

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JEREL S. BROOKS

Appellant

No. 1373 EDA 2013

Appeal from the Judgment of Sentence April 11, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009258-2007,
CP-51-CR-0009259-2007, CP-51-CR-0009260-2007

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and WECHT, J.

MEMORANDUM BY LAZARUS, J.:

FILED JULY 15, 2014

Jerel S. Brooks appeals from the judgment of sentence imposed by the Court of Common Pleas of Philadelphia County on April 11, 2013, following his conviction for involuntary deviate sexual intercourse (IDSI),¹ indecent assault,² unlawful contact with a minor³ and endangering the welfare of children.⁴ After careful review, we affirm.

The trial court set forth the facts of this case as follows:

¹ 18 Pa.C.S. § 3123(b).

² 18 Pa.C.S. § 3126.

³ 18 Pa.C.S. § 6318(a)(1).

⁴ 18 Pa.C.S. § 4304(a).

From 2002 to 2006 [Brooks] resided . . . with the minor complainants, BG1, twin sister BG2 and their sister JT, their brothers, J and M, and the children's mother [(Mother)]. At trial BG1, BG2, and JT described incidents of sexual touching that began when the twins were approximately [seven years old and JT was approximately eight years old]. BG1 stated that on occasion, while she was home alone with [Brooks], he grabbed her breasts and kissed her neck and her lips, placing his tongue in her mouth. She testified that [Brooks] directed her to lay in bed with him and that he removed her shirt, kissed her breasts, and kissed her vagina. On another occasion [Brooks] called her into the bedroom and removed her shirt, kissing her in the mouth and neck as she stood between his legs. BG1's brother M and a few of his friends knocked on the bedroom door and [Brooks] instructed her to quickly dress before M entered the room. A third incident occurred during which BG2 was watching television while sitting on the edge of [Brooks'] bed. [Brooks] crawled over to her and started kissing her on the back of her neck and BG2 felt [Brooks'] penis touching her back. BG2 stated that [Brooks] then turned her around to face him and he began touching her stomach and breasts, kissing her with his tongue in her mouth. BG2 stated that she was in the second and third grades when [Brooks] engaged in this conduct, and that it happened numerous times.

BG1 testified that when she was approximately seven years old, [Brooks] engaged in similar conduct with her, kissing her and licking her stomach. She stated that she did not report the incident as [Brooks] was a father figure to her and that she did not know his touching her was inappropriate. She believed that [Brooks] was being affectionate towards her as he would to his daughter.

BG1 and BG2 testified of multiple additional incidents of [Brooks] touching them sexually while the two sisters were together with him. BG1 testified that on one such occasion, she and her twin sister BG2 were in bed and [Brooks] entered the room, turned the lights off, and began kissing her. [Brooks] pulled BG1 on top of him and placed his hands on her rear while continuing to kiss BG1 with his tongue in her mouth. He then leaned over to BG2, lifted up her shirt, and kissed her breasts.

BG1 and BG2 testified that on another occasion they were watching a movie with [Brooks] in his bedroom and [Brooks] was kissing them on various parts of their bodies. BG1 stated

that there were times when she and BG2 would be watching a movie with [Brooks] in the bedroom he shared with their mother, and [Brooks] would instruct one of the girls to get on the bed with him while the other watched the movie. [Brooks] then engaged in similar sexual touching with each of the minor complainants.

BG1 further testified that when she was in the fourth grade, [Brooks] and BG1 were home alone and [Brooks] called her over to his bed. When BG1 sat next to [Brooks] he lifted her shirt and began kissing her stomach and chest. He then pulled her pants down and started kissing her thighs and legs and sucking on BG1's toes. BG1 stated that these incidents occurred almost daily.

JT testified and described multiple incidents of [Brooks] touching her sexually. She stated that [when she was eight years old Brooks] kissed her with his tongue in her mouth and that she pushed him off. On one occasion as JT, then twelve, was preparing dinner for her siblings while her mother was at work, [Brooks] came behind her, hugged and began kissing her on the back of her neck. Again she pushed him off. The three complainants described an incident during which JT was preparing dinner while BG2 and BG1 watched and [Brooks] entered the kitchen, picked JT up, placed her on a counter top, and began hugging and kissing her. Finally, JT testified that while she was asleep in the bedroom the girls shared she was awakened to find [Brooks] laying on her bed and French kissing her neck. She again repelled Brooks and he threw a nearby blow heater at her. JT stated that these incidents occurred over the course of several months. She reported the initial incident to [Mother], who did not believe her and was dismissive of her claims. [Mother] did confront [Brooks] with the allegations and he denied them.

