NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. BARRY REISS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1407 WDA 2012

Appeal from the Judgment of Sentence of December 22, 2011
In the Court of Common Pleas of Westmoreland County
Criminal Division at No(s): CP-65-CR-0000695-2011

BEFORE: DONOHUE, OLSON AND MUSMANNO, JJ.

MEMORANDUM BY OLSON, J.: FILED: November 25, 2013

Appellant, Barry Reiss, appeals from the judgment of sentence entered on December 22, 2011, as made final by the denial of his post-sentence motion on April 30, 2012. We affirm.

The trial court summarized the factual background of this case as follows:

> This case arose from incidents that occurred between May of 2010 and August of 2010 in Derry Borough in Westmoreland County, Pennsylvania. At that time, K.K. was a 13[-]year[-]old female who had just completed the seventh grade. Her mother and her father had separated, and she visited her father regularly at his room at the Oasis Bar [("Oasis")] near New Alexandria. The Oasis Bar was a combination restaurant, bar[,] and boarding house. K.K. indicated that while visiting her father, she would sometimes stay overnight in his room. Her uncle, [Appellant], also stayed at the Oasis in another boarding room.[1] K.K. testified that she enjoyed spending time with her

[1] Appellant was an uncle to K.K. through marriage. N.T., 10/4/11, at 77.

> uncle, that he was a family member and was always fun to be around.
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> K.K. testified that at one point near the end of the school year, she had fallen asleep in [Appellant's] room, and awoke to find [Appellant's] hand inside her pants. She testified that she had gone to [Appellant's] room because her father was drunk and had passed out in his room. [Appellant] had a marijuana joint, and he asked her if she wanted to try it. She thought that it was a cigarette, and said that she would. K.K. testified that when she did, she became dizzy and not herself. She asked [Appellant] what the cigarette was, and he told her that it was marijuana. K.K. testified that she felt sleepy and did fall asleep. When she woke, his hands were in her pants and his fingers were inside her vagina. [Appellant] apologized to K.K., saying that he was drunk. K.K. testified that she never told anyone about the incident because she didn't want anyone to judge her or think that she was weird or a liar.
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> K.K. testified that she did go to [Appellant's] room a few weeks after this incident. She testified that she was visiting her father and was alone in his room at the Oasis. She became frightened because drunken bar patrons were in the hallway and she was alone. She knew that [Appellant] was in his room because she saw his truck in the parking lot. K.K. testified that [Appellant] let her into his room, she sat down on the floor, and eventually fell asleep. She awoke to find [Appellant] sitting on the side of the bed, just looking at her. When she questioned [Appellant] about why he was doing so, he told her he had put his hand down her pants again. He told her not to tell anyone, and she then left the room.
>
> K.K. finally disclosed the incidents to her mother's boyfriend, who told her to speak with her mother. The incidents were later reported to the Pennsylvania State Police. Trooper Robert Harr testified that he was assigned to investigate the complaint as a referral from the Westmoreland County Children's Bureau. During the course of his investigation, he came to learn that at the time of the alleged incidents, K.K. was 13 years of age, and [Appellant] was 48 years old. While initially denying the allegations, [Appellant] eventually admitted to having some sexual contact with K.K.

Trial Court Opinion, 1/25/13, at 1-3 (citations omitted).

The relevant procedural history of this case is as follows. A complaint was filed against Appellant on February 3, 2011. An information was filed on March 28, 2011. On June 20, 2011, Appellant pled guilty to aggravated indecent assault of an individual under 16 years of age,[2] indecent assault of an individual under 16 years of age,[3] and corruption of minors.[4] On June 30, 2011, Appellant filed a motion to withdraw his plea of guilty, which was granted on August 16, 2011. An amended information was filed on September 13, 2011.

Jury selection was conducted on October 3, 2011. On October 4, 2011, the jury found Appellant guilty of aggravated indecent assault of an individual under 16 years of age, two counts of indecent assault of an individual under 16 years of age, and corruption of minors. On December 22, 2011, Appellant was sentenced to an aggregate term of 8 to 20 years' imprisonment. On December 30, 2011, Appellant filed a post-sentence motion. On April 30, 2012, Appellant's post-sentence motion was denied by operation of law. ***See*** Pa.R.Crim.P. 720(B)(3)(a); 1 Pa.C.S.A. § 1908. On

[2] 18 Pa.C.S.A. § 3125(a)(8).

