J. S60007/13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
AKANINYENE EFIONG AKAN,	:	No. 1284 WDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, June 26, 2012,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0001844-2011

BEFORE: FORD ELLIOTT, P.J.E., WECHT AND STRASSBURGER,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.:**FILED NOVEMBER 25, 2013**

This is an appeal from the judgment of sentence entered on June 26, 2012. Following a jury trial, appellant was convicted of burglary, two counts of rape by forcible compulsion, four counts of involuntary deviate sexual intercourse ("IDSI") by forcible compulsion, sexual assault, indecent assault, terroristic threats, unlawful restraint, and simple assault.[1] Appellant was sentenced to four consecutive terms of imprisonment of 8 to 20 years for an aggregate sentence of 32 to 80 years. Timely post-sentence motions were filed and denied. After careful review, we affirm.

The trial court summarized the evidence as follows:

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 3502(c); 3121(a)(1); 3123(a)(1); 3124.1; 3126(a)(1); 2706(a)(1); 2902(a)(1); and 2701(a)(3), respectively.

> At trial, the evidence presented established that in the evening hours of September 11, [2010], University of Pittsburgh student ["the victim"] left her off-campus house at [redacted] in the Oakland section of the City of Pittsburgh to attend a party for the University's lacrosse team. When she returned to her house, she chatted with a friend on Facebook and fell asleep in her clothes with her laptop open. At approximately 5 a.m., she was awakened by the sound of footsteps on the stairs. She saw a man in the hallway, whom she described as short, approximately 5'7" to 5'8", muscular build, wearing dark clothing and a ski cap, and later identified as the Defendant. The Defendant came into her room, shut and locked her door and closed her laptop. One of [the victim's] housemates, [K.] heard the footsteps as well and called out to [her]. By this time, the Defendant had put his arms around her neck, indicated that he had a knife and hydrochloric acid and threatened to kill her if she didn't do as he said. [The victim] replied to [her housemate, K.,] that she was fine and had just gone downstairs to get a glass of water. [The housemate] accepted this and went back into her room and went to sleep.
>
> Over the next two hours, the Defendant forced [the victim] to perform oral sex on him and raped her vaginally and anally multiple times. Throughout the attack, [the victim] heard several ripping sounds, which she determined were condom wrappers. When she resisted his sexual assaults, the Defendant continually threatened to kill or hurt her if she didn't comply. At approximately 7 a.m., the Defendant asked what she wanted and [the victim] said she wanted to go to sleep. The Defendant again threatened her, saying he would come back and kill her and her family. He spit in her mouth to indicate that what happened was a pact between them, then left the house. [The victim] remained in her bed, crying and unable to move, for some time. When she heard [her housemate] in the bathroom, she went and told her what had happened. Against [her housemate's] advice, [the victim] showered, and then the girls and their third housemate, [L.], went

> to [K.'s] parent['s] house, where [they] called her parents and the police. As they left the house, they noticed the living room window was open, when it had been closed the previous evening.
>
> Approximately one week later, University of Pittsburgh Police stopped the Defendant on Bates Street in Oakland as a suspicious person. Pittsburgh Police Detective Rufus Jones was called to the scene and engaged the Defendant in conversation. During this conversation, the Defendant asked for, and was given, a cigarette. The Defendant smoked the cigarette and dropped it on the ground before leaving his encounter with the police. Detective Jones bagged the cigarette and reported the incident to his commanding officer. Several weeks later, Detective Jones was asked to turn the cigarette over to Detective Boss, which he did. DNA testing on saliva taken from the cigarette matched a saliva sample found on the panties [the victim] wore during the rapes. Eventually, the Defendant's fingerprints were matched to latent prints taken from the open window at [the victim's] house. It was later discovered that the Defendant had accompanied [the victim's] housemate, [K.], home from a bar the previous evening, but [K.] was incoherently drunk and [she] made the Defendant leave. Friends of the girls, [J.] and [N.], were present when the Defendant entered the house with [K.], and both said that the Defendant did not touch the window at any time.

