J-S17031-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
GEORGE E. CLARITT, JR.	:	
Appellant	:	No. 1354 WDA 2012

Appeal from the Judgment of Sentence Dated June 15, 2012,
in the Court of Common Pleas of Warren County,
Criminal Division, at No(s): CP-62-CR-0000390-2011.

BEFORE: BENDER, MUNDY, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: FILED: May 2, 2013

George E. Claritt, Jr. (Appellant) appeals from the judgment of sentence entered on June 15, 2012 following his convictions for aggravated assault, rape, involuntary deviate sexual intercourse by forcible compulsion (IDSI), terroristic threats, and indecent assault.[1] We affirm.

The trial court aptly summarized the relevant factual and procedural history of this case as follows.

> On September 17, 2011, Pennsylvania State Police Trooper Gary L. West was dispatched at 5:21 a.m. to a report of an assault. Upon arrival at the 5M [Feed Store] parking lot, Trooper West observed the Victim, K.D., "naked [and] wrapped in a blanket." [Victim] reported to Trooper West that she had been physically assaulted and raped in her home by a black male who was still in her home which was directly behind the parking lot. [Victim] was taken to Warren General Hospital by a friend, and Trooper West and his partner proceeded to [Victim's] home.

[1] 18 Pa.C.S §§ 2702(a)(1), 3121(a)(1), 3123(a)(1), 2706, and 3126(a)(2), respectively.

*Retired Senior Judge assigned to the Superior Court.

Upon entering the house, Trooper West observed various articles of women's clothing on the living room floor and went upstairs. Upon entry into an upstairs bedroom, Trooper West observed [Appellant] sleeping, naked, in a bed. Beside the bed a knife was laying on a night stand. Trooper West observed [Appellant] to be very heavily intoxicated as he was unable to awaken Appellant for a period of about thirty (30) minutes.

The testimony presented established that [Victim] was at Kelly's Pub earlier on the evening of September 16, 2011. Appellant was also present at Kelly's Pub that evening and befriended [Victim] at some point during the evening. [Victim] admitted to having a number of drinks at the bar on that evening. [Victim] and Appellant left Kelly's Pub at the same time. [Victim] stated that at some point in the evening, Appellant had made a sexual comment to her and she replied that she was not interested. [Victim] related that Appellant asked to follow her home to make sure that she arrived at home safely. Upon arriving at [Victim's] home, Appellant stood on [Victim's] porch while she smoked a cigarette. Appellant attempted to kiss [Victim] various times, but [Victim] rebuffed those advances. Appellant followed [Victim] into the home. Appellant asked if she had anything to drink, and Appellant then went into [Victim's] kitchen. When Appellant returned to the living room where [Victim] was sitting on a couch, Appellant brandished a knife from [Victim's] kitchen and stated "This is going to happen." [Victim's] testimony related that Appellant forced her to perform oral sex on him after pushing her to the floor. Appellant next pushed [Victim] to her back on the living room floor, held the knife to her throat, choked her almost to the point of unconsciousness twice, slapped her, and vaginally raped her. [Victim] testified that she was screaming during this period of time for Appellant to stop. Subsequently, Appellant forced [Victim] upstairs to her bedroom where he raped her vaginally and anally. Appellant passed out, and [Victim] fled her home with her cell phone, naked, wrapped in a blanket.

On October 18, 2011, [a criminal i]nformation was filed charging Appellant with [the aforementioned] criminal offenses[.]

* * *

> On March 13, 2012, the Commonwealth filed a [motion to amend information], which was granted by the [trial court]. An [amended information] was filed on the same date. The [amended information] did not alter the offenses charged, but did amend the "TO WIT" portions of [the aggravated assault and rape charges.]
>
> On March 15, 2012, after a jury trial, Appellant was found guilty of all counts charged at the [amended information]. On June 15, 2012, Appellant was sentenced by [the trial court] to stand committed to a State Correctional Institution for an aggregate period of incarceration for a minimum period of three hundred and one months (301) to a maximum period of six hundred and two months (602). On June 21, 2012, Appellant filed various post-sentence motions. Appellant filed a [motion for a new trial] and a [motion for reconsideration of sentence]. After oral argument, [trial court] denied Appellant's [post-sentence motions]. Appellant filed a [timely notice of appeal], and upon order of [the trial court], a [statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On November 2, 2012, the trial court filed its 1925(a) opinion.]

