NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	
v.	
BARRY L. SMITH JR.	
Appellant	No. 1958 WDA 2011

Appeal from the Judgment of Sentence of November 15, 2011
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0000293-2010

BEFORE: MUSMANNO, J., BOWES, J., and WECHT, J.

MEMORANDUM BY WECHT, J. Filed: February 7, 2013

Barry Smith ("Appellant") appeals his November 15, 2011 judgment of sentence. Following trial by jury at which Appellant was found guilty, the court of common pleas imposed a sentence of 90 months' to 240 months' incarceration arising from Appellant's convictions of indecent assault by forcible compulsion, indecent assault by threat of forcible compulsion, unlawful restraint, stalking, false imprisonment, recklessly endangering another person, rape by forcible compulsion, rape by threat of forcible compulsion, aggravated assault, sexual assault, and aggravated indecent assault.[1] We affirm.

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[1] 18 Pa.C.S. §§ 3126(a)(2), 3126(a)(3), 2902(a)(2), 2709.1(a)(1), 2903, 2705, 3121(a)(1), 3121(a)(2), 2702(a)(1), 3124.1, 3125, respectively.

The trial court summarized the relevant facts of this case as follows:

> In the Fall of 2009, [Appellant] was in a relationship with Allison Vivian Kessler, a school teacher of eight (8) years and a resident of Monessen, Pennsylvania. [Appellant] and Kessler had been dating for three (3) months.
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> Kessler spent Thanksgiving weekend at [Appellant's] apartment, a duplex located at 67 Sampson Street, Belle Vernon, Fayette County, Pennsylvania. On November 29, 2009, the Sunday following Thanksgiving, the couple attended the Charleroi Sportsmen's Club and then purchased ammunition at Gander Mountain in preparation for the opening of hunting season the next day. Afterwards [Appellant] and Kessler stopped at two (2) bars before returning to [Appellant's] apartment. The first bar was the Steel City Saloon in West Mifflin, Pennsylvania. There they drank beers, ate wings, and watched the first half of the Pittsburgh Steelers football game. Around halftime, the two went to a bar located a few blocks from [Appellant's] apartment, known as Frosty Muggs.
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> Upon returning to [Appellant's] apartment, [Appellant] demanded sex from Kessler. Kessler refused and the two began arguing. Kessler decided to leave [Appellant's] apartment. As she attempted to exit the bedroom [Appellant] "kept blocking [her] from getting back to the steps. . . ." Kessler screamed for help hoping that neighbors would hear her. In response, [Appellant] forced Kessler to the floor and covered her mouth with his hands. He placed his fingers in her mouth attempting to silence her. Unable to muffle Kessler's screams, [Appellant] choked her until she passed out. [Appellant] wrapped his arm around Kessler's throat and squeezed until she was unconscious. Kessler testified [that Appellant] would choke her "until I couldn't scream any more or couldn't breathe or anything and then I wouldn't know if I just passed out for a minute, seconds, an hour, I'd be just totally limp. . . ." Kessler was choked by [Appellant] until she passed out at least four (4) different times that night.
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> After losing consciousness for the first time, Kessler awoke to find both she [*sic*] and [Appellant] naked. [Appellant] had her pinned down, warning her not to fight him while engaging in forcible sexual intercourse.

