NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. EDWARD JOSEPH MILLER, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1261 MDA 2012

Appeal from the Judgment of Sentence June 20, 2012
In the Court of Common Pleas of Schuylkill County
Criminal Division at No(s): CP-54-CR-0001750-2011
CP-54-CR-0001751-2011

BEFORE: MUNDY, OLSON and STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J.: Filed: March 12, 2013

Appellant, Edward Joseph Miller, Jr., appeals from the judgment of sentence entered on June 20, 2012. We affirm.

As the trial court ably explained, the underlying facts are as follows:

> [During Appellant's June 6, 2012] trial, the victim, [W.K.], testified that he had known [Appellant] since the beginning of 2011. [Both Appellant and W.K.] attended the same [Alcoholics Anonymous ("AA")] meetings[] and[,] after the meetings, [W.K. would] often [take Appellant to a restaurant] to eat. . . .
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> [On November 13, 2011, W.K.] was at an AA meeting [in the City of Pottsville, Pennsylvania]. . . . [Appellant] arrived at the end of the meeting and asked [W.K.] to take him [to a restaurant to get] something to eat. [W.K.] agreed, and they decided [to eat at] a Dunkin Donuts shop not far from the meeting place. There[, W.K.] bought [Appellant] a coffee and [a donut] roll, and they talked for 10 or 20 minutes.

*Retired Senior Judge assigned to the Superior Court.

[Appellant] then asked [W.K.] for a ride to his [AA] sponsor's house, and [W.K.] agreed to [drive Appellant] there. [During the drive, Appellant] told [W.K.] that he needed to stop at an ATM [machine] for money [] and directed [W.K.] to an ATM in a parking area beneath the second floor of an adjacent building. Thinking that [Appellant] would have to approach the ATM on foot, [W.K.] drove a little beyond the ATM and stopped his car. Almost immediately, [Appellant] grabbed [W.K.] around the neck with his left hand and held a sharp object to [W.K.'s] neck with [his] right hand. [Appellant] said, "[t]his is what's going down." [W.K.] asked [Appellant] if he wanted money, and [Appellant] replied affirmatively.

Panicking, [W.K.] pushed his vehicle's [OnStar] button and bumped the gear shift into neutral. The vehicle had been stopped on an incline and began rolling backward. As [the vehicle] got to the sidewalk, [W.K.] unbuckled his seatbelt and jumped out onto the ground. He began yelling for help and waving his arms. . . . [Appellant] then moved to the driver's seat [of W.K.'s vehicle] and drove [away in W.K.'s] car. . . . A vehicle . . . with the Setlock family inside [saw W.K. waving his arms on the street and saw Appellant drive by in another vehicle]. . . .

[Thinking that the vehicle had just hit W.K., and observing that W.K. was not in need of immediate medical aid, t]he Setlocks followed [Appellant] through the city streets[and] observed [Appellant drive] through several stop signs and a red light without stopping. [Mr. Setlock] stopped [his vehicle] at the [red] light to avoid endangering his family and lost sight of [Appellant]. [Mr. Setlock then turned his vehicle around and went back to help W.K.]. . . .

[The police later found W.K.'s] vehicle . . . in a parking lot a short distance from where [Mr.] Setlock lost sight of [Appellant].

[W.K.] was taken to the hospital [and] treated for a knee injury [that] he received when he jumped from his vehicle. [W.K.] also had a small cut on his throat. A pair of scissors was found on the console of [W.K.'s] vehicle.

> [Appellant] was eventually apprehended in another county. Captain [Wojciechowsky] and Detective Guers of the Pottsville Police department were dispatched to bring [Appellant] back [to Pottsville, Pennsylvania]. As they got in sight of the Schuylkill County Prison, [Appellant] kicked out the police car window. When the vehicle stopped, [Appellant] dove out [of the] window and began to run. [However, since Appellant] was shackled, [Appellant] fell and was quickly retrieved by the officers.

Trial Court Opinion, 9/7/12, at 2-3.

With respect to the incident involving W.K., Appellant was charged with robbery, robbery of a motor vehicle, aggravated assault, theft by unlawful taking, receiving stolen property, and simple assault.[1] Appellant was also charged with escape, institutional vandalism, and criminal mischief, for the actions he undertook while in custody.[2]

Following a consolidated jury trial, Appellant was found not guilty of robbery, robbery of a motor vehicle, aggravated assault, and theft by unlawful taking. The jury, however, found Appellant guilty of receiving stolen property, simple assault, escape, institutional vandalism, and criminal mischief.

