NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: N.R., A MINOR,	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
APPEAL OF: N.R., A MINOR,	
	No. 1490 WDA 2011

Appeal from the Adjudication of Delinquency August 22, 2011
In the Court of Common Pleas of Allegheny County
Juvenile Division at No(s): JID NO. 83647-B
T-168071-DOCKET NO. 0490-10

BEFORE: STEVENS, P.J., MUSMANNO, J., and ALLEN, J.

MEMORANDUM BY STEVENS, P.J. Filed: January 11, 2013

This is an appeal from the dispositional order entered by the Court of Common Pleas of Allegheny County, Family Division--Juvenile Section, adjudicating N.R. delinquent of third degree misdemeanor Criminal Mischief, 18 Pa.C.S.A. SS 3304(b), for his involvement in causing damage to a motor vehicle. On appeal, Appellant challenges the sufficiency of evidence and alleges the ineffective assistance of counsel for failing to object to the Commonwealth's use of inadmissible hearsay to establish a necessary element of the delinquent act charged. We affirm.

The juvenile court provides an apt recitation of facts and procedural history as follows:

> In this matter, Appellant, N.R., appeals from th[e juvenile] court's delinquency adjudication dispositional order dated August

> 22, 2011, adjudicating N.R. delinquent of Criminal Mischief and ordering N.R. to pay court costs and restitution, to perform 50 hours of community service, to adhere to a 9:00 p.m. curfew, to maintain perfect attendance at school and to have no contact with his accusers. On September 21, 2011, a Notice of Appeal was timely filed. On November 17, 2011, th[e juvenile court] ordered Appellant to file a Concise Statement of Matters Complained of on Appeal. The Concise Statement of Matters to be raised on appeal was timely filed on December 8, 2011.
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> Appellant raises [two] issues on appeal [1][A]ppellant asserts that N.R.'s adjudication was based on inadmissible hearsay and violated his rights under the state and federal constitutions to confront his accusers. Similarly, Appellant asserts that trial counsel was ineffective for failing to object to the admission of the hearsay evidence. . . .
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> The following facts were found during the August 22, 2011 trial and all facts contained herein were derived from testimony given on that date. Victim is a female living in McKees Rocks, Pennsylvania with her husband and daughter. Victim testified to the events that occurred on Tuesday, March 15, 2011 at approximately 6:00 p.m. N.T. 8/22/11 at 8. Victim's home is located approximately 50 feet below and 25 feet out from the McKees Rocks Bridge. N.T. at 9.
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> On the date of the incident, Victim drover her 2010 Nissan Altima to her home and parked it in the driveway. As Victim was pulling up to her home she notice[d] one Caucasian and one African American male walking together on the bridge. The two males stopped and stared at the Victim while she was still in her car. N.T. at 9, 10, 11. Appellant bent down and picked up a rock off of the ground. Victim opened her car door and said, "If you throw that at my car, I'm calling the cops." N.T. at 12, 13.
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> In response, Appellant began swearing at Victim at which time her husband came outside. N.T. at 13, 14. Next, Victim called the police and indicated that there were, "kids throwing stuff off the bridge." Appellant then threw the rock with his left hand and

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[1] Appellant has briefed only two of the four issues raised in his concise statement.

it skipped off of the hood of Victim's vehicle taking the paint off down to the metal. N.T. at 14, 15. Her husband then drove to the bridge to attempt to locate the kids and the Victim telephoned the police again describing the youth and stating that they were on the bridge and asked them to come. The police indicated that they caught Appellant and the African American male on the bridge. N.T. at 15, 16. Victim indicated that she received an estimate for the repair of her vehicle to be approximately $740.00 and that she had a $500.00 insurance deductible. N.T. at 17. On cross-examination, Victim testified that she had 20/20 vision, did not wear corrective lenses and due to the time of day there was still daylight. N.T. at 19.

Victim's husband ("Victim's Husband") testified that he went outside of his home when Victim began screaming and saw two males on the bridge yelling at Victim. N.T. at 26, 27. Victim's Husband estimated that the McKees Rocks Bridge was 25 to 35 feet from the door of his home and approximately 50 to 60 feet in height. N.T. at 27. Victim's Husband corroborated Victim's description of Appellant's and his companion's clothing. N.T. at 28. Victim's Husband then indicated that after he turned to walk back into his house he heard a ["]ping" off of the roof of his car. Victim's Husband then got into his car and drove onto the bridge where he found two police officers, the Appellant and his companion N.T. at 28. Victim's Husband then told police, "that's them," because they were wearing red and black, they were the only two kids on the bridge, and the short period of time between the rock being thrown and Victim's Husband arriving on the bridge. N.T. at 29.