> Kessler tried to escape. [Appellant] permitted Kessler to use the bathroom. Kessler took advantage of the opportunity and attempted to run downstairs and outside to freedom. As she reached the top of the stairwell [Appellant] [dragged] her back into the bedroom by her hair. Her second attempt to escape failed as well. Kessler reached the stairs again but she was [dragged] back to the bedroom by her legs and then choked until she passed out. On her third attempt, Kessler reached as far as the kitchen, which was located downstairs, before [Appellant] choked her unconscious once again. When she came to, [Appellant dragged] her back upstairs to the bedroom. Finally, Kessler escaped after fooling [Appellant] into believing she was in the bathroom.
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> Once free, Kessler drove to Tom Suppa's house. Suppa was her longtime friend. He provided her with clothes and took her to the hospital.
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> At the hospital, Kessler's voice was inaudible, her neck and tongue were swollen, and she could not swallow. Chunks of her hair were missing from her head and blood was matted through her hair. She had brush burns, human bite marks on her hands and fingers, and one of her fingernails was completely missing. A CAT scan revealed Kessler also suffered from a broken nose. The hospital staff conducted a rape kit. At trial, Dr. Todd Robert Fijewski, the physician who examined Kessler at the hospital on November 30, 2009, testified that Kessler's injuries were consistent with her claim that she had been assaulted the night before.
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> [Appellant] testified at trial. He claimed that both he and Kessler spent the weekend using large quantities of cocaine and consuming a great deal of alcohol. [Appellant] testified that Kessler's injuries resulted from her falling down the steps at his apartment, on two (2) occasions that night after doing drugs and drinking alcohol. He also reported that her eye injury stemmed from an automobile incident a week earlier.

Trial Court Opinion ("T.C.O."), 11/15/2011, at 2-5 (citations to the notes of testimony and record omitted).

On June 10, 2011, Appellant was sentenced to 90 months' to 240 months' incarceration. On June 13, 2011, Appellant filed a motion for modification of his sentence. On June 20, 2011, that motion was denied. On the same day, Appellant filed additional post-sentence motions. On November 15, 2011, following briefing and oral argument, Appellant's post-sentence motions were denied.

On December 16, 2011, in response to Appellant's December 13, 2011 notice of appeal, 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, filing his statement on January 5, 2012. On January 25, 2012, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

Appellant now raises the following five issues for our consideration:

> 1. Did the trial court err in denying a defense motion *in limine* seeking to preclude as prejudicial testimony by the Commonwealth's medical expert?
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> 2. Did the trial court err in denying [Appellant's] post-sentence motion for judgment of acquittal alleging that the evidence presented against [Appellant] at trial was insufficient as a matter of law to establish [Appellant's] guilt beyond a reasonable doubt on all the charges against him?
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> 3. Did the trial court err in denying [Appellant's] post-sentence motion for the award of a new trial and/or an arrest of judgment alleging that the verdict of guilty entered against [Appellant] in the above captioned matter was against the weight of the evidence?
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> 4. Did the trial court err in overruling [Appellant's] objection to the Commonwealth's medical expert that in his opinion the victim was telling the 100% truth about the injuries she suffered?

> 5. Did the trial court err in denying [Appellant's] post-sentence motion for a new trial based on [Appellant's] trial counsel having been ineffective?

Brief for Appellant at 5.

In his first issue, Appellant contends that the trial court abused its discretion in denying Appellant's motion *in limine* seeking to preclude the Commonwealth's medical expert from testifying at trial. On the Friday before trial was set to commence, the Commonwealth provided Appellant with the victim's medical reports and the name of the emergency room treating physician, Todd Robert Fijewski, M.D.. Before Dr. Fijewski testified, Appellant presented an oral motion *in limine*, arguing essentially that the Commonwealth was engaging in trial by ambush. Notes of Testimony ("N.T."), 3/7-8/2011, at 67. The Commonwealth replied that, in its initial discovery disclosure to Appellant, it had noted that the investigation was ongoing and that other witnesses might be identified as the investigation continued. Moreover, the Commonwealth argued that it did not receive the medical records until after satisfying Appellant's initial discovery request. The Commonwealth maintained that it disclosed the medical records, which identified Dr. Fijewski as the victim's treating physician, in a prompt manner after the Commonwealth received them. The trial court, satisfied that the records were received by defense counsel's office before trial began, denied Appellant's motion *in limine*. N.T. at 69.

