

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DANA POINDEXTER

Appellant

No. 3056 EDA 2011

Appeal from the Judgment of Sentence October 20, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0011634-2008

BEFORE: PANELLA, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J.

FILED MAY 29, 2013

Appellant, Dana Poindexter, appeals from the judgment of sentence entered on October 20, 2011, by the Honorable Jeffrey P. Minehart, Court of Common Pleas of Philadelphia County.

After an extended period of abuse and neglect, Danieal Kelly, a wheel chair-bound fourteen-year-old girl afflicted with cerebral palsy, died of infection and malnutrition. At the time of her death, she weighed just 42 pounds.

The trial court summarized the factual history as follows.¹

* Retired Senior Judge assigned to the Superior Court.

¹ The Commonwealth tried Poindexter and Daniel Kelly, the victim's father, and Dr. Mickal Kamuvaka together. The jury convicted Daniel Kelly of
(Footnote Continued Next Page)

Abuse and neglect led to the tragic death of Danieal Kelly, the victim herein, who was born three months premature in 1992 afflicted with cerebral palsy, which rendered her wholly dependent upon her mother and father, Andrea and Daniel Kelly. Shortly after Danieal's birth, the couple separated and she was left in her mother's care. During the next four years, she lived in a dilapidated and unsanitary apartment in Philadelphia. Due to Ms. Kelly's neglect of the victim, Danieal's grandmother contacted Mr. Kelly and explained that the victim and her brother were being neglected. Mr. Kelly took custody of both children and moved to Pittsburgh. At that time, Mr. Kelly was involved with a woman named Kathleen John, who acted as a stepmother to the victim and her brother.

Eventually Mr. Kelly, his girlfriend, and the children moved to Arizona where Danieal was able to attend school where she received special education services, as well as physical, occupational, and speech therapy. However, her father failed to see that she attended school regularly and she was chronically absent, which deprived her of essential services.[] In 2000, Danieal underwent surgery on her hips. Following the surgery, Mr. Kelly failed to take her to physical therapy. In 2001, Mr. Kelly split up with his girlfriend, Kathleen John, and he moved the victim and her brother to another part of Arizona. He did not enroll her in school and she did not attend school for the next two years.

In July of 2003, Mr. Kelly and the children returned to Philadelphia and the responsibility to care for Danieal fell to her mother, who now had seven other children under her care. For seven months Mr. and Ms. Kelly, the grandmother, and the children lived together. Danieal was not enrolled in school nor did she receive medical care. In 2004, Mr. Kelly abandoned the family leaving Danieal with her mother's eight other children, the grandmother, Ms. Kelly's sister, and other children in [a] small home on Greenway Avenue. Two years later Danieal died due to abuse and neglect.

(Footnote Continued) _____

endangering the welfare of a child. The jury convicted Dr. Kamuvaka of the following offenses: criminal conspiracy, endangering the welfare of a child, perjury, forgery, tampering with public records, involuntary manslaughter, and recklessly endangering another person.

Defendant, Dana Poindexter, was an intake worker at the Department of Human Services ("DHS"). When DHS receives a report or call alleging abuse or neglect in a particular family, a worker is assigned and is responsible for investigating the claim by going out to the home and determining whether the complaint is founded and whether family services are needed. Defendant was assigned in 2003 to investigate a complaint of abuse concerning the victim and her family. Under DHS regulations, defendant had sixty days after a call or report came in to determine whether the family should receive services or close the case. Defendant, however, did not investigate the claims of abuse or neglect pertaining to Danieal, he did not open her case for services, and he did not close her case. Thus, defendant violated the sixty-day rule.

In May of 2004, a friend of the family, Carolyn Thomas, called in a report to DHS saying that Danieal was not being cared for, but the woman's concern for the victim was ignored and defendant did not investigate the claim. One month later, an anonymous neighbor placed a call into DHS reporting that Danieal was not receiving care. Again, defendant did not investigate this claim. In April of 2005, defendant failed to investigate another claim from Ms. Kelly's ex-boyfriend, who told DHS that Danieal had not received medical attention in over two years, was defecating and urinating on herself, and was without care. Fortunately for Danieal, a fifth report was received in September of 2005 and answered by another intake worker, Trina Jenkins.