Trial Court Opinion, 11/2/2012, at 1-3 (internal citations and quotations omitted).

Appellant raises three issues for our review.

> 1. Is the evidence sufficient to convict [Appellant] on the charge of [IDSI] by forcible compulsion, when [Victim] testified repeatedly that he did not show her a knife beforehand or threaten her, and there is no other specific evidence of forcible compulsion?
>
> 2. Are the verdicts against the weight of the evidence such that a new trial is warranted, when [Victim] gave seriously contradictory testimony, the evidence suggest[s] that the sex was consensual, and there was no other direct evidence besides the complainant's testimony that implicated [Appellant]?
>
> 3. Did [the trial court] abuse [its] discretion in imposing consecutive sentences at the highest end of the standard range, when the offenses involved the same alleged victim over a very short time span, [Appellant] has no prior convictions for sex

> offenses, [Appellant] was found to not be a sexually violent predator, and due to [Appellant's] age the sentence may easily be for a life term?

Appellant's Brief at 7.

> 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. 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. Knox*,* 50 A.3d 749, 754 (Pa. Super. 2012) (quoting ***Commonwealth v. Brown****,* 23 A.3d 544, 559–60 (Pa. Super. 2011) (*en banc*)).

In his first argument, Appellant contends that the Commonwealth failed to prove the forcible compulsion element for the charge of IDSI. Appellant's Brief at 8-9.

With respect to the crime of IDSI, the Crimes Code provides, in relevant part, that "[a] person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant: (1) by

forcible compulsion[.]" 18 Pa.C.S. § 3123(a)(1). The forcible compulsion is defined as "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa.C.S. § 3101 (in pertinent part).

Appellant argues that because the testimony of the victim failed to establish the specific forcible compulsion contained in the criminal information, that Appellant threatened her with a knife if she did not comply with engaging in oral sex, he is entitled to a new trial. Appellant's Brief at 8. We note that "[t]he purpose of the [criminal information] is to provide the accused with sufficient notice to prepare a defense. A variance is not fatal unless it could mislead the defendant at trial, impairs a substantial right or involves an element of surprise that would prejudice the defendant's efforts to prepare his defense." ***Commonwealth v. Einhorn***, 911 A.2d 960, 978 (Pa. Super. 2006). Here, Appellant was charged with IDSI by forcible compulsion and, as discussed ***infra***, facts were presented to support this charge. That Victim's testimony may have varied from the description of events charged in the criminal information is immaterial as Appellant was always on notice that he was being charged with IDSI by forcible compulsion. Thus, we discern no prejudice to Appellant's ability to prepare a defense to that charge, particularly in light of the fact that his unwavering stance, both before and after trial, was that the sexual encounter with Victim was consensual.

Additionally, Appellant claims that not only was a knife not employed, but no other evidence of force was presented to support Appellant's IDSI conviction. We disagree.

On direct examination, Victim testified as follows.

Q: What did [Appellant] do after [entering your home]?

A: He walked into my kitchen and came back with, he came back in, as I saw then, empty-handed.

Q: Okay.

A: I did not see the knife at that time.

Q: And you were still located on the couch?

A: Yes.

Q: What happened after that?

A: He showed the knife and said, This is going to happen.

Q: He said, This is going to happen?

A: Yes.

* * *

Q: Now you just got done testifying that [Appellant] said, This is going to happen?

A: Yes.

Q: What was [Appellant] referring to? What was that about?

A: Sex

Q: Now, define the, when did you first see the knife?

A: That I remember was when I was on the floor, on my back [while Appellant was vaginally raping Victim.]