In reviewing a trial court's decision to grant or deny a motion *in limine*, we employ an abuse of discretion standard. ***Commonwealth v. Bozyk***, 987

A.2d 753, 755–56 (Pa. Super. 2009) (quoting ***Commonwealth v. Owens***, 929 A.2d 1187, 1190 (Pa. Super. 2007)). The admission of evidence is committed to the sound discretion of the trial court, and a trial court's ruling regarding the admission of evidence will not be disturbed on appeal "unless that ruling reflects 'manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous.'" ***Id.*** (quoting ***Commonwealth v. Einhorn***, 911 A.2d 960, 972 (Pa. Super. 2006)).

As part of the discovery process, the Commonwealth is required to disclose, upon request, "any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth." Pa.R.Crim.P. 573(B)(1)(e). The Commonwealth complied with Appellant's initial discovery request by providing Appellant with all of the police reports and discovery materials that the Commonwealth possessed at the time. There is no evidence suggesting that the Commonwealth was in possession of the medical reports or the name of the treating physician at that time. No evidence of record suggests, nor does Appellant argue, that the Commonwealth obtained the records and held on to them until the last possible minute before disclosing them. Appellant directs his complaint at the date of disclosure as it relates to the commencement of trial, but does not allege that the material was in the Commonwealth's possession at an earlier date. Nothing in the record indicates that the Commonwealth failed

to disclose the records in a timely manner once the records came into the Commonwealth's possession. Because Appellant cannot establish a discovery violation, the trial court did not abuse its discretion in denying Appellant's motion *in limine*.

Even if the Commonwealth's actions constituted a discovery violation, such a violation does not automatically entitle Appellant to a new trial. ***Commonwealth v. Jones***, 668 A.2d 491, 513 (Pa. 1995). "A defendant seeking relief from a discovery violation must demonstrate prejudice." ***Commonwealth v. Causey***, 833 A.2d 165, 171 (Pa. Super. 2003). Appellant contends that he suffered prejudice from the late disclosure because, had he been provided with the reports and the name of the treating physician, he might have retained his own expert to review the reports and possibly offer an alternative cause of the victim's injuries. However, Appellant was provided with the police reports in the initial discovery disclosure. From those reports, Appellant knew that the victim was treated at the hospital for severe injuries. Because Appellant was on notice of the injuries, nothing prevented him from retaining his own expert. The Commonwealth's disclosure of the medical information was not a prerequisite to Appellant conducting his own investigation. Appellant cannot demonstrate the level of prejudice that would give rise to an abuse of the trial court's discretion.

Appellant next challenges the sufficiency of the evidence presented by the Commonwealth at trial to prove the crimes of rape, aggravated assault, sexual assault and aggravated indecent assault.

> 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 [finder] 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. Jones, 886 A.2d 689, 704 (Pa. Super. 2005).

We turn to Appellant's challenges to the sex-related offenses. We consider them together because Appellant's argument as to these offenses is the same. Appellant contends that the evidence for each of these crimes must be insufficient, because no other evidence was presented to prove these offenses other than the victim's testimony. In other words, Appellant argues that the evidence was insufficient to prove each of these crimes

beyond a reasonable doubt because no evidence was presented to corroborate the victim's testimony. This argument fails.

A person commits a rape when that person engages in sexual intercourse with another person by forcible compulsion. 18 Pa.C.S. § 3121(a)(1). To prove the "forcible compulsion" component of rape, the Commonwealth must establish, beyond a reasonable doubt, that the defendant "used either physical force, a threat of physical force, or psychological coercion, since the mere showing of a lack of consent does not support a conviction for rape . . . by forcible compulsion." ***Commonwealth v. Brown***, 727 A.2d 541, 544 (Pa. 1999).

For sexual assault, the Commonwealth must prove that a person "engaged in sexual intercourse . . . with a complainant without the complainant's consent." 18 Pa.C.S. § 3124.1. Resistance to sexual assault is not required to sustain a conviction. 18 Pa.C.S. § 3107; ***Commonwealth v. Pasley***, 743 A.2d 521 (Pa. Super. 1999) (noting that the crime of sexual assault is intended to fill the loophole left by the rape and involuntary deviate sexual intercourse statutes by criminalizing non-consensual sex where the perpetrator employs little or no force).