Trial court opinion, 1/23/12 at 4-5.

On appeal, appellant raises four issues:

1. Is Defendant's sentence excessive?

2. Were Defendant's rights violated by the consideration of remorse at sentencing?

3. Was the evidence offered by the Commonwealth of the various sexual acts

> sufficient to support Defendant's convictions on each count?
>
> 4. Was the conviction against the weight of the evidence?

Appellant's brief at 7.

We begin by addressing appellant's argument regarding the sufficiency of the evidence.

> When reviewing challenges to the sufficiency of the evidence, we evaluate the record in the light most favorable to the Commonwealth as the verdict winner, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. ***Commonwealth v. Duncan***, 932 A.2d 226, 231 (Pa.Super. 2007) (citation omitted). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." ***Id.*** (quoting ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa.Super. 2005), ***appeal denied***, 585 Pa. 685, 887, A.2d 1239 (2005). However, the Commonwealth need not establish guilt to a mathematical certainty, and it may sustain its burden by means of wholly circumstantial evidence. ***Id.*** Moreover, this Court may not substitute its judgment for that of the factfinder, and where the record contains support for the convictions, they may not be disturbed. ***Id.*** Lastly, we note that the finder of fact is free to believe some, all, or none of the evidence presented. ***Commonwealth v. Hartle***, 894 A.2d 800, 804 (Pa.Super. 2006).

Commonwealth v. Yasipour, 957 A.2d 734, 745 (Pa.Super. 2008), ***appeal denied***, 602 Pa. 658, 980 A.2d 111 (2009).

The evidence is sufficient to sustain a conviction for rape by threat of forcible compulsion if the Commonwealth proves that: (1) sexual

intercourse occurred; (2) the victim was compelled in the act precluding consent; and (3) the sexual intercourse was compelled by threat of forcible compulsion. ***Commonwealth v. Rhodes***, 510 Pa. 537, 555-556, 510 A.2d 1217, 1226-1227 (1986). When sustaining a conviction for rape by threat of forcible compulsion, ". . . the victim's testimony as to her fear and appellant's forceful treatment of her demonstrate sufficient lack of consent to sustain the verdict." ***Commonwealth v. Rough***, 418 A.2d 605, 608 (Pa.Super. 1980). "The uncorroborated testimony of the complaining witness is sufficient to convict a defendant of sexual offenses." ***Commonwealth v. Castelhun***, 889 A.2d 1228, 1232 (Pa.Super. 2005) (citations omitted); ***see also Commonwealth v. Davis***, 650 A.2d 452, 455 (Pa.Super. 1994) (the victim's uncorroborated testimony, if believed by the trier of fact, is sufficient to support the conviction even if the defense presents countervailing evidence), ***affirmed on other grounds***, 543 Pa. 628, 674 A.2d 214 (1996).

The elements for the crime of IDSI are set forth in Section 3123 of the Crimes Code, which provides, in pertinent part:

> **(a) Offense defined.**--A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:
>
> (1) by forcible compulsion;
>
> (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution[.]

18 Pa.C.S.A. § 3123(a)(1), (2).

"Deviate sexual intercourse" is defined as: "Sexual intercourse per os or per anus between human beings . . . . The term also includes penetration, however slight." 18 Pa.C.S.A. § 3101. Sexual assault occurs when a person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent. 18 Pa.C.S.A. § 3124.1.

Appellant argues the evidence presented at trial was not sufficient to support the various sexual assault convictions. In his one-page argument, appellant claims the jury should have accepted the victim's initial statement to the investigating detective in which she recounted five sex acts instead of her trial testimony where she described eight acts, four separate acts of IDSI (two oral sex and two anal sex) along with four acts of vaginal intercourse. (Appellant's brief at 24.) Appellant also claims no evidence was offered to support his sexual assault conviction. (***Id.***)

Viewing the evidence in the light most favorable to the Commonwealth, the evidence overwhelmingly established that four acts of vaginal rape were performed by forcible compulsion or threat of forcible compulsion, that four acts of IDSI were performed by forcible compulsion or

threat of forcible compulsion, and that a sexual assault occurred without the victim's consent.[2]