As the trial court explained,

> After a presentence investigation, [Appellant] was sentenced on June 20, 2012 to [three to six years in prison] for receiving stolen property, [one to two years in prison]

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[1] 18 Pa.C.S.A. §§ 3701(a)(1)(ii), 3702(a), 2702(a)(1), 3921(a), 3925(a), and 2701(a)(1), respectively.

[2] 18 Pa.C.S.A. §§ 5121(a), 3307(a)(3), and 3304(a)(5), respectively.

> for simple assault, [three to six years in prison] for escape, and [six months to one year in prison] for institutional vandalism, all to be served consecutively to [one another] for a total sentence of [seven-and-a-half to 15 years in prison].

Trial Court Opinion, 9/7/12, at 1. Appellant filed a timely notice of appeal and now raises the following claims to this Court:[3]

> 1. Whether the evidence introduced at trial was sufficient to sustain a conviction for receiving stolen property?
>
> 2. Whether the [trial] court abused its discretion by imposing a sentence that was unduly harsh?

Appellant's Brief at 6.

Appellant first claims that the evidence was insufficient to support his receiving stolen property conviction. This claim fails.

We review Appellant's sufficiency claim under the following standard:

> 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.

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[3] The trial court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant complied and listed the two claims he currently raises on appeal.

> 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. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001) (internal citations, quotations, and corrections omitted), *quoting* ***Commonwealth v. Hennigan***, 753 A.2d 245, 253 (Pa. Super. 2000).

Appellant's sufficiency claim contains two subparts. First, Appellant contends that his acquittal on the theft by unlawful taking charge rendered the evidence insufficient to support his receiving stolen property conviction. Second, Appellant claims that there was no evidence he "inten[ded] to deprive the owner of his property." Appellant's Brief at 9. Both claims fail.

As we have explained, it is well-established that

> Consistency in verdicts in criminal cases is not necessary. When an acquittal on one count in an indictment is inconsistent with a conviction on a second count, the court looks upon the acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity. The rule that inconsistent verdicts do not constitute reversible error applies even where the acquitted offense is a lesser included offense of the charge for which a defendant is found guilty.

Commonwealth v. DeLong, 879 A.2d 234, 238 (Pa. Super. 2005) (internal corrections omitted), *quoting* ***Commonwealth v. Petteway***, 847 A.2d 713, 718 (Pa. Super. 2004); ***see also United States v. Powell***, 469 U.S. 57

(1984) ("a criminal defendant convicted by a jury on one count [cannot] attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count"); ***Commonwealth v. Carter***, 282 A.2d 375, 376 (Pa. 1971) ("[a]n acquittal cannot be interpreted as a specific finding in relation to some of the evidence. As in other cases of this kind, the court looks upon this acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity") (internal quotations and citations omitted).

Our Supreme Court has held that the above rule – tolerating inconsistent verdicts – is subject to a limited exception. This exception is, however, only applicable where the criminal statute specifically "set[s] forth or require[s] the **commission** [of a listed] predicate offense as an **element**" of the crime. ***Commonwealth v. Miller***, 35 A.3d 1206, 1212 (Pa. 2012) (emphasis added); ***Commonwealth v. Magliocco***, 883 A.2d 479, 493 (Pa. 2005) (evidence was insufficient to support "ethnic intimidation" conviction where defendant was acquitted of the "predicate offense" of terroristic threats; holding was necessitated because of the fact that the "ethnic intimidation" statute "require[d] as a[statutory] element the commission beyond a reasonable doubt of the [predicate] offense"); ***see also Miller***, 35 A.3d at 1212 (***Magliocco*** holding was required because "the **commission** of the predicate offense [was made an] **element** of ethnic intimidation") (emphasis in original).

Here, Appellant was convicted of receiving stolen property, as defined by 18 Pa.C.S.A. § 3925. This statute provides:

> (a) Offense defined.--A person is guilty of theft if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.
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> (b) Definition.--As used in this section the word "receiving" means acquiring possession, control or title, or lending on the security of property.

18 Pa.C.S.A. § 3925.

Theft by unlawful taking or disposition is defined as:

> (a) Movable property.--A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.