[3] 18 Pa.C.S.A. § 3126(a)(8).

[4] 18 Pa.C.S.A. § 6301(a)(1).

September 3, 2012, Appellant filed a petition for leave to file an appeal *nunc pro tunc*, which was granted on September 4, 2012. This appeal followed.[5]

Appellant presents three issues for our review:

1. Were the verdicts returned by the jury at each [count] supported by sufficient evidence?

2. Were the verdicts against the weight of the evidence produced at trial?

3. Did the [trial court] abuse its discretion [in] imposing a sentence of [8 to 20] years['] incarceration?

Appellant's Brief at 4 (capitalization omitted).

Appellant contends that the jury's verdict was based upon insufficient evidence. Appellant's Brief at 8-11. "A claim challenging the sufficiency of the evidence presents a question of law." ***Commonwealth v. Fortune***, 68 A.3d 980, 983 (Pa. Super. 2013) (citation omitted). "In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense." ***Commonwealth v. Cox***, 72 A.3d 719, 721 (Pa. Super. 2013), *quoting* ***Commonwealth v. Koch***, 39 A.3d 996, 1001 (Pa. Super. 2011). "[T]he facts and circumstances established by the

[5] On September 7, 2012, the trial court ordered Appellant to file a concise statement of errors complaint of on appeal ("concise statement") pursuant to Pa.R.A.P. 1925(b). Appellant filed his concise statement on September 28, 2012. The trial court filed its opinion pursuant to Pa.R.A.P. 1925(a) on January 25, 2013. All of the issues raised on appeal were raised in Appellant's concise statement.

Commonwealth need not preclude every possibility of innocence . . . . [T]he 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. Thomas***, 65 A.3d 939, 943 (Pa. Super. 2013) (first alteration in original), *quoting* ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1236 n.2 (Pa. 2007).

"A person will be found guilty of aggravated indecent assault if they engage 'in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures.'" ***Commonwealth v. Castelhun***, 889 A.2d 1228, 1233 (Pa. Super. 2005), *quoting* 18 Pa.C.S.A. § 3125(a) (other citations omitted). In this case, K.K. testified that when she awoke "[Appellant's] fingers were inside [her] vagina." N.T., 10/4/11, at 58.[6] She also testified that "[she] could feel [Appellant] moving [his fingers inside her vagina]." ***Id.*** This evidence, when considered in the light most favorable to the Commonwealth, is sufficient to sustain the jury's verdict on the aggravated indecent assault charge.[7] ***See Commonwealth v. Kelley***, 801 A.2d 551, 557 (Pa. 2002)

[6] The notes of transcript for October 3 and 4, 2011 are combined in one volume. Citations to the notes of transcript of October 4, 2011 are to the pagination reflected in the combined volume.

[7] We note that as K.K. was 13 years old, and Appellant was 48 years old, the age requirements for establishing the absence of consent with respect to the aggravated indecent assault charge and indecent assault charges were

(citation omitted) (digital penetration of vagina sufficient to convict on aggravated indecent assault).

A person is guilty of indecent assault if the evidence presented at trial established that the defendant touched the sexual or other intimate parts of the victim for the purpose of arousing or gratifying sexual desire, in either person. ***Castelhun***, 889 A.2d at 1233-1234; 18 Pa.C.S.A. §§ 3101, 3126(a). Appellant does not argue on appeal that the evidence was insufficient regarding the arousal or gratification requirement of indecent assault. Rather, he argues that the evidence is insufficient to show that the incidents occurred. ***See generally*** Appellant's Brief at 8-11.

As to the first incident, which was the basis for the aggravated indecent assault charge, we have previously held that digital penetration of the vagina is sufficient to find a defendant guilty of indecent assault in addition to aggravated indecent assault. ***See Commonwealth v. Bishop***, 742 A.2d 178, 190 (Pa. Super. 1999), *appeal denied*, 758 A.2d 1194 (Pa. 2000). As to the second incident, K.K. testified that when she awoke, Appellant told her "that he had put his hands down [her] pants again." N.T., 10/4/11, at 62. This testimony was sufficient to establish that Appellant had touched K.K.'s sexual parts, as required for indecent assault. Accordingly, the Commonwealth presented sufficient evidence to sustain the guilty verdict for two counts of indecent assault of an individual under 16 years of age.