We will not repeat the graphic details of this matter as was testified to by the victim. (***See*** notes of testimony, 3/27/12, Vol. 1, at 64-75.) Suffice it to say, her testimony was believed by the jury. Our case law holds that a victim's uncorroborated testimony, if believed by the jury, is sufficient to support a rape conviction and no medical testimony is needed to corroborate her testimony. ***See Commonwealth v. Poindexter***, 646 A.2d 1211, 1214 (Pa.Super. 1994), ***appeal denied***, 540 Pa. 580, 655 A.2d 512 (1995) (citing cases). Nonetheless, the Commonwealth presented physical evidence that proved beyond a reasonable doubt that appellant was the victim's assailant.

Even though the victim showered before going to the hospital, her examination there revealed she had redness around her rectum and a small abrasion less than dime sized at her rectal site. These injuries were consistent with that of a sexual assault. When the sexual assault kit that was performed on the victim was analyzed, one vaginal vault sample tested positive for the presence of saliva. One oral sample had a weak positive result of prostate specific antigen. The victim's underwear tested positive for the presence of saliva. DNA testing revealed that a portion of the interior

[2] The sexual assault occurred during the one instance of vaginal intercourse where appellant did not overtly threaten the victim. He guided the victim to the floor, told her to get on all fours, and had sexual intercourse with her without her consent. (Notes of testimony, 3/27/12, Vol. 1, at 70-71, 111-112.)

crotch area of the victim's underpants had a mixture of DNA, and appellant could not be excluded as a contributor; it was a match of 1 in 18 million African Americans. Further molecular testing interpreted that a match between the minor DNA contributor on the crotch and appellant was 1.35 quadrillion times more probable than a coincidental match to an unrelated person.

In addition to the above evidence, five fingerprints were lifted from the window at the victim's house and one from a screen. The fingerprints were compared to the known prints of appellant, and four from the window and one from the screen were positively identified as appellant's fingerprints. Based on all of the foregoing physical evidence along with the victim's testimony, appellant's challenge to the sufficiency of the evidence is meritless.

Next, appellant avers the verdicts were against the weight of the evidence. Appellant argues based on the victim's testimony that she endured eight sexual acts over a roughly two-hour period, that she should have had more injuries than those observed during her forensic examination. Initially, while appellant filed a post-sentence motion in which he challenged the weight of the evidence, our review of appellant's Rule 1925(b) statement suggests that appellant failed to raise this specific challenge. Failure to include in a Rule 1925(b) statement an issue argued on appeal in one's brief will result in waiver of the issue. ***Commonwealth v.***

Deck, 954 A.2d 603, 610 (Pa.Super. 2008), ***appeal denied***, 600 Pa. 738, 964 A.2d 1 (2009). As such, we conclude that this aspect of appellant's weight of the evidence challenge is waived.

We observe the trial court addressed appellant's weight claims that were preserved in his Rule 1925(b) statement. (***See*** trial court opinion, 1/23/12 at 7-8.) Nothing indicates the trial court acted manifestly unreasonably, failed to apply the law, or ruled out of partiality, prejudice, bias, or ill will in denying appellant's challenge to the weight of the evidence. Additionally, it was within the province of the jury as fact-finder to reconcile inconsistent testimony, and to believe all, part, or none of the evidence, assigning to it whatever weight it deemed appropriate. ***Commonwealth v. Manchas***, 633 A.2d 618, 624 (Pa.Super. 1993), ***appeal denied***, 539 Pa. 647, 651 A.2d 535 (1994).

Last, appellant argues his sentence is manifestly excessive and too severe "in light of his potential for rehabilitation and lack of a prior record." (Appellant's brief at 11.) Additionally, in relation to his sentence, appellant faults the trial court for drawing an "adverse inference from a perceived lack of remorse" and claims it violated his privilege against self-incrimination. (***Id.*** at 18-22.)

