

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

TIMOTHY VALES

Appellant

No. 1920 WDA 2011

Appeal from the Judgment of Sentence of June 29, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015909-2010

BEFORE: ALLEN, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.

FILED: MAY 10, 2013

Timothy Vales ("Appellant") appeals from the June 29, 2011 judgment of sentence. We affirm.

On June 29, 2011, Appellant appeared in the Court of Common Pleas of Allegheny County, charged with a single count of forgery.¹ Appellant waived his right to a jury trial, and elected to defend against the charge in a non-jury trial. Appellant stipulated to the Commonwealth's evidence. The assistant district attorney ("ADA") recited that evidence to the trial court as follows:

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. § 4101(a)(3).

The facts, Your Honor, would first be presented by a representative of S&T Bank, a Mr. Stuart Rattner Mr. Rattner is a bank manager at the S&T Bank located at 6303 Forbes Avenue.

. . . On or about November 15th, 2010, [Appellant] entered the bank and attempted to cash a check for \$1,500. He was first asked if he was a client at the bank, and he indicated that he was not.

Pursuant to bank policy, Mr. Rattner would testify that any check of \$100 that is being cashed by a non-client of the bank, the bank teller would first call the person who was allegedly issuing the check to the payee.

So in this case the teller would have called Westmoreland Community Action, the entity that's identified at the top of the check.

The representative from Westmoreland Community Action . . . was a Mr. Jeffrey Diehl. . . . Mr. Diehl would have testified that he spoke with Mr. Rattner that day and was confronted with the information on this check and later was able to see this check in person.

He would testify that Westmoreland Community Action did not issue this check, that the check does not appear to be – or is not the same type of check that is issued by Westmoreland Community Action, it is, in essence, a different format, that the tracking number at the top . . . was a check that was cashed about [45 days] prior to this, so the number was close to sequence, but cashed previously.

He would also testify that there are signatures on the bottom of the check that appear like two signatures from their company. Those would be board members of Westmoreland Community Action. But he would confirm that they – this check is not a check from Westmoreland Community Action. So their signatures appear to be those of the board members, but this is not one of the checks that they would be signing.

[H]e would testify that they did not issue this check to [Appellant]. . . .

I'd then call Officer Frank Pattinato . . . with the Zone 4, Pittsburgh Police Department. Officer Pattinato would testify

that he arrived at the bank following the complaint and [Appellant] was still there.

He would testify that he reviewed this check with the bank teller and manager, noting the signature on the back of the check. Commonwealth also has a video of [Appellant] signing the check at the bank.

[Appellant] was still present when the officers arrived, and we would stipulate that [Appellant] did give a statement to the officer and other members of the bank that were there.

[Appellant] stated that he applied for a school grant through FastWeb on the Internet. He stated that he received the check from them and was cashing the check for a school grant.

[The ADA then offers the check as an exhibit.]

The testimony also, I apologize, for Mr. Rattner would be that the teller wrote some information at the top of the check, that is a PA driver's license number, an expiration date and a date of birth matching [Appellant's] date of birth. This is information that the teller received from [Appellant] on that date.

Notes of Testimony ("N.T."), 6/29/2011, at 6-10.

Appellant then took the stand in his own defense. Appellant testified that, on the morning in question, he received in the mail an envelope addressed to him from Westmoreland Community Action. Inside the envelope, Appellant found a check in the amount of \$1,500. N.T. at 12-13. Appellant testified that he had applied for a scholarship grant on FastWeb.com. Appellant claimed that he had made similar requests on the website twice before, and had been provided with two other checks that were cashed without incident. N.T. at 14-15.

Appellant testified that, after receiving the \$1,500 check, he called S&T Bank's customer service center. Appellant provided the bank with all of

the relevant information on the check, including the routing numbers printed on the bottom of the check. Appellant claimed that he was informed that the check would be honored. Appellant stated that he then proceeded to the S&T Bank and attempted to cash the check, believing that it would be cashed. N.T. at 16. Once the check was rejected at the bank and Appellant was informed that the police were being called, Appellant remained at the bank because he believed that the check was a legitimate check issued pursuant to his online application for a scholarship grant. N.T. at 25.