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satisfied. Further, Appellant and K.K.'s respective ages satisfy the age requirement for corruption of minors.

"To support a charge of corruption of minors, the Commonwealth must prove that [A]ppellant, 'being of the age of 18 years and upwards, by any act corrupted the morals of any minor less than 18 years of age.'" ***Commonwealth v. Smith***, 863 A.2d 1172, 1177 (Pa. Super. 2004) (ellipsis omitted), *quoting* 18 Pa.C.S.A. § 6301(a)(1). The sexual contacts that formed the basis for the aggravated indecent assault and indecent assault charges are also sufficient to convict Appellant of corruption of minors. ***See Smith***, 863 A.2d at 1177. Furthermore, K.K. testified that Appellant offered her marijuana. N.T., 10/4/11, at 57. Exposing K.K. to illicit narcotics constitutes sufficient evidence for the corruption of minors charge. ***See Commonwealth v. Barnette***, 760 A.2d 1166, 1173 (Pa. Super. 2000), *appeal denied*, 781 A.2d 138 (Pa. 2001). Accordingly, the Commonwealth presented evidence sufficient for the jury to convict Appellant on all four counts.

Appellant next contends that his convictions are against the weight of the evidence. Appellant's Brief at 11-12. A challenge to the weight of the evidence must first be raised at the trial level "(1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion." Pa.R.Crim.P. 607; ***Commonwealth v. Foley***, 38 A.3d 882, 891 (Pa. Super. 2012), *appeal denied*, 60 A.3d 535 (Pa. 2013). Appellant properly preserved his weight of the evidence claim by raising the issue in his post-sentence motion.

"To grant a new trial based upon the weight of the evidence, it must appear to the trial court that the verdict was so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative." ***Commonwealth v. Luster***, 71 A.3d 1029, 1049 (Pa. Super. 2013) (internal quotation marks and citation omitted). "[We do] not answer for [ourselves] whether the verdict was against the weight of the evidence . . . . [O]ur review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion." ***Commonwealth v. Brown***, 71 A.3d 1009, 1013 (Pa. Super. 2013), *quoting* ***Commonwealth v. Karns***, 50 A.3d 158, 165 (Pa. Super. 2012).

The trial court summarized its weight of the evidence finding as follows:

> A review of the trial transcript establishes that the victim's testimony was clear and convincing, and if believed by the jury, was certainly of such weight to sustain a verdict of guilty on the four charges for which [Appellant] was convicted. Based upon the verdict rendered in this matter, the jury clearly believed K.K. to be credible. The verdict does not shock the [trial] court's sense of justice and therefore should not be set aside, nor should the sentence be vacated on this basis.

Trial Court Opinion, 1/25/13, at 4.

Appellant challenges the weight of the evidence on three grounds. First, he argues that if K.K. had smoked marijuana in such a confined space, that she would have had the odor of marijuana on her person when she returned to her father's room. Second, he argues that the smoking of

marijuana and assault could not have occurred without a hovering father discovering the activities. Finally, he argues that it is not credible to believe that K.K. would have sought refuge in the room of a man who had previously assaulted her when she feared for her safety.

We first note that Appellant's statement that, "[f]or the verdicts to be sustained the credibility of the accuser should be without issue[,]" is legally incorrect. Most, if not all, witnesses are imperfect; however, their testimony is not discarded. ***See Commonwealth v. Cesar***, 911 A.2d 978, 986 n.11 (Pa. Super. 2006), *appeal denied*, 928 A.2d 1289 (Pa. 2007) (citation omitted). "It is well settled that the jury is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses[.]" ***Brown***, 71 A.3d at 1013 (alteration omitted), *quoting* ***Karns***, 50 A.3d at 165.