Lastly, a person will be found guilty of aggravated indecent assault if he engages "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."

18 Pa.C.S. § 3125(a); ***Commonwealth v. Hunzer***, 868 A.2d 498, 505 (Pa. Super. 2005).

Instantly, the victim testified that Appellant choked her until she was unconscious at least four times. When she awoke from one of these attacks, she was naked and pinned down by Appellant. Appellant instructed her not to fight with him and forced his penis inside of her vagina, without her consent. This evidence plainly established the elements of the crimes of rape, sexual assault, and aggravated indecent assault beyond a reasonable doubt.

Appellant's belief that corroboration of the victim's testimony was necessary to prove these crimes beyond a reasonable doubt has no basis in our law. To the contrary, our Crimes Code and our case law explicitly reject Appellant's theory, instead providing that testimony of a victim in a sex-related criminal case **does not require** corroboration to constitute proof beyond a reasonable doubt. 18 Pa.C.S. § 3106; ***see also Commonwealth v. Wall***, 953 A.2d 581, 584 (Pa. Super. 2008) ("A rape victim's uncorroborated testimony to penile penetration is sufficient to establish sexual intercourse and thus support a rape conviction."). Therefore, Appellant's argument fails.

Lastly, Appellant challenges the sufficiency of the evidence offered to support his conviction for aggravated assault. A person may be convicted of aggravated assault if he or she "attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under

circumstances manifesting extreme indifference to the value of human life." 18 Pa.C.S. § 2702(a)(1). Serious bodily injury is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. § 2301.

Appellant does not challenge the proof offered to establish the *mens rea* element of aggravated assault. Rather, Appellant argues that the injuries suffered by the victim did not rise to the level of "serious bodily injury." However, whether the victim's injuries amounted to serious bodily injury actually is irrelevant because the the evidence presented at trial was sufficient to establish beyond a reasonable doubt that Appellant **attempted** to cause serious bodily injury to the victim. ***See*** 18 Pa.C.S. § 2702(a)(1).

"A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S. § 901(a). An attempt under § 2702(a)(1) requires a showing of some act, albeit not one causing serious bodily injury, accompanied by an intent to inflict serious bodily injury. ***Commonwealth v. Alexander***, 383 A.2d 887, 889 (Pa. 1978). "A person acts intentionally with respect to a material element of an offense when . . . it is his conscious object to engage in conduct of that nature or to cause such a result . . . ." 18 Pa.C.S. § 302(b)(1)(i). "As intent is a subjective frame of mind, it is of necessity difficult of direct proof." ***Commonwealth v. Roche***, 783 A.2d 766, 769 (Pa. Super. 2001)). The intent to cause

serious bodily injury may be proven by direct or circumstantial evidence. ***Commonwealth v. Hall***, 830 A.2d 537, 542 (Pa. 2003).

Here, when the victim attempted to leave Appellant's residence, Appellant grabbed her and jammed his fingers in her mouth to quiet her. Appellant proceeded thereafter to choke the victim until she lost consciousness at least four times. Unquestionably, such an action could have caused the victim's death on any of those four occasions. Moreover, as the victim continued to attempt to escape Appellant's attack, Appellant repeatedly thwarted her attempts by dragging her by her hair or her legs to his bedroom, where he again choked her to the point of unconsciousness. Following Appellant's brutal assault, the victim could not speak, because her throat and tongue were swollen. The victim was unable to swallow properly. Patches of hair were missing from her head, which was partially covered with blood, and a fingernail was missing from one of her fingers. The victim had brush burns, bite marks, and a broken nose.

There is no doubt that, by choking the victim no less than four times to the point of unconsciousness, Appellant intended to cause serious bodily injury. As such, the evidence was sufficient to prove that Appellant attempted to cause serious bodily injury, and, ultimately, the crime of aggravated assault, beyond a reasonable doubt.