Ms. Jenkins went out to Ms. Kelly's house at 1722 Memorial Avenue and discovered Ms. Kelly living alone with her nine children, all of whom were not enrolled in school, and saw that Danieal was not receiving medical care. Ms. Jenkins was able to enroll all of the children in school except for Danieal, who needed an evaluation. Ms. Jenkins characterized the family as a Level III, meaning the family needed the highest level of care. Unfortunately, Danieal did not receive the care she needed and deserved.

Dr. Mickal Kamuvaka, program director of Multi-Ethnic Behavior Health an Agency of Services for Children in their Own Home ("SCOH"), thereafter was assigned to the case. Because the family was characterized as a Level III, a SCOH worker at

Dr. Kamuvka's agency was responsible for going out to the family's home twice a week to see Danieal and the other children face to face each time. The city paid the agency to service neglected and abused children, but Dr. Kamuvaka made a profit by hiring unpaid student interns to do the work of licensed social workers. Dr. Kamuvaka assigned the Kelly family case to Alan Speed, an unpaid student intern who had no experience in overseeing families having the kinds of problems the Kelly family had. Instead of having a licensed or experienced social worker accompany him on the visit, Dr. Kamuvaka sent only the inexperienced Mr. Speed to the Kelly residence. In the six months he was assigned to the case, Mr. Speed made no progress ameliorating the problems of the Kelly family and he fail[ed] to provide the victim and her siblings with appropriate care.

While Mr. Speed was on vacation, Dr. Kamuvaka failed to send anyone to the house for three weeks and after Mr. Speed's internship ended, Dr. Kamuvaka left the family uncovered for one month before she assigned the case to Julius Murray, a SCOH worker, who never visited the Kellys. On August 4, 2006, Danieal's 42-pound, bedsores-ridden body was found in the back of the room on her bed....

Trial Court Opinion, 5/29/12, at 2-5 (footnotes omitted).²

A jury convicted Poindexter of endangering the welfare of a child, perjury, and recklessly endangering another person. The sentencing court imposed a period of incarceration and this timely appeal followed.

Poindexter first argues that the trial court erred in admitting photographs of the victim's body taken on the date of her death and during

² Oddly, Poindexter's statement of the case presents the facts verbatim from the investigating grand jury report. **See** Appellant's Brief, at 7-17. There was a trial in this case. The facts derive from the trial not from the grand jury's findings.

her autopsy. Poindexter maintains that the sole function of the photographs was to shock and outrage the jury. The photographs, however, are not in the certified record. How can we make findings about the discretion of the trial court of photographs not in the record? Of course, we cannot.

“[I]t is an appellant’s duty to ensure that the certified record is complete for purposes of review.” **Commonwealth v. Lopez**, 57 A.3d 74, 82 (Pa. Super. 2012) (citation omitted). An appellant’s “[f]ailure to ensure that the record provides sufficient information to conduct a meaningful review constitutes waiver of the issue sought to be reviewed.” **Id.** (citation omitted). Thus, this claim is waived.

Poindexter next alleges that the trial court erred in denying his motion *in limine* in which he sought to exclude his personnel file and the testimony of two witnesses. At trial, the Commonwealth made an offer of proof as to the two witnesses’ testimony. The witnesses would testify that Poindexter had neglected his responsibilities in other cases and that his failures had placed children at risk and he had been warned about his failure to investigate. Poindexter objected, arguing it constituted impermissible character evidence under Rule 404(b) of the Pennsylvania Rules of Evidence and that the evidence was irrelevant. **See** N.T., Trial, 7/7/11, at 4, 11.

We review a trial court’s decision to grant or deny a motion *in limine* with the same standard of review as admission of evidence at trial. With regard to the admission of evidence, we give the trial court broad discretion, and we will only reverse a trial court’s decision to admit or deny evidence on a showing that the trial court clearly abused its discretion. An abuse of

discretion is not merely an error in judgment, but an overriding misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence or the record.

Commonwealth v. Flamer, 53 A.3d 82, 86 (Pa. Super. 2012).