As to Appellant's first argument, K.K. testified that she smoked the marijuana cigarette by the window and blew the smoke out the window. N.T., 10/4/11, at 56-57. Her testimony that she blew the smoke from the marijuana cigarette out the window could explain why she did not smell of marijuana when she returned to her room. She admitted on cross-examination that when she relayed the story to Trooper Harr, she did not mention that she was standing by the window and blowing the smoke out the window. ***Id.*** at 66-67. However, this may not have seemed important to her at the time or she may not have remembered this fact when talking to Trooper Harr about these traumatic events.

As to Appellant's second argument, J.K., K.K.'s father, testified that on occasion when K.K. would visit, he would fall asleep while K.K. was still awake. N.T., 10/4/11, at 80. He also corroborated K.K.'s testimony that one time he left her alone at the Oasis after they had an argument. ***Id.*** J.K. also testified that when K.K. went to Appellant's room "**almost** all the time [he] would be observing." ***Id.*** at 81 (emphasis added). J.K. testified that he was not always observing K.K. when she was at Appellant's room because he was sometimes sleeping or away from the Oasis. ***Id.*** Thus, J.K.'s testimony is consistent with that of K.K. Although he attempted to be observant when K.K. went to Appellant's room, there were times when K.K. was present in Appellant's room and J.K. did not observe what occurred. Thus, it is possible that these incidents occurred when J.K. was sleeping or away from the Oasis, and not observing K.K.

As to Appellant's final contention, K.K. testified that Appellant apologized after the first incident and claimed that he was drunk. N.T, 10/4/11, at 58. It is not unreasonable to believe that a young female might seek protection from an individual whom she considered to be a family member if she also believed that a previous assault by that individual was merely a drunken indiscretion. Furthermore, Appellant admitted to Trooper Harr that he had committed the indecent acts against K.K. ***Id.*** at 122-127 and 131-136.

In sum, the jury chose to credit K.K.'s testimony. The trial court found that her testimony was "clear and convincing" and that the verdict did not

shock its sense of justice. Trial Court Opinion, 1/25/13, at 4. We conclude that the trial court did not abuse its discretion in making these determinations and denying Appellant's post-sentence motion based upon the weight of the evidence.

Appellant contends that the trial court abused its discretion in imposing an excessive sentence. Appellant's claim challenges the discretionary aspects of his sentence. We note that "[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." ***Commonwealth v. Clarke***, 70 A.3d 1281, 1287 (Pa. Super. 2013) (citation omitted). 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:

> To 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; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

Commonwealth v. Cook, 941 A.2d 7, 11 (Pa. Super. 2007) (citations omitted). Appellant filed a timely notice of appeal and the issue was

properly preserved in a post-sentence motion. Appellant's brief also includes a statement pursuant to Pa.R.A.P. 2119(f). Thus, we turn to whether the appeal presents a substantial question.

In his Rule 2119(f) statement, Appellant avers that he has raised a substantial question for two reasons. First, he argues that the trial court sentenced him to consecutive terms of imprisonment at the top end of the guidelines for each count as punishment for exercising his constitutional right to a jury trial. Appellant's Brief at 13. Second, he argues that the trial court did not consider all of the relevant sentencing factors. ***Id.***

A claim alleging consecutive sentences does not, by itself, raise a substantial question. ***See Commonwealth v. Edwards***, 71 A.3d 323, 331 (Pa. Super. 2013). Nonetheless, a panel of this court recently held that a claim that consecutive sentences are unjustified combined with an allegation that the trial court failed to properly "consider the nature of the offenses or provide adequate reasons for its sentence" raises a substantial question. ***Commonwealth v. Dodge***, 2013 WL 4829286, *5 (Pa. Super. Sept. 11, 2013); ***see also Commonwealth v. Ventura***, 975 A.2d 1128, 1133 (Pa. Super. 2009), *appeal denied*, 987 A.2d 161 (Pa. 2009) ("Ventura further asserts that the trial court imposed his sentence based solely on the seriousness of the offense and failed to consider all relevant factors, which has also been found to raise a substantial question."). As Appellant has

raised such a claim, he has raised a substantial question and we will consider the merits of his sentencing claims.