Appellant next challenges the jury's weighing of the evidence. "For this Court to reverse the jury's verdict on weight of the evidence grounds, we must determine that the verdict is so contrary to the evidence as to

shock one's sense of justice." ***Commonwealth v. Johnson***, 910 A.2d 60, 64 (Pa. Super. 2006) (citation and internal quotation marks omitted).

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Id.

The victim testified as to the events described above. Her testimony relevant to the injuries she sustained was corroborated by the emergency room treating physician, Dr. Fijewski. The jury credited this testimony, despite Appellant's own testimony that the victim had been drinking heavily and that the causes of her injuries were multiple falls down the stairs. The victim's testimony clearly supported the verdict, and we discern no cause to believe that this verdict should have shocked the conscience of any court. Thus, the trial court did not abuse its discretion in rejecting Appellant's weight of the evidence challenge.

Appellant next assigns error to the trial court's denial of his objection to a portion of the opinion offered by Dr. Fijewski at trial. When asked by the assistant district attorney whether he had an expert opinion as to the cause of the victim's injuries, Dr. Fijewski testified that, "[m]y opinion in the

history of physical effects in this case I think [the victim] told the one hundred percent honest truth in regards to what had happened to her the night before and I think she suffered an assault." N.T. at 88. Appellant's counsel immediately objected. The trial court overruled the objection, reasoning that, "[h]e's making an opinion on his medical evaluation and opinion based upon his examination and the history of the case. So taking the history of the case with his medical examination, he's qualified to make the opinion. We will overrule the objection." ***Id.*** We agree with Appellant that this testimony was improperly admitted. However, Appellant nonetheless is not entitled to a new trial.

Our standard of review in evidentiary challenges is well-settled. "The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error." ***Commonwealth v. Glass***, 50 A.3d 720, 724–25 (Pa. Super. 2012) (citation and internal quotation marks omitted).

The assessment of the credibility of a witness and the veracity of that witness' testimony lies within the exclusive province of the jury.

> The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon references drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness. The phenomenon of lying, and situations in which prevarications might be expected to occur, have traditionally been regarded as within the ordinary facility of jurors to assess.

Commonwealth v. Seese, 517 A.2d 920, 922 (Pa. 1986).

It is well-settled in Pennsylvania that an expert may not intrude upon the jury's primary role. ***See Commonwealth v. Bormack***, 827 A.2d 503, 511-12 (Pa. Super. 2003); ***Commonwealth v. D.J.A.***, 800 A.2d 965, 974 (Pa. Super. 2002) (citing ***Commonwealth v. Dunkle***, 602 A.2d 830, 837–838 (Pa. 1992) ("The Pennsylvania Supreme Court has . . . been emphatic in holding that an expert may not testify as to the credibility of a witness's testimony.") "It is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of the credibility of a witness." ***Seese***, 517 A.2d at 922. "Whether the expert's opinion is offered to attack or to enhance, it assumes the same impact—an unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess." ***Commonwealth v. Spence***, 627 A.2d 1176, 1182 (Pa. 1993).

Based upon these well-entrenched principles, the trial court unquestionably erred, and abused its discretion, in overruling Appellant's objection to Dr. Fijewski's opinion as to the victim's veracity. Dr. Fijewski was testifying as a medical expert and/or the victim's treating physician. His contested testimony was not a valid medical opinion, as found by the trial court, but instead was an explicit opinion to the effect that the victim was telling the truth. This invaded the jury's province. It was not permissible.

However, the improper admission of this testimony does not automatically entitle Appellant to relief. Where an error is deemed to be harmless, reversal is not warranted. Harmless error exists where:

> (1) the error did not prejudice the defendant or the prejudice was *de minimis*; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Hutchinson, 811 A.2d 556, 561 (Pa. 2002) (quoting ***Commonwealth v. Robinson***, 721 A.2d 344, 350 (Pa. 1999)).