On September 4, 2006, the young girls' brother, C, walked into their bedroom and found BG2 sitting on [Brooks's] lap. He shut the door and left the house. C explained that Appellant was only clad in a towel and that he felt uncomfortable. The children's mother returned home shortly thereafter and C reported his observations, telling her that [Brooks] was 'messing' with the girls. After speaking with C, [Mother] took the girls into the house at which point the children reported the incidents to her. The children told [Mother] that they did not tell her before then because Brooks had threatened them. [Mother] then directed

the children to go outside of the house whereupon she confronted [Brooks who fled]. [Mother] called the police. She was transported to the Police Special Victims Unit with her children where they gave formal statements.

Trial Court Opinion 10/18/2013 at, 2-5 (citations omitted).

Brooks was arrested on September 11, 2006, but was not tried until several years later. At the conclusion of trial on March 8, 2013, the jury convicted him of the aforementioned offenses. On April 11, 2013, Brooks was determined to be a sexually violent predator, and was sentenced to an aggregate term of ten to twenty years' imprisonment plus five years' probation.

On May 3, 2013, Brooks filed a timely notice of appeal, and on August 19, 2013, in response to an order from the trial court, he filed a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court filed its Rule 1925(a) opinion on October 18, 2013.

Brooks raises the following issues for our review:

1. Whether the jury's verdict was against the weight of the evidence and whether there was sufficient evidence to support the jury's verdict;
2. Whether the court abused its discretion in consolidating the offenses;
3. Whether the court's concurrent sentences were unduly excessive in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution;
4. Whether the court abused its discretion regarding the admissibility of hearsay evidence and tender years hearsay evidence.

Appellant's Brief, at 4.

Brooks first argues there was insufficient evidence to support his conviction for IDSI with a child, indecent assault, and unlawful contact with a minor. This Court's standard of review of a sufficiency of the evidence claims is well established:

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 [this] 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 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. Chine, 40 A.3d 1239, 1242 (Pa. Super. 2012) (citations omitted).

IDSI occurs "when the person engages in deviate sexual intercourse with a complainant who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other." 18 Pa.C.S. § 3123(a)(7). Deviate sexual intercourse is defined as "[s]exual intercourse per os or per anus between human beings." 18 Pa.C.S. § 3101. Sexual intercourse "includes

intercourse per os or per anus, with some penetration however slight; emission is not required.” **Id.**

Brooks argues that there was insufficient evidence to prove penetration. He notes that BG2 testified on direct and on cross-examination that Brooks “kissed” her vagina, but remained on “top” and on the “outside” of her vagina. (N.T. 3/2/12, at 135). However, this Court has held that the term “penetration however slight” is not limited to penetration of the vagina. **See Commonwealth v. Ortiz**, 457 A.2d 559 (Pa. Super. 1983)(twelve-year-old victim’s testimony that defendant licked her vagina sufficient to support conviction of IDSI). In this case, BG2 testified that “he went down to my vagina area and started licking down there.” (N.T. 3/2/12, at 135) Accordingly, the trial court properly determined that there was sufficient evidence for the jury to find Brooks guilty of IDSI.⁵

Brooks also argues that there was insufficient evidence to find him guilty of indecent assault because BG1 and JT only indicated that Brooks kissed them on their necks or mouths. Section 3126(7) of the Crimes Code states:

A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the

⁵ Brooks also challenges the weight of the evidence supporting his convictions. However, we are precluded from reviewing this issue because he failed to raise it prior to sentencing or in a post-sentence motion. **See** Pa.R.Crim. 607(A).

complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and the complainant is less than 13 years of age.

18 Pa.C.S. § 3126(7). The Crimes Code defines indecent contact as “any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person.” 18 Pa.C.S. § 3101. BG1 testified that Brooks kissed her lips, “put his tongue in [her] mouth, and put his hands on [her] butt.” (N.T. 3/05/12, at 20). She also testified that Brooks “would shake [his leg] and . . . moan[.]” when “he really got into it.” (N.T. 3/5/12, at 23). JT testified that Brooks kissed and licked her neck making her feel uncomfortable. (N.T. 3/5/12, at 67). The evidence was sufficient for the jury to find Brooks guilty of indecent assault.

Brooks also challenges the sufficiency of the evidence in regard to unlawful contact with a minor. Brooks states that he “lacked the intent to come in contact with the complainants.” Appellant’s Brief, at 11. The Crimes Code provides that, “[a] person commits an offense if he is intentionally in contact with a minor.” 18 Pa.C.S. § 6318. The trial testimony provides ample evidence to substantiate Brooks’ intent. BG1 stated that Brooks called her into his room and removed her shirt before touching her breasts. BG2 testified that Brooks did the same to her as well. JT testified that Brooks came up behind her and began kissing her and rubbing her before she pushed him away. It is clear from Brooks’ conduct that he intended to initiate conduct and there was sufficient evidence for the jury to convict Brooks of unlawful contact with a minor.

