NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. IMERE SMITH, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1379 EDA 2011

Appeal from the Judgment of Sentence May 5, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006842-2010

BEFORE: OLSON, WECHT and COLVILLE,* JJ.

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

Appellant, Imere Smith, appeals from the judgment of sentence entered May 5, 2011, sentencing him to 18 to 36 months' incarceration followed by two years' probation, for convictions of burglary,[1] conspiracy,[2] theft,[3] receiving stolen property,[4] and criminal mischief.[5] For the following reasons, we affirm.

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[1] 18 Pa.C.S.A. § 3502(a), *amended*, 2012 Pa.Legis.Sevr. Act 2012-12 (S.B. 100).

[2] 18 Pa.C.S.A. § 903(a)(1).

[3] 18 Pa.C.S.A. § 3921.

[4] 18 Pa.C.S.A. § 3925.

[5] 18 Pa.C.S.A. § 3304.

*Retired Senior Judge assigned to the Superior Court.

The trial court summarized the relevant factual and procedural background of this matter as follows.

> At trial, the Commonwealth presented the testimony of eyewitness Lugene Johnson, her daughter Jeannie Sydnor, and Philadelphia Police Officer Joseph Iacuzio. Viewed in the light most favorable to the Commonwealth, the testimony presented established the following facts:
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> On March 3, 2010, at approximately 10:00 A.M., Ms. Johnson and Ms. Sydnor drove onto the 5500 block of Upland Street to check on their house that was to be showcased to a potential buyer. As Ms. Johnson and Ms. Sydnor turned onto the block, they saw a burgundy colored conversion van with a Pennsylvania tag HDW-1604, double parked in the middle of the street, several doors down from their residence. Ms. Johnson and Ms. Sydnor testified that they saw [Appellant], and two unknown individuals pushing a 56-inch projection television down the street onto the van. Ms. Johnson testified that she noticed [Appellant] specifically because the [Appellant] was pushing a television that was bigger than [Appellant]. Ms. Sydnor told her mother that the television belonged to them, but Ms. Johnson wrote down the license plate number of the van before verifying whether or not the television was in fact theirs.
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> Ms. Johnson got out of the car and walked up to the front door of 5535 Upland Street. As Ms. Johnson opened the screen door, she noticed that the lock on their front door was removed and that their television was missing. Ms. Johnson immediately told her daughter, who was walking towards the van, to dial 911. [Appellant] and two unknown individuals immediately dropped the television in the middle of the street; the unknown individuals ran into a waiting black car, and fled the scene. [Appellant] subsequently got into the burgundy van and drove off.
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> Moments later, Ms. Johnson called 911 and reported that someone broke into their house and stole their television. Ms. Johnson gave the description of the van with the Pennsylvania license plate number. Officer Iacuzio testified he and his partner, Officer Vallejo, saw the van matching the description provided by Ms. Johnson, and after confirming the license plate number, the [o]fficers stopped the vehicle. Inside the van were

> [Appellant], his aunt, Dawn Petter, and Ms. Petter's seven year[-]old son. Further, Officer Iacuzio testified that inside the van were numerous tools.
>
> Shortly thereafter, the officers took Ms. Johnson and Ms. Sydnor to a shopping center parking lot at Woodland Avenue in order to identify the arrested parties. Ms. Johnson and Ms. Sydnor identified [Appellant] as the person seen with the two unknown individuals attempting to load their television into the conversion van. [Appellant] and Ms. Petter were subsequently arrested. Ms. Petter later plead [sic] guilty to burglary and conspiracy of the first degree. [Appellant] and Ms. Petter testified that they were at Upland Street to pick up a television, originally valued at $2200, which Ms. Petter bought from an individual named "Black" for thirty dollars. However, the restitution amount for the damaged television was determined to be worth $850. Although [Appellant] and Ms. Petter denied ever getting off the van to push the television in or any criminal involvement, [the trial court] found their testimony wholly incredible.

Trial Court Opinion, 4/12/2012, at 2-4.

After a bench trial on March 3, 2011, the trial court found Appellant guilty of the aforementioned crimes. The trial court sentenced Appellant on May 5, 2011. This timely appeal followed.[6]

Appellant presents one issue for appeal:

> Was not the evidence insufficient to establish burglary where the evidence was that [Appellant] was merely present on a street where a home had been burglarized sometime prior, he was not seen entering or exiting the property in question, and the last person legitimately in the property was not presented?