> Q: Okay. But, when he said, This is going to happen, he was referring [to] having sex with you?
>
> A: Oral sex.
>
> * * *
>
> A: He made me kneel down in front of him and perform oral sex.
>
> Q: Okay. So --
>
> A: While he was on the couch.
>
> Q: Okay. That's the couch that we have already [*sic*] as depicted in [Commonwealth Exhibit 6]?
>
> A: Yes.
>
> Q: How did he make you kneel on the floor?
>
> A: Pushed me.
>
> Q: Pushed you?
>
> A: Yes.

N.T., 3/15/2012, at 88.

Later on cross-examination, Victim reiterated that Appellant "pushed [her] down between his leg [*sic*] and ripped [her] shirt off" before forcing her to perform oral sex on him. ***Id.*** at 135. Victim testified that she tried to get away. ***Id.*** at 135. Additionally, Victim testified that she was verbally protesting Appellant's assault, repeatedly yelling "no". ***Id.*** at 88-89. Appellant eventually backhanded Victim across the face "because she wouldn't be quiet." ***Id.***

Forcible compulsion encompasses a lack of consent, although it has been interpreted as requiring something more. ***Commonwealth v. Buffington***, 828 A.2d 1024, 1031 (Pa. 2003) (citation omitted). Victim's testimony is sufficient to establish a showing of forcible compulsion. Victim had brushed off Appellant's sexual advances earlier in the night. When they arrived at her home, Appellant told her unequivocally that sex was going to occur and then pushed Victim to her knees in front of him, ripping her shirt. Victim testified that she resisted the advancements, physically and verbally, but eventually complied. Based on the totality of the circumstances, we find such evidence is sufficient to establish forcible compulsion. ***See Commonwealth v. Garaffa***, 656 A.2d 133 (Pa. Super. 1995) (finding sufficient facts to support forcible compulsion where victim voluntarily accompanied the defendant to his hotel room and, while there, defendant pushed victim onto the bed and sexually assaulted her, frightening victim who began to cry and ask him to stop, but did not push defendant away).

In his second claim, Appellant argues that his convictions are against the weight of the evidence.[2] Appellant argues that Victim's testimony was not credible because of inconsistencies between her statements to police officers and her testimony at trial. Appellant's Brief at 10. In particular, Appellant contends that Victim's testimony that she was afraid of Appellant is belied by her decision to allow him into her home. ***Id.*** He also highlights

[2] Appellant properly preserved this claim by raising it before the trial court in his June 21, 2012 post-sentence motions. ***See*** Pa.R.Crim.P. 607.

her uncertainty regarding when during the sexual assault Appellant produced a knife. ***Id.*** Appellant also contends that there is no physical evidence to support Victim's allegations of sexual assault. ***Id.*** Finally, he alleges that Victim fabricated her claims to cover up the fact that she stole money from Appellant following their consensual sexual encounter. Thus, as she had motive to lie and her testimony was inconsistent, the verdict was against the weight of the evidence and he is therefore entitled to a new trial. ***Id*.** We disagree.

Our scrutiny of whether a verdict is against the weight of the evidence is governed by the following principles.

> 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 lower court's 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. Serrano, 61 A.3d 279, 289 (Pa. Super. 2013) (quoting ***Commonwealth v. Champney****,* 832 A.2d 403 (Pa. 2003) (citations omitted)). "The testimony of a sexual assault victim standing alone is sufficient weight to support a conviction. . . . Furthermore, since issues of credibility are left to the trier of fact, the trial court, sitting as fact finder, [is] free to accept all, part, or none of a witness's testimony." ***Commonwealth***

v. Strutt, 624 A.2d 162, 164 (Pa. Super. 1993) (citations and internal quotations omitted).

Here, the jury as fact finder did not find any of the variations in the victim's testimony to affect her credibility, nor did it find credible Appellant's testimony that the sexual encounter with Victim was consensual. The trial court did not find that verdict was so contrary to the evidence as to shock its sense of justice, and upon careful review of the record, we do not find any abuse of discretion in that determination.

In his final question, Appellant claims that the trial court abused its discretion in imposing consecutive sentences at the high end of the standard sentencing guideline range. Appellant's Brief at 12. Such a challenge implicates the discretionary aspects of Appellant's sentence.