Brooks next argues that the court abused its discretion in consolidating the offenses. “The decision to sever offenses is within the sound discretion of the trial court and will be reversed only for a manifest abuse of that discretion.” ***Commonwealth v. Collins***, 703 A.2d 418, 422 (Pa. 1997). Section 582 of the Crimes Code states, “[o]ffenses charged in separate indictments or informations may be tried together if the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion.” Pa.R.Crim.P. 582 (a)(1)(a). Evidence relating to other offenses “is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.” Pa.R.E. 404(b)(2). Evidence is unfairly prejudicial if “the evidence tended to convict appellant only by showing his propensity to commit crimes, or . . . the jury was incapable of separating the evidence or could not avoid cumulating the evidence.” ***Commonwealth v. Houseman***, 986 A.2d 822 (Pa. 2009).

Brooks argues that consolidating the charges created confusion for the jury because the complainants testified about events that occurred over a span of several years. He also states that the three complainants’ testimony created a prejudicial storyline emphasizing his character to commit these acts.

In this case, the offenses were committed against members of the same family, and the complainants witnessed the acts committed against other members of their family. The testimony of the twins was separated by

three days, and the events they described were different enough to enable the jury to differentiate between them. Furthermore, to avoid jury confusion, the prosecutor provided the jury with a chart correlating the victims' ages with the separate charges of abuse.

Consolidating the counts against Brooks also served the interest of judicial economy. "The general policy of the law is to encourage joinder of offenses and consolidation of indictments when judicial economy can thereby be affected, especially when the result will be to avoid the expensive and time-consuming duplication of evidence." ***Commonwealth v. Patterson***, 546 A.2d 596, 600 (Pa. 1988). Accordingly, the trial court did not abuse its discretion when it consolidated the claims against Brooks.

Brooks next argues that the trial court's sentences were unduly excessive, in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution. Brooks argues that the sentence of ten to twenty years' incarceration with five years of probation was disproportionate with respect to protection of the public, impact on the community, and his rehabilitative needs. Brooks points out that the sentencing court only found him guilty of abusing girls "he considered daughters," and that his actions have "little effect on the surrounding community or public." Appellant's Brief at 15. Brooks further contends that his sentence was excessive in relation to the danger he presents to the public at large. Brooks also states that "there is no evidence presented suggesting that [he] would commit this type of crime again." ***Id.*** Brooks also argues that he would be responsive to rehabilitation

because he had no prior convictions, no history of mental health issues, and although he is categorized as a sexually violent predator, he was not found to have committed the acts in an “unusually cruel manner, nor in a way that exceeded the means necessary to achieve the offense.” **Id.** at 16. We disagree.

An appellant challenging the sentencing court’s discretion must invoke this Court’s jurisdiction by satisfying a four-part test. **Commonwealth v. Prisk**, 13 A.3d 526 (Pa. Super 2011).

We conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (3) whether appellant’s brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Id. at 532 (citing **Commonwealth v. Evans**, 901 A.2d 528, 533 (Pa. Super. 2006)).

Here, Brooks has failed to satisfy the second prong of the four-prong test. Brooks did not file any post sentence motions nor did he raise any issues during sentencing. Therefore, his appeal of the discretionary aspects of sentencing is waived. Pa.R.Crim.P. 720.

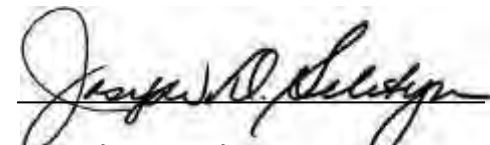
Brooks finally argues that the trial court abused its discretion regarding the admissibility of tender years hearsay evidence. He states that testimony of BG1 about what he did to BG2 in the bedroom was hearsay that did not fall under the tender years doctrine. Brooks also takes

exception to JT's testimony about a conversation she had with BG1 in which BG1 described where the defendant licked her. Brooks argues that the tender years doctrine requires that the court hold an *in camera* hearing before admitting this type of hearsay.

"This Court has deemed an appellate claim that testimony constituted inadmissible hearsay waived where, at trial, counsel, merely said without this explanation 'Objection.'" ***Commonwealth v. Lopez***, 57 A.3d 74, 82 (Pa. Super. 2012) (citing ***Commonwealth v. Willis***, 552 A.2d 682, 690 (Pa. Super. 1988)). Brooks identifies four parts of the testimony as being hearsay. Of these four, trial counsel only objected to three. Furthermore, trial counsel did not specifically state the basis for her objection to any of the testimony, only stating "Objection." Therefore, Brooks waived the right to appeal the admission of this testimony. ***Lopez, supra***.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014