICE BECK DUBOW, J