As Appellant was sentenced within the applicable guidelines, we may only vacate the sentence if this "case involves circumstances where the application of the guidelines would be clearly unreasonable." 42 Pa.C.S.A. § 9781(c)(2). When reviewing Appellant's sentence, we must consider: "(1) [t]he nature and circumstances of the offense and the history and characteristics of the [Appellant;] (2) [t]he opportunity of the sentencing court to observe the [Appellant], including any presentence investigation[;] (3) [t]he findings upon which the sentence was based[; and] (4) [t]he guidelines promulgated by the commission." 42 Pa.C.S.A. § 9781(d).

Appellant first contends that the trial court considered the withdrawal of his guilty plea when sentencing him. A court may not consider the fact that a defendant chose to proceed to trial when determining his sentence. ***Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010), *citing* ***Commonwealth v. Bethea***, 379 A.2d 102, 104 (Pa. 1977). To assert that the trial court improperly considered his decision to withdraw his guilty plea when imposing sentence, Appellant relies upon the sentencing colloquy, in which the trial court referenced his prior plea deal and the sentencing agreement under which he would receive five to ten years' imprisonment, followed by five years of probation, for the instant offenses. ***See*** Appellant's Brief at 14.

At sentencing, the record reflects that the trial court offered a brief recitation of the facts surrounding Appellant's withdraw of his guilty plea. N.T., 12/22/11, at 15-16. However, the trial court immediately followed that recitation of the procedural history by saying that, "You certainly have a right to continue to deny and I cannot take that into consideration in my sentencing of you and I will not take that into consideration in my sentencing[.]" ***Id.*** at 16. There is nothing further in the record to suggest that the trial court improperly considered Appellant's choice to exercise his right to a jury trial when fashioning an appropriate sentence. ***See Moury***, 992 A.2d at 174 ("The [trial] court's sentencing discourse indicates it properly relied upon the evidence adduced at trial, testimony during the sentencing hearing, and the [pre-sentence investigation report] when it sentenced Appellant."). Thus, we conclude that the trial court did not impermissibly consider Appellant's decision to go to trial when imposing sentence.

Appellant's second contention is that the trial court focused on the seriousness of the offenses and failed to consider the other sentencing factors, namely the need to protect the public and the rehabilitative needs of the Appellant. The trial court's reasons for its sentence were mainly focused on the impact of the offenses on K.K. and the sentencing guidelines. N.T., 12/22/11, at 17-20. The trial court expressed its desire to sentence Appellant to a longer term of imprisonment, but wished to stay within the

standard guideline range. ***Id.*** at 19-20. Thus, it imposed consecutive sentences at three of the four counts,[8] each at the top end of the guideline range. However, the trial court also considered the need to protect the public. ***See id.*** at 17 (discussing how parents seek to protect their kids from strangers, not from trusted family members). The trial court also considered the need to protect the public by prohibiting Appellant from unsupervised contact with children upon his release. The trial court likewise considered the need to rehabilitate Appellant, ordering a drug and alcohol evaluation and ordering him to comply with the recommendations of the evaluation. ***Id.*** at 18.

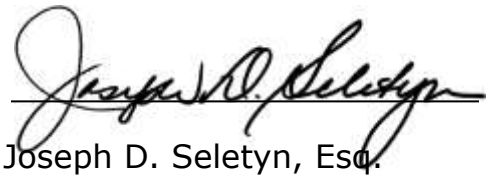
Appellant took the innocence of his 13-year-old niece by sexually assaulting her on two separate occasions and providing drugs to her for the first time in her life. Appellant was not a new participant in the criminal justice system, having a prior offense score of five. Although those crimes were dissimilar to those in the case *sub judice*, they evidence lack of respect for the law. The trial court considered the pre-sentence investigation report, the testimony by K.K. and her parents at sentencing, along with the statement made by Appellant at sentencing and crafted a sentence it deemed appropriate. A sentence in the guideline range in this case was not "clearly unreasonable." ***See*** 42 Pa.C.S.A. § 9781(c)(2). Thus, we conclude that the trial court did not abuse its discretion in sentencing Appellant to

[8] Count three, one of the indecent assault charges, merged for purposes of sentencing.

consecutive terms at the high end of the guideline ranges for counts one, two, and four.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013