Notably, Appellant admitted during his direct examination that he had pleaded guilty to forgery² and bad checks³ in the past. N.T. at 25-26. On cross-examination, the ADA exposed the fact that Appellant pleaded guilty to these crimes of falsehood on at least four separate occasions. N.T. at 27.

Before rendering a verdict, the trial court made the following observation:

Mr. Vales, I listened to your story. I just don't believe you. I mean, I believe you're a fraud. I believe you're a con man. I believe you have a history of doing this for 20 – going on 30 years now, 28 years. You have a pattern of doing the same things with forged checks, bad checks. I mean, that's not only what you do, that's who you are now. You're a con man. And of all people , someone just for no motive would just make up a check, put a name close to yours on it and send it to your house. Who would have a motive to do something like that? I mean, who could gain from that but you?

² 18 Pa.C.S. § 4101.

³ 18 Pa.C.S. § 4105.

I find you guilty. I think you're a habitual forger.

N.T. at 41. Thereafter, Appellant was sentenced to the time that he had already served in jail and a six-year term of probation. N.T. at 43, 48.

On July 11, 2011, Appellant filed post-sentence motions alleging, *inter alia*, that the trial court improperly considered Appellant's past crimes of dishonesty as evidence of Appellant's guilt in the present case. **See** Post-Sentence Motion at ¶6. On November 9, 2011, the trial court denied Appellant's motions. On December 9, 2011, Appellant filed a notice of appeal. In response, on December 14, 2011, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied.

Appellant now raises two issues for our consideration:

1. Did the trial court abuse its discretion when it denied [Appellant's] post-sentence motion for a new trial to cure the fact finder's prejudicial error of considering [Appellant's] prior convictions as proof that [Appellant] is a "habitual forger"?
2. Did the Commonwealth adduce sufficient evidence to prove beyond a reasonable doubt that [Appellant] acted with intent to defraud?

Brief for Appellant at 6.

In his first issue, Appellant argues that the trial court improperly considered Appellant's prior *crimen falsi* convictions as "proof of his propensity for committing forgery" and as "proof of [Appellant's] tendency to forge checks." Brief for Appellant at 13. We typically review claims of evidentiary error for an abuse of discretion. **See Commonwealth v. King,**

959 A.2d 405, 411 (Pa. Super. 2008). However, we must first determine whether Appellant properly preserved this issue in the trial court.

“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a). It is axiomatic that issues are preserved when objections are made timely to the error or offense. **See Commonwealth v. May**, 887 A.2d 750, 761 (Pa. 2005) (holding that an “absence of contemporaneous objections” renders an appellant’s claims waived); **Commonwealth v. Bruce**, 916 A.2d 657, 671 (Pa. Super. 2007) (holding that a “failure to offer a timely and specific objection results in waiver” of the claim). Raising an issue for the first time in a post-sentence motion does not overcome waiver for failing to object at the time of the alleged error. **Commonwealth v. Baumhammers**, 960 A.2d 59, 73 (Pa. 2008).

After reviewing the trial transcript, it is quite clear that Appellant did not contemporaneously object to the trial court’s observations before finding Appellant guilty. Additionally, Appellant has not directed us to any place in the record where a proper objection was made, other than in his post-sentence motions. **See** Pa.R.A.P. 2117(c); 2119(e). Consequently, this issue is waived.

Nonetheless, even if the issue were not waived, Appellant would not be entitled to relief. “Evidence of prior convictions can be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statements” **Commonwealth v.**

Randall, 528 A.2d 1326, 1329 (Pa. 1987). However, evidence of a defendant's prior crimes generally is not admissible solely to demonstrate a defendant's bad character or his propensity for committing criminal acts. **Commonwealth v. Aguado**, 760 A.2d 1181, 1186 (Pa. Super. 2000) (citing **Commonwealth v. Lark**, 543 A.2d 491, 497 (Pa. 1988)).

The purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes he was more likely to commit that crime for which he is being tried. The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence[.]

Aguado, 760 A.2d at 1186 (quoting **Commonwealth v. Spruill**, 391 A.2d 1048, 1049-50 (Pa. 1978)).