Appellant is challenging the discretionary aspects of sentencing for which there is no automatic right to appeal. ***Commonwealth v. Koren***, 646 A.2d 1205, 1207 (Pa.Super. 1994).

> Where an appellant challenges the discretionary aspects of a sentence, as in the instant case, there is no automatic right to appeal and an appellant's appeal should be considered a petition for allowance of appeal. ***Commonwealth v. Ritchey***, 779 A.2d 1183, 1185 (Pa.Super. 2001). Before a challenge to a judgment of sentence will be heard on the merits, an appellant first must set forth in his or her brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of his or her sentence. ***Id.***; Pa.R.A.P. 2119(f). . . .
>
> An appellant also must show that there is a substantial question as to whether the imposed sentence was inappropriate under the Sentencing Code. ***See Ritchey***, 779 A.2d at 1185; 42 Pa.C.S.A. § 9781(b). Whether an issue raises a substantial question is a determination that must be made on a case-by-case basis; however, in order to establish a substantial question, the appellant generally must establish that the sentencing court's actions either were inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process. ***Ritchey***, 779 A.2d at 1185.

Commonwealth v. Curran, 932 A.2d 103, 105 (Pa.Super. 2007).

Appellant's brief does contain the requisite concise statement of reasons for allowance of appeal, and appellant's post-trial motion and statement pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., adequately preserved the issues presented here.

Appellant's argument can be broken into two parts: one, the sentence was manifestly excessive; and two, the sentence was excessive considering his background and potential for rehabilitation, ***i.e.***, mitigating factors. Turning first to appellant's second argument, this court has long held that an

argument that the trial court failed to adequately consider mitigating factors does not raise a substantial question. ***Commonwealth v. Dunphy***, 20 A.3d 1215, 1222 (Pa.Super. 2011); ***Commonwealth v. Ratushny***, 17 A.3d 1269, 1273 (Pa.Super. 2011). We need not address this contention.

However, appellant's claim that his sentence was manifestly excessive does raise a substantial question. ***See Commonwealth v. Titus***, 816 A.2d 251, 255 (Pa.Super. 2003) (this court must review each excessiveness claim on a case-by-case basis when the sentence imposed is within the statutory limits).

Our scope of review is well established. "Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." ***Commonwealth v. Johnson***, 666 A.2d 690, 693 (Pa.Super. 1995). Instantly, the trial court sentenced appellant outside the aggravated range of the guidelines but within the statutory limits. A sentencing court is permitted to impose a sentence outside the guidelines when it sets forth valid reasons on the record. ***Commonwealth v. Holiday***, 954 A.2d 6, 11 (Pa.Super. 2008).

In ***Commonwealth v. P.L.S.***, 894 A.2d 120, 129-130 (Pa.Super. 2006), ***appeal denied***, 588 Pa. 780, 906 A.2d 542 (2006), this court stated:

> [I]n exercising its discretion, the sentencing court may deviate from the

> guidelines, if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offenses as it relates to the impact on the life of the victim and the community, so long as he also states of record the factual basis and specific reasons which compelled him to deviate from the guideline range. The sentencing guidelines are merely advisory and the sentencing court may sentence a defendant outside of the guidelines so long as it places its reasons for the deviation on the record.

Commonwealth v. Cunningham, 805 A.2d 566, 575 (Pa.Super.2002) (citation omitted). The legislature has provided that an appellate court shall vacate a sentence and remand to the sentencing court if "the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable." 42 Pa.C.S. § 9781(c)(3). That section also mandates that "in all other cases the appellate court shall affirm the sentence imposed by the sentencing court." 42 Pa.C.S. § 9781(c). The factors that should be weighed when we review a sentence include:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
>
> (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
>
> (3) The findings upon which the sentence was based.
>
> (4) The guidelines promulgated by the commission.

42 Pa.C.S.A. § 9781(d).

Furthermore, according to 42 Pa.C.S.A. § 9781(c)(3), the focus of appellate review concerning a sentence outside the guidelines is whether the sentence is unreasonable.