When considering a challenge to the discretionary aspects of a sentence on appeal, this Court's standard of review is limited:

> [s]entencing 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. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa. Super. 2005), (quoting ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa. Super. 1999)). It is well established that a criminal defendant does not have an absolute right to challenge the discretionary aspects of his sentence on appeal. ***See***

Commonwealth v. Bishop, 831 A.2d 656, 660 (Pa. Super. 2003). Before this Court will consider such a claim, two preliminary requirements must be met:

> First, the appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of his sentence. [Pa.R.A.P. 2119(f)]. Second, he must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. [42 Pa.C.S. § 9781(b)].

Id. (citations omitted).

"The determination of whether a substantial question exists must be determined on a case-by-case basis." ***Commonwealth v. Hartman***, 908 A.2d 316, 320 (Pa. Super. 2006) (citation omitted). This Court has explained that: "[a] substantial question exists where an appellant advances a colorable argument that the sentencing judge's actions [were] either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Id.*** (quoting ***Commonwealth v. Koren***, 646 A.2d 1205, 1208-1209 (Pa. Super. 1994)). Finally, we note that issues challenging the discretionary aspects of sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings. ***Commonwealth v. Watson***, 835 A.2d 786, 791 (Pa. Super. 2003). Absent such efforts, an objection to a discretionary aspect of a sentence is waived. ***Id.***

Instantly, Appellant filed a timely post-sentence motion and has included a Rule 2119(f) statement in his brief. The remaining question,

therefore, is whether Appellant has raised a "substantial question" as Pennsylvania law defines that term. Appellant contends that the aggregate term of 301 months' to 602 months' incarceration is unreasonable because (1) the alleged crimes occurred over a short period of time in the same location, (2) Appellant has no prior history of sexual offenses,[3] and (3) given Appellant's age, 45, the sentence is essentially a life sentence. Appellant's Brief at 13.

"Generally, Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. Any challenge to the exercise of this discretion ordinarily does not raise a substantial question." ***Commonwealth v. Prisk***, 13 A.3d 526, 533 (Pa. Super. 2011) (internal quotation omitted) (quoting ***Commonwealth v. Pass***, 914 A.2d 442, 446–47 (Pa. Super. 2006)). "[T]he key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Commonwealth v. Mastromarino***, 2 A.3d 581, 587 (Pa. Super. 2010), *appeal denied,* 14 A.3d 825 (Pa. 2011). ***See Commonwealth v. Gonzalez-Dejusus***, 994 A.2d 595, 598 (Pa. Super. 2010) ("Generally

[3] The record indicates that Appellant has a lengthy prior record, resulting in a prior record score of 5, but such record does not include any sexual-based offenses. N.T., 6/15/2012, at 8, 17.

speaking, the court's exercise of discretion in imposing consecutive as opposed to concurrent sentences is not viewed as raising a substantial question that would allow the granting of allowance of appeal.")

We recognize that in the case of ***Commonwealth v. Dodge*** ("***Dodge I***"), 859 A.2d 771 (Pa. Super. 2004), *vacated and remanded on other grounds,* 935 A.2d 1290 (Pa. 2007), a panel of this Court found Dodge's aggregate sentence manifestly excessive and determined that a substantial question was presented where the trial court imposed consecutive, standard-range sentences at thirty-seven theft-related charges, resulting in an aggregate term of 58 ½ to 124 years' imprisonment. However, according to the Court in ***Gonzalez-Dejusus***, ***supra***, "the key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case." ***Id.*** at 598-599. Based on our review of the record, the sentence in this case is not as extreme as that imposed in ***Dodge I***, particularly in light of Appellant's conduct here and his prior history of violent offenses. Because Appellant has failed to present a substantial question for our review, we hold that he is not entitled to relief. Accordingly, we deny Appellant permission to appeal the discretionary aspects of his sentence, and affirm the judgment of sentence.

Permission for allowance of appeal denied, and judgment of sentence affirmed.

Judgment Entered.

Deputy Prothonotary

Date: 5/2/2013