Appellant's Brief at 3.

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[6] The requirements of Pennsylvania Rule of Appellate Procedure 1925 have been satisfied in this matter.

Appellant challenges the sufficiency of the evidence, which we consider under a well-accepted standard of review:

> 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 factfinder 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 a 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. Muniz, 5 A.3d 345, 348 (Pa. Super. 2010) (internal citations and quotations omitted), *appeal denied*, 19 A.3d 1050 (Pa. 2011).

Appellant's appeal argues that there was insufficient evidence to convict him of burglary.[7] At the time of Appellant's trial, the crime of

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[7] The substance of Appellant's brief also challenges the sufficiency of the evidence for his conspiracy conviction. Appellant's Brief at 8-13. Appellant, however, failed to raise the challenge to his conspiracy conviction in either his Rule 1925(b) concise statement or the question presented within his moving brief. Consequently, Appellant waived our consideration of the sufficiency of the evidence for his conspiracy conviction. ***See*** Pa.R.A.P. 1925(b)(4)(vii) (issues not raised within a concise statement are waived on

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burglary was defined as follows: "A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." 18 Pa.C.S.A. § 3502(a), *amended*, 2012 Pa.Legis.Sevr. Act 2012-12 (S.B. 100).[8]

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appeal); Pa.R.A.P. 2116(a) ("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.")

[8] Effective September 4, 2012, the crime of burglary was redefined as follows:

> A person commits the offense of burglary if, with the intent to commit a crime therein, the person:
>
> (1) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present;
>
> (2) enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense no person is present;
>
> (3) enters a building or occupied structure, or separately secured or occupied portion thereof that is not adapted for overnight accommodations in which at the time of the offense any person is present; or
>
> (4) enters a building or occupied structure, or separately secured or occupied portion thereof that is not adapted for overnight accommodations in which at the time of the offense no person is present.

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Our Court has long held that "[t]he Commonwealth may prove [burglary] by circumstantial evidence, and the specific intent to commit a crime necessary to establish the second element of burglary may thus be found in the [d]efendant's words or conduct, or from the attendant circumstances together with all reasonable inferences therefrom." ***Commonwealth v. Tingle***, 419 A.2d 6, 9 (Pa. Super. 1980). "We have also said[, however,] that the mere presence of a [d]efendant at the scene is not sufficient to prove burglary, or conspiracy beyond a reasonable doubt." ***Id.***

Appellant begins his challenge to the sufficiency of the evidence by asserting that the Commonwealth failed to meet its burden of proof by not presenting the testimony of the last legal occupant of the home. Appellant's Brief at 9. Rather, as Appellant concedes, the Commonwealth presented Ms. Johnson, the owner of the home. ***Id.***

What Appellant attempts to assert by this argument is unclear. Nothing within the burglary statute requires the Commonwealth to present testimony from the last legal occupant of the building or occupied structure. Providing Appellant the benefit of the doubt, we assume that Appellant attempts to challenge the Commonwealth's evidence that Appellant did not have license or privilege to enter the home. ***Id.*** However, at trial, Ms.

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18 Pa.C.S.A § 3502.

Johnson testified that she did not know Appellant, and that she had never given Appellant permission to enter her home. N.T., 1/28/2011, at 17. Furthermore, Ms. Johnson testified that the deadbolt lock from the front door had been forcibly removed, thereby providing the intruder unlawful access to the home. ***Id.*** Such evidence is sufficient to establish Appellant's lack of license or privilege to enter the home.