Zachary Martsolf, a police officer for the borough of McKees Rocks then testified as to the events of March 15, 2011. Officer Martsolf indicated that officers were dispatched to McKees Rocks Bridge (the "Bridge") for a report that two males, one white, one black, were throwing rocks from the Bridge down at cars on Gardner Street. N.T. at 34. Officer Martsolf drove onto the Bridge and located the Appellant and his companion right above the river on the Pittsburgh side of the Bridge. N.T. at 34. Officer Martsolf questioned the two juveniles who denied throwing anything off the Bridge. The officer recalled that the Appellant and his friend were dressed in black and red. N.T. at 36. Officer Martsolf viewed a small chip down to either the primer or the metal on Victim's car and a golf ball sized rock of cement piece. N.T. at 37. On cross-examination Officer Martsolf indicated that

> the chip on the vehicle appeared to be fresh and that he did not see any other damage surrounding teh chip. N.T. at 38. . . . In addition, Officer Martsolf identified Appellant as one of the individuals [whom] he spoke with on the day in question. N.T. at 41.He testified that officers were dispatched to the scene on a report of two males, one white, one black throwing rocks from the bridge down onto Gardner Street.

Pa.R.A.P. 1925(a) Opinion dated 2/7/12 at 1-4.

Appellant raises two issues on appeal:

> **I. DID THE COMMONWEALTH INTRODUCE SUFFICIENT COMPETENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT N.R. CAUSED MONETARY LOSS IN EXCESS OF $500.00?**
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> **II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE COMMONWEALTH'S USE OF INADMISSIBLE HEARSAY TO ESTABLISH A MATERIAL ELEMENT OF CRIMINAL MISCHIEF?**

Brief of Appellant at 5.

In a juvenile proceeding, the hearing judge sits as the finder of fact. ***In re A.D.***, 771 A.2d 45, 53 (Pa. Super. 2001) (citation omitted). The weight to be assigned the testimony of the witnesses is within the exclusive province of the fact finder. ***Id.*** Our standard of review of dispositional orders in juvenile proceedings is well settled:

> The Juvenile Act grants broad discretion to the court when determining an appropriate disposition. We will not disturb a disposition absent a manifest abuse of discretion. ***In re R.D.R.***, 876 A.2d 1009, 1013 (Pa. Super. 2005) (internal citation omitted). Moreover, "[a] petition alleging that a child is delinquent must be disposed of in accordance with the Juvenile Act. Dispositions which are not set forth in the Act are beyond the power of the juvenile court." ***In re J.J.***, 848 A.2d 1014, 1016–17 (Pa. Super. 2004) (citation omitted).

Commonwealth v. B.D.G., 959 A.2d 362, 366–367 (Pa. Super. 2008).

In reviewing the sufficiency of the evidence to support the adjudication below, we recognize that

> the Due Process Clause of the United States Constitution requires proof beyond a reasonable doubt at the adjudication stage when a juvenile is charged with an act which would constitute a crime if committed by an adult. Additionally, we recognize that in reviewing the sufficiency of the evidence to support the adjudication of delinquency, just as in reviewing the sufficiency of the evidence to sustain a conviction, though we review the entire record, we must view the evidence in the light most favorable to the Commonwealth.

In re A.D., 771 A.2d 45, 48 (Pa. Super. 2001) (internal citations and quotation marks omitted) (quoting ***In re Johnson***, 445 Pa. 270, 284 A.2d 780, 781 (1971)).

Finally, we note that in conducting our analysis of Appellant's sufficiency claim, we consider all of the evidence actually admitted at trial and do not review a diminished record. ***See Commonwealth v. Koch***, 39 A.3d 996 (Pa. Super. 2011). Consequently, our sufficiency examination is unaffected by Appellant's subsequent ineffectiveness/evidentiary claim alleging the erroneous admission of inadmissible hearsay. ***See id***.

The offense of Criminal Mischief refers to "intentional [ ] or reckless [ ] tamper[ing] with tangible property of another so as to endanger person or property." 18 Pa.C.S.A. § 3304(a)(2). Section 3304(b) provides, in pertinent part, that where the pecuniary loss to the property is in excess of $500, the offense is graded a misdemeanor of the third degree, otherwise it is graded

a summary offense. Summary offenses, except under circumstances not relevant here, are not classified as delinquent acts. 42 Pa.C.S.A. § 6302. Therefore, it was the Commonwealth's burden to prove Appellant caused in excess of $500 damage to the Arlotts' car.