18 Pa.C.S.A. § 3921(a).

To convict an individual of receiving stolen property, "the Commonwealth must prove [that] the [property was] actually stolen." ***Commonwealth v. Stafford***, 623 A.2d 838, 840 (Pa. Super. 1993) (*en banc*), *affirmed*, 652 A.2d 297 (Pa. 1995). However, as the plain language of the statute makes clear, the crime of receiving stolen property does **not** require that the Commonwealth prove the defendant committed a theft by unlawful taking. Instead, the crime requires only that the Commonwealth prove: "(a) that the [property is] stolen; (b) that the defendant received [the stolen property]; and (c) that [the defendant received the stolen

property] knowing, or having reasonable cause to know that [it was] stolen." ***Stafford***, 623 A.2d at 840 (internal quotations and citations omitted).

Therefore, since "to convict an accused of [receiving stolen property], the Commonwealth is not required to prove that the accused actually committed" a theft by unlawful taking, the jury was permitted to convict Appellant of receiving stolen property and, at the same time, acquit Appellant of theft by unlawful taking. ***Miller***, 35 A.3d at 1212 (emphasis omitted). In this case, even if one could view the jury's verdict as "inconsistent," it would be pure speculation to interpret an "acquittal [of one crime] . . . as a specific finding in relation to some of the evidence." ***Carter***, 282 A.2d at 376.

Appellant also claims that the evidence was insufficient to support his receiving stolen property conviction because the Commonwealth failed to prove he intended to deprive W.K. of the vehicle. Appellant argues:

> The evidence clearly showed that [W.K.] vacated/abandoned his vehicle at a time when it was in neutral and rolling toward a city street. . . . The uncontroverted fact that [Appellant] took control of the vehicle and moved it to a nearby location, parked it[,] and left it unlocked with the keys inside so that it could be retrieved, indicates no intent to deprive the owner of his property.

Appellant's Brief at 9.

Clearly, Appellant's argument is contingent upon this Court viewing the evidence in a light most favorable to him. This we will not do. Rather, as explained above, our standard of review requires that we view the evidence

"in the light most favorable to the Commonwealth, as the verdict winner, and [] draw all reasonable inferences in favor of the Commonwealth." ***Commonwealth v. Brown***, 52 A.3d 1139, 1164 (Pa. 2012) (internal quotations and citations omitted).

Viewed in the proper light, the evidence does not support Appellant's self-serving version of the events. Instead, the evidence establishes that Appellant placed a sharp object to W.K.'s neck, forced W.K. out of W.K.'s own vehicle, drove away in W.K.'s vehicle, and then attempted to avoid capture by driving through stop signs and red lights. N.T. Trial, 6/6/12, at 29, 33, 37, and 67-68. This evidence was clearly sufficient to support Appellant's conviction for receiving stolen property, as it establishes "(a) that the [property was] stolen; (b) that [Appellant] received [the stolen property]; and (c) that [Appellant received the stolen property] knowing, or having reasonable cause to know that [it was] stolen." ***Stafford***, 623 A.2d at 840 (internal quotations and citations omitted). Appellant's sufficiency of the evidence claim thus fails.

For Appellant's final claim on appeal, Appellant contends that the trial court "abused its discretion by imposing a sentence that was unduly harsh." Appellant's Brief at 6. This claim was never raised before the trial court. Therefore, the claim is waived.

Appellant's challenge is to the discretionary aspects of his sentence. We note that "sentencing is a matter vested in the sound discretion of the

sentencing judge, whose judgment will not be disturbed absent an abuse of discretion." ***Commonwealth v. Ritchey***, 779 A.2d 1183, 1185 (Pa. Super. 2001). Moreover, pursuant to statute, Appellant does not have an automatic right to appeal the discretionary aspects of his sentence. ***See*** 42 Pa.C.S.A. § 9781(b). Instead, Appellant must petition this Court for permission to appeal the discretionary aspects of his sentence. ***Id.***

As this Court has explained:

> [t]o reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 [Pa.C.S.A.] § 9781(b).

Commonwealth v. Cook, 941 A.2d 7, 11 (Pa. Super. 2007).

Here, Appellant failed to raise his discretionary aspects of sentencing claim either at sentencing or in a post-sentence motion. As such, Appellant's current claim is waived. Pa.R.Crim.P. 720; Pa.R.A.P. 302(a) ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal").

Judgment of sentence affirmed.