Appellant also challenges the sufficiency of his burglary conviction on the basis that the Commonwealth presented insufficient evidence that he actually entered the home and removed the television. Appellant's Brief at 10. While Appellant admits to having been in illegal possession of the television, he argues that such possession goes to his conviction for receipt of stolen property, which he does not challenge on appeal. ***Id.*** However, Appellant argues that simply being at the scene of a burglary is insufficient evidence to convict him of commission of burglary. ***Id.*** at 10-11. In support of his argument, Appellant cites to multiple cases wherein the Supreme Court of Pennsylvania or our Court reversed burglary convictions, holding that the convictions were improperly based solely on suspicion and speculation. ***See*** Appellant's Brief at 9-10, *citing* ***Commonwealth v. Stanley***, 309 A.2d 408 (Pa. 1973); ***Commonwealth v. Beauford***, 428 A.2d 1000 (Pa. Super. 1981); ***Commonwealth v. Jones***, 435 A.2d 223 (Pa. Super. 1981); ***Commonwealth v. Smith***, 399 A.2d 788 (Pa. Super. 1979); ***Commonwealth v. Johnson***, 415 A.2d 1246 (Pa. Super. 1979); and

Commonwealth v. Keller, 378 A.2d 347 (Pa. Super. 1977). Reliant upon the cited cases, Appellant argues that any finding that he actually participated in the burglary in this matter is based upon improper speculation and conjecture, and should therefore be reversed. ***See*** Appellant's Brief at 13.

We disagree with Appellant's characterization of the evidence and hold that the Commonwealth established substantially more than Appellant's mere presence at the scene and speculation of Appellant's participation in the burglary. Rather, at trial the Commonwealth presented evidence establishing that Appellant was within two blocks of the burglarized home, immediately after the burglary, **and** in possession of the stolen item. Furthermore, when Appellant learned that authorities had been called, he fled the scene, leaving the television in the middle of the street. Such evidence, establishing possession of the stolen item in contemporaneous time and location to the burglary, along with the inference of guilt arising from his rapid departure from the crime scene, was sufficient to convict Appellant of burglary. ***See Commonwealth v. Lovette***, 450 A.2d 975, 977-978 (Pa. 1982) (affirming sufficiency of the evidence for burglary where defendant was found in possession of the fruits of the burglary, within a block and a half from the site of the burglary, and within a half an hour of the discovery of the crime); ***Commonwealth v. Stasiak***, 451 A.2d 520, 523-524 (Pa. Super 1982) (evidence of burglarized drug store and

apprehension of defendant minutes after the crime, within blocks of the store, in possession of stolen items and meeting the description of the burglar was sufficient to sustain defendant's burglary conviction); ***Commonwealth v. Rizzuto***, 777 A.2d 1069, 1078 (Pa. 2001) ("evidence of flight shows consciousness of guilt"), *abrogated on other grounds*, ***Commonwealth v. Freeman***, 827 A.2d 385, 400 (Pa. 2003).

Indeed, we note that the facts of each of the cases relied upon by Appellant are distinguishable from the facts of this matter. Specifically, in ***Stanley***, contrary to Appellant's explanation, the defendant was observed 12 to 13 stores away from the burglarized location, not leaving the actual location. ***See Stanley***, 309 A.2d at 411. Furthermore, in that matter, while the defendant was found in possession of a screwdriver that **could have** been used in the burglary, there was no evidence actually linking the screwdriver and the burglary. ***Id.*** In the other cases relied upon by Appellant, our Court held that a defendant's presence at the scene of a burglary and flight therefrom, alone, are insufficient to convict someone of burglary. ***See Beauford***, 428 A.2d at 1002-1003 (underage defendant's flight from scene of a burglarized beer distributor, alone, insufficient to substantiate burglary conviction); ***Jones***, 435 A.2d at 225 (observation of defendant running through an ally at an early hour and one block from a burglarized location insufficient to connect the defendant to the burglary); ***Smith***, 399 A.2d at 789 (though the defendant was seen standing some ten

feet away from the burglarized premises, looking towards it, there was no evidence of any other conduct by him except walking away from the scene shortly thereafter); ***Johnson***, 415 A.2d at 1247 (evidence of burglary limited to presence at scene and flight from police); ***Keller***, 378 A.2d at 349-350 (same).

However, in this matter, there is more evidence than just Appellant's presence and flight. Rather, prior to his flight, Appellant was observed at the location of the burglary, and in possession of the burglarized item. Consequently, in this matter, unlike the matters cited by Appellant, there was evidence of presence, possession, and flight. Such evidence is sufficient to convict Appellant of burglary. Consequently, we hold that Appellant's challenge to the sufficiency of the evidence for his burglary conviction lacks merit.

Judgment of sentence affirmed.