The trial court ruled that the testimony was admissible because it showed that Poindexter “was specifically warned of the potential danger his actions could have upon those cases he was assigned[.]” and that “[e]ach of these incidents demonstrated that defendant was aware of his duty to protect those to whom he was assigned to investigate claims of abuse.” Trial Court Opinion, 5/29/12, at 11. As such, the trial court found the evidence was relevant to the crimes charged.

The evidence was not offered to prove that on a particular occasion Poindexter acted in accordance with his bad character in violation of Rule 404(b)(1) of the Pennsylvania Rules of Evidence. ***See Commonwealth v. Hudson***, 955 A.2d 1031, 1034 (Pa. Super. 2008) (noting that it is impermissible to present evidence at trial of a defendant’s prior bad acts or crimes to establish the defendant’s criminal character or proclivities). The Commonwealth offered the evidence to prove Poindexter’s knowledge and intent—that Poindexter was specifically warned in the past that the failure to investigate claims of abuse could have dire consequences. This is a permissible use of evidence of past conduct. ***See*** Pa.R.E. 404(b)(2). Such evidence is directly relevant to proving the charges of reckless

endangerment and endangering the welfare of a child. **See** 18 Pa.C.S.A. § 2705 and § 4304(a)(1). We can discern no abuse of discretion in the denial of the motion *in limine*.³

Poindexter next argues that the Commonwealth presented insufficient evidence to sustain the convictions of recklessly endangering another person and endangering the welfare of a child. We disagree.

The standard we apply in reviewing the sufficiency of 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 that of 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. Finally, the trier of fact while passing upon the credibility of witnesses and

³ Poindexter also raises for the first time on appeal two additional reasons why the evidence should have been excluded. He contends that the introduction of this evidence violated his due process rights under the United States Constitution and that it “should have been excluded because the Personnel File and related testimony had of the appearance of findings of fact or conclusions of law that pose a serious risk to the fairness of the judicial process....” Appellant’s Brief, at 25. As Poindexter failed to present these reasons to the trial court, they cannot provide him relief on appeal. **See** Pa.R.A.P. 302(a). **See also Commonwealth v. Arroyo**, 723 A.2d 162, 170 (Pa. 1999) (“[I]f the ground upon which an objection is based is specifically stated, all other reasons for its exclusion are waived....”).

the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hesel, 53 A.3d 906, 917-918 (Pa. Super. 2012) (citation omitted).

The pertinent statutory definition of endangering the welfare of a child is: "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 he knowingly endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa.C.S.A. § 4304(a)(1). Here, Poindexter, as the assigned DHS caseworker, had a duty to investigate the claims of abuse and neglect. Poindexter failed to meet reporting deadlines and did not physically investigate the claims of abuse and neglect he received over a two-year period. During that period, the victim was subject to horrific abuse and neglect. Such evidence is sufficient to sustain the conviction of endangering the welfare of a child.

We next consider whether the Commonwealth presented sufficient evidence to sustain the conviction for recklessly endangering another person. "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.A. § 2705. "The mens rea required for this crime is a conscious disregard of a known risk of death or great bodily harm to another person." ***Commonwealth v. Cottam***, 616 A.2d 988, 1004 (Pa. Super. 1992) (citations omitted). Here, Poindexter received numerous reports of abuse and neglect over an extended time

period—and he did nothing. His behavior evidenced a conscious disregard of great bodily harm to the victim. As such, the evidence is sufficient to sustain the conviction.

Lastly, Poindexter argues that he is serving an illegal sentence as the sentencing court imposed fines and costs without determining his ability to pay. This issue is completely meritless.

The sentencing court did not impose fines in this case. **See** Order, 10/20/11 (expressly noting that the fines “amount” to “\$0.00”). The sentencing court did impose costs (\$688.94) and an award to the crime victims’ compensation fund (\$60.00). However, there is no mandate that the sentencing court determine the defendant’s ability to pay when imposing costs. **See** 18 P.S. § 11.1101.⁴

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambetta", written over a horizontal line.

Prothonotary

Date: 5/29/2013

⁴ In fact, “[t]he defendant's liability for costs is not part of the punishment for the offense, as it is not a sentence to pay something in addition to any penalty imposed by law.” 16B West’s Pa. Prac., Criminal Practice § 31:35 (citation omitted).