The totality of evidence offered at the delinquency hearing sufficed to prove Appellant caused in excess of $500 damage to the Arlotts' car. As noted above, the Arlotts' testimony established that a golf ball-sized rock thrown by Appellant from the McKees Rocks Bridge hit their late model Nissan Altima, removing a quarter sized section of paint from the hood. Mrs. Arlott testified that she received a $740 repair estimate and that she would pay a $500 insurance deductible applicable under her comprehensive automotive insurance policy. This testimony sufficed to hold Appellant delinquent of misdemeanor Criminal Mischief.

Appellant, however, alleges counsel rendered ineffective assistance of counsel [2] at the hearing when he failed to raise a hearsay objection to Mrs.

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[2] Recently, we noted the following concerning a juvenile's direct appeal claim of ineffective assistance of counsel:

> We held ***In the Interest of A.P.***, 617 A.2d 764 (1992) (*en banc*), that the Post–Conviction Relief Act, which is the remedy for adults seeking post-conviction relief, is unavailable to a juvenile. ***See also In Interest of DelSignore***, 249 Pa.Super. 149, 375 A.2d 803 (1977) (en banc) (holding that Post Conviction Hearing Act is not available to juvenile proceeding since the child is not convicted of a crime). Consequently, in the case *sub judice*, Appellant would be denied review of his claims

(Footnote Continued Next Page)

Arlott's testimony that she received a repair estimate of more than $740. There is no dispute at bar that such testimony constituted inadmissible hearsay. Moreover, without someone from the repair shop to authenticate the estimate/invoice and attest that it was prepared in the ordinary course of business, the estimate did not qualify as a business records exception to the Rule against Hearsay. Counsel had no reasonable strategy to withhold an objection to such pivotal evidence, which, because it established a third degree misdemeanor grading of the offense, clearly caused him prejudice, Appellant contends.

With regard to ineffectiveness claims, there exists a presumption that counsel is effective, and the appellant bears the burden of proving otherwise. ***In re A.D.***, 771 A.2d at 50. Therefore:

> [i]n reviewing ineffectiveness claims, we must first consider whether the issue underlying the charge of ineffectiveness is of arguable merit. If not, we need look no further since counsel will not be deemed ineffective for failing to pursue a meritless issue. If there is arguable merit to the claim, we must then determine whether the course chosen by counsel had some reasonable basis aimed at promoting the client's interests. Further, there must be a showing that counsel's ineffectiveness prejudiced

(Footnote Continued) ––––––––––––––––––––

> of ineffective assistance of counsel if not addressed on direct appeal. Thus, we will address the merits of Appellant's ineffectiveness claims.

In re R.D., 44 A.3d 657 (Pa. Super. 2012).

> Appellant's case. The burden of producing the requisite proof lies with Appellant.

Id.

In support of his argument, Appellant cites ***In re Gillen***, 344 A.2d 706 (Pa. Super. 1975), and its holding that damages evidence comprising nothing more than an unauthenticated and, therefore, inadmissible repair shop estimate failed to establish damages necessary to prove delinquency for misdemeanor criminal mischief. In reversing the adjudication of delinquency, the court reasoned:

> The estimates were not authenticated by the authors, nor even identified by the persons who had requested that the estimates be made,[FN1] and consequently do not fall within the business records exception to the hearsay rule. ***See Jones Appeal***, 449 Pa. 543, 297 A.2d 117 (1972). Concluding, as we must, that such evidence was improperly admitted *and finding No other evidence of pecuniary loss*, the Commonwealth's case must fail by reason of its failure to establish an essential element of the juvenile court's jurisdiction.
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> FN1. In the case of the Lobley's, Mr. Lobley obtained the estimate but was not called as a witness. Mrs. Lobley stated that the information contained on the estimates was what her husband told her the garage told him, and that she did not know from personal knowledge that the information was correct. In the Styer's case, Mrs. Styer obtained the estimate but Mr. Styer testified at the hearing.

Gillen at 708 (emphasis added), 708 n.1.

We distinguish the case *sub judice* from ***Gillen*** because Mrs. Arlott not only had first-hand, personal knowledge of the estimate received from the repair shop, but also, and more important, testified that her automotive insurance deductible of $500.00 would apply. This insurance testimony,

when coupled with the reasonable inference drawn from evidence of a late model car needing damage repair and new paint on the hood, led to a reasonable inference that the damage equaled $500.01 or more. Therefore, this competent evidence on damages and the reasonable inferences made therefrom render the inadmissible hearsay cumulative and, consequently, harmless. ***Cf. Commonwealth v. Small***, 602 Pa. 425, 980 A.2d 549 (2009) (holding erroneously admitted testimony is harmless if cumulative of other properly admitted testimony). Having thus failed to prove that counsel's failure to object to the admission of hearsay caused him prejudice, Appellant's ineffective assistance of counsel claim fails.

Discerning no manifest abuse of discretion in the court's adjudication below, we affirm the dispositional order.

Order affirmed.