The *crimen falsi* evidence in this case was offered by Appellant himself. Unquestionably, Appellant offered these prior crimes in anticipation of the ADA's cross-examination, which would have introduced the crimes to impeach Appellant's credibility. Appellant essentially sought to take the wind from the ADA's sail. The prior crimes evidence was introduced to be used for credibility purposes only, and the record confirms that the trial court considered the evidence for that limited purpose. Indeed, the trial court made the contested statements immediately after saying, "Mr. Vales, I listened to your story. I just don't believe you." N.T. at 41. The challenged remarks were part of the trial judge's explanation of why he rejected

Appellant's testimony. This is exactly the purpose for which the prior crimes were admitted during Appellant's testimony.

Moreover, the trial court confirmed in its Pa.R.A.P. 1925(a) opinion that it considered the evidence of these prior crimes for credibility purposes only. The judge asserted that the comments were made only in reference to Appellant's credibility and that propensity to commit crimes was not part of the judge's deliberations. Trial Court Opinion ("T.C.O"), 4/3/2012, at 4. Just as there is a presumption that jurors follow the trial court's instructions on the law, **see Commonwealth v. Baker**, 614 A.2d 663, 672 (Pa. 1992), there is also the presumption that a trial court follows the law in a non-jury trial. **Commonwealth v. Gonzales**, 609 A.2d 1368, 1371 (Pa. Super. 1992). We can and do presume that the learned and experienced trial court knew that it was not permitted to use Appellant's prior crimes as propensity-type evidence, and we accord appropriate deference to the trial court's representations that it did not consider Appellant's prior crimes in that manner. **Id.** We also can and do presume that the trial court followed the law. While the court's comments initially could give a reasonable observer pause, they ultimately do not warrant any type of relief.

In his second issue, Appellant contends that the evidence was insufficient to support his forgery conviction. Appellant maintains that the Commonwealth failed to demonstrate beyond a reasonable doubt that Appellant possessed the necessary intent to defraud. We disagree.

“Our well-settled standard of review when evaluating a challenge to the sufficiency of the evidence mandates that we assess the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict-winner.” ***Commonwealth v. Whitacre***, 878 A.2d 96, 99 (Pa. Super. 2005). We must determine whether there is sufficient evidence to enable the fact-finder to have found every element of the crime beyond a reasonable doubt. ***Commonwealth v. Lambert***, 795 A.2d 1010, 1014-15 (Pa. Super. 2002) (internal citations and quotation marks omitted).

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 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.

Id.

To prove the crime of forgery, the Commonwealth must demonstrate beyond a reasonable doubt that the defendant, “with intent to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone . . ., utter[ed] any writing which he knows to be forged” 18 Pa.C.S. § 4101(a)(3). It is well-settled that the design

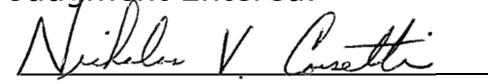
wrongfully to procure money concomitantly with a dishonest and injurious purpose is sufficient to demonstrate an individual's intent to defraud for forgery purposes. ***Commonwealth v. Green***, 211 A.2d 5, 9 (Pa. Super. 1965).

The evidence to which Appellant stipulated established that Appellant attempted to cash a check that was purportedly issued by Westmoreland Community Action. However, that check was not issued by Westmoreland Community Action. The fraudulent check was not styled in the same format as that of official Westmoreland Community Action checks. The tracking number on the fraudulent check identified a check that was cashed approximately 45 days before Appellant attempted to pass the check. Although Appellant alleged that he did not know that the check was fraudulent, the trial court found this testimony incredible. When supported by the record, we are bound by the trial court's credibility determinations. ***Commonwealth v. Abu-Jamal***, 720 A.2d 79, 93 (Pa. 1998). Thus, the evidence, viewed in the light most favorable to the Commonwealth, supports the reasonable inference that Appellant knowingly attempted to cash a fraudulent check with the intent to wrongfully procure money from the bank. ***See Green, supra***. Appellant's sufficiency claim fails.

Judgment of sentence affirmed. Jurisdiction relinquished.

Allen, J., concurs in the result.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: May 10, 2013