Any prejudice that resulted from the error was *de minimis*. The victim testified at length to the physical and sexual assaults inflicted upon her by Appellant. Appellant essentially tortured her through these assaults, and used violence and threats to prohibit her from escaping his clutches. The victim's testimony was unequivocal and credited by the jury. Additionally, the victim's testimony was corroborated fully and extensively through the properly admitted portion of Dr. Fijewski's testimony. The jury was fully capable of assessing the credibility not only of the victim's testimony but also of Appellant's testimony. The jury resoundingly believed the victim's testimony, and rejected Appellant's. There is no indication in the record that Dr. Fijewski's improper testimony contributed to, or swayed, the jury's verdict in any meaningful way. Accordingly, we conclude that the trial court's error was harmless.

In his final issue, Appellant argues that his trial counsel was ineffective for failing to call character witnesses to testify that Appellant had a reputation in the community for, among other relevant traits, being non-violent. Appellant initially raised this issue in post-sentence motions. The trial court held a hearing, during which Appellant called seven witnesses, including trial counsel. Following the hearing, the trial court rejected Appellant's ineffective assistance of counsel claim.

Even though this claim appears ripe for review, we must dismiss it without prejudice to be raised in a subsequent Post-Conviction Relief Act ("PCRA") petition.[2] ***See Commonwealth v. Barnett***, 25 A.3d 371 (Pa. Super. 2011) (*en banc*) (holding that this Court cannot review ineffective assistance of counsel claims on direct appeal absent a defendant's waiver of PCRA review). As we explained in ***Commonwealth v. Quel***, 27 A.3d 1033, 1036-37 (Pa. Super. 2011):

> In ***Commonwealth v. Grant***, 572 Pa. 48, 813 A.2d 726 (2002), our Supreme Court announced a general rule providing a defendant "should wait to raise claims of ineffective assistance of trial counsel until collateral review" pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546. ***Grant***, at 738. Nevertheless, in ***Commonwealth v. Bomar***, 573 Pa. 426, 826 A.2d 831 (2003), *reargument denied*, July 17, 2003, *cert. denied*, ***Bomar v. Pennsylvania***, 540 U.S. 1115, 124 S.Ct. 1053, 157 L.Ed.2d 906 (2004), our Supreme Court recognized an exception to ***Grant*** and found that where ineffectiveness claims had been raised in the trial court, a hearing devoted to the question of ineffectiveness was held at

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[2] ***See*** 42 Pa.C.S. §§ 9541-46.

> which trial counsel testified, and the trial court ruled on the claims, a review of an ineffectiveness claim was permissible on direct appeal. ***See Bomar***, 826 A.2d at 853–854; ***See also Commonwealth v. Fowler***, 893 A.2d 758, 763–764 (Pa. Super. 2006); ***Commonwealth v. Wright***, 599 Pa. 270, 319–320, 961 A.2d 119, 148 (2008).
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> However, most recently, in ***Commonwealth v. Barnett***, 25 A.3d 371, 376–78 (Pa. Super. 2011) (*en banc*), this Court concluded our Supreme Court has limited the applicability of ***Bomar*** and that Barnett's assertions of counsel's effectiveness are appropriately raised only on collateral review. We ultimately determined that "[w]ith the proviso that a defendant may waive further PCRA review in the trial court, absent further instruction from our Supreme Court, this Court, pursuant to ***Wright*** and [***Commonwealth v. Liston***, 602 Pa. 10, 28, 977 A.2d 1089, 1100 (2009)], will no longer consider ineffective assistance of counsel claims on direct appeal." ***Id.*** at 377.

Quel, 27 A.3d at 1036-37 (footnote omitted).

Instantly, there is no indication in the record that Appellant expressly waived his right to PCRA review. In fact, Appellant was not even present in court when the ineffective assistance of counsel claim was litigated. ***See*** N.T., 10/28/2011, at 4-5. Consequently, in light of ***Barnett***, we dismiss Appellant's claim of ineffective assistance of counsel, without prejudice to his ability to raise it in a subsequent PCRA petition, if he so chooses

Judgment of sentence affirmed. Jurisdiction relinquished.