Instantly, prior to sentencing, the trial court reviewed appellant's sentencing memorandum and his pre-sentence report. Where a trial court has the benefit of a pre-sentence report, it is presumed the court is aware of all appropriate sentencing factors and considerations, and where the court has been so informed, its discretion should not be disturbed. ***Commonwealth v. Ventura***, 975 A.2d 1128, 1135 (Pa.Super. 2009), ***appeal denied***, 604 Pa. 706, 987 A.2d 161 (2009). Despite appellant's claims that the trial court failed to consider mitigating factors such as his lack of a criminal record, it is presumed the trial court was aware of such factors.[3] Additionally, appellant addressed the court where he repeated facts, such as, his age, his lack of a criminal record, his work history, etc. Appellant further stated:

> And I am a positive and productive person outside of these allegations. I am proud of that about myself. If you choose to believe all the actions attributable to me, please, Your Honor, realize these actions are not reflective of the content of my character, what I want for my life, how I relate to women and people.
>
> I am a Christian first. And my faith defines me, guides me. Although I am far from a perfect person, I would never intentionally seek the hurt of another

[3] We note that a ppellant's lack of a criminal record would be included in his prior record score.

> person. I have a respect for the boundaries of persons and property that governs how I relate to people. Since my arrest on December 9, 2010 my personal, professional and financial losses have been absolute and far reaching. They have been very far reaching. There are people who I love, admire and respect who are too scared, cautious and confused and don't want anything to do with me because of the circumstances I am going through. For me, that is extremely heartbreaking. These are the people I love and people I consider my family for as long as I have been in the United States.

Notes of testimony, 6/26/12 at 6-7.

The victim testified concerning the impact this brutal crime had on her life along with her mother who spoke regarding the impact appellant's crime had on her daughter's life. (***Id.*** at 8-20.) The trial court made the following statement:

> THE COURT: All right. Mr. Akan, clearly I don't have to address the issue of remorse because you have none in this case. You have led an otherwise conviction-free life, which amounts to something. However, the seriousness of the crimes and the impact you had on [redacted] is far outweighed by the good things you believe to have been done.
>
> Your crime was stupid. It was senseless. It was violent. It was just out and out mean. And I think of all of the things you did that were demoralizing to [the victim], the worst was spitting in her mouth. That is just the way you think people are and should be treated and you have no right to feel that way about another human being.

Id. at 21-22.

Regarding appellant's contention that the trial court drew an adverse inference from a perceived lack of remorse on his part, the trial court explained:

> To the extent that the Defendant has identified remorse as its own appellate issue, a defendant's remorse (or lack thereof) is one of the many factors considered at sentencing, such as the gravity of the offense, the defendant's rehabilitative potential, etc. [] To that end, any discussion of the Defendant's lack of remorse is not properly considered on its own, but rather is more appropriate under the general claim of the excessiveness of the sentence. It bears mention that the Defendant carried on with facial expressions and gestures to such an extent that this Court had to physically shield the victim and her family following the verdict.

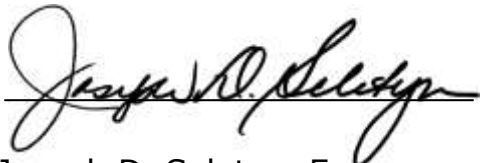
Trial court opinion, 1/23/13 at 9, footnote 13.

Clearly, our review of this record indicates the trial court witnessed appellant throughout the proceedings, properly considered the nature and circumstances of the offenses he committed, the impact of the offenses on the victim and her family, the protection of the public, and the history, characteristics, and rehabilitative needs of appellant when imposing sentence. The trial court placed greater weight on the fact appellant terrorized the victim, breaking into her residence and repeatedly raping and sodomizing her and the effect that crime had on other students who live in

that community.[4] We find no abuse of discretion in the trial court's sentencing appellant outside the guidelines.

Accordingly, having found no merit to the issues raised on appeal, we affirm the judgment of sentence.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013

[4] We are aware appellant lists sentences of other defendants in what he considers similar cases. (Appellant's brief at 13-15.) That is irrelevant here as he received an individualized sentence suited for his particular actions.