NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	
DONALD MICHAEL KLOCH,	:	No. 1469 MDA 2013
	:	
Appellant	:	

Appeal from the Judgment of Sentence, May 30, 2013,
in the Court of Common Pleas of York County
Criminal Division at No. CP-67-CR-0006893-2012

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STRASSBURGER,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 08, 2014**

Appellant appeals the judgment of sentence entered May 30, 2013. Finding no error, we affirm.

On February 11, 2013, a jury found appellant guilty of one count of attempted homicide, two counts of aggravated assault, three counts of terroristic threats, one count of false imprisonment, one count of unlawful restraint, three counts of simple assault, three counts of recklessly endangering another person, and one count of attempted involuntary deviate sexual intercourse ("IDSI").[1]

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 901(a), 2702(a)(4), 2706(a)(1), 2903(a), 2902(a)(1), 2701(a)(3), 2705, and 901(a), respectively.

Appellant's convictions arose from events that transpired on May 7, 2012, in Peach Bottom Township. At that time, the victim, Aerial Auble, was at appellant's house purchasing and consuming drugs. Auble came and went from appellant's residence several times that day. Eventually, after exchanging text messages with one Kacey Simon, Auble informed appellant that Simon could get them a good deal on Percocet. Appellant gave Simon $800 and transported Auble and Simon to a house in Maryland.[2] Simon went into the house, but never returned, and no one answered the door to the house when appellant knocked. Simon initially had responded to text messages from Auble, but eventually stopped returning her messages.

Appellant and Auble returned to appellant's residence and went into his bedroom. Appellant announced his intent to go to Simon's house. He retrieved a double-barreled shotgun and loaded it. Auble attempted to grab her purse and leave, but appellant prevented her. Appellant told Auble that she was responsible for him losing his money and that she needed to fix it. Appellant then repeatedly told Auble that she better be "a good piece of ass" for his money. Appellant grabbed Auble by the hair and the shotgun discharged through the floor near Auble's feet. Appellant pushed Auble onto the bed and, while holding her down, reloaded the shotgun. Appellant first tried to remove Auble's clothing and then exposed his penis and attempted to force Auble's face down to his groin, telling her to "suck his dick."

[2] The record variously identifies the amount of money as $800 and $900.

At this moment, Auble's cellular telephone began to ring. Appellant grabbed the phone and hit Auble in the head with it which had the inadvertent effect of answering the telephone. On the other end was Auble's mother who overheard the sounds of their struggle. Auble's mother summoned Auble's father and the two of them, along with one Benjamin Pohl, went to appellant's house. Ultimately, Auble's father and Pohl entered the house and broke down the bedroom door. Appellant threatened them with the shotgun, and a physical struggle for the gun ensued among appellant, Auble's father, and Pohl, with the gun twice discharging into the bedroom wall. Appellant eventually lost control of the gun and Auble, her father, and Pohl were able to make their escape. Appellant followed them out onto his front porch threatening that if he ever saw any of them again, he would kill them.

On May 30, 2013, appellant was sentenced to an aggregate term of 8½ to 17 years' imprisonment with a consecutive 5 years' probation for the attempted IDSI. Appellant filed a post-sentence motion in which he raised, without specification as to any details, boilerplate claims as to the weight and sufficiency of the evidence. No supporting brief was filed. On July 17, 2013, a hearing was held on these claims. The entire sum and substance of appellant's argument was as follows:

> Next case, Your Honor, is the Commonwealth versus Donald Kloch, docketed at 6893 of 2012. This is the date and time scheduled for a hearing on Defendant's post-sentence motion.

Defendant is present and represented by Attorney Holt.

THE COURT: All right. Good morning, counselor.

ATTORNEY HOLT: Good morning.

THE COURT: What would you like me to know?

ATTORNEY HOLT: Well, I filed the post-trial motions. You were present during the entire trial. You heard the testimony.

THE COURT: All right.

ATTORNEY HOLT: It's your recollection as to what the testimony was and whether it was the way [sic] of the verdict.

My biggest argument, although they have all been raised, has to deal with the IDSI.

THE COURT: Right.

ATTORNEY HOLT: We had discussions even off the record about the sex charges and --

THE COURT: Right, understood.

All right. I understand defense has to file these motions to preserve it. The Court can't disturb the jury verdict where there was adequate evidence to support the jury verdict.

On the -- on the offenses where Mr. Kloch was convicted, that had to do with the wrestling with the weapon and the three people being in the room and everything that derived from that, there were three eyewitnesses. The jury had sufficient evidence from those witnesses to support the findings of guilt.

In regard to the IDSI, it was basically a swearing contest. We had the alleged victim

> indicating one set of facts, Mr. Kloch stating another set of facts. Again, that was the jury's job as fact finder to decide who to believe and who not to believe, and they had believed the young lady, so there was sufficient evidence to support that finding of guilt as well.
>
> The jury is entitled to choose to believe one person's testimony over another, even if both witnesses would seem to even have a similar level of credibility from the stand, and the jury chose to believe the young lady.
>
> So, there is sufficient evidence to support the verdict. There's not a basis on a factual dispute to grant the new trial. It's a jury verdict question, and, accordingly, motion for new trial is denied.

Notes of testimony, 7/17/13 at 1-2.

On appeal, appellant raises the sole issue that the verdict was against the weight of the evidence. We begin with our standard of review:

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. ***Commonwealth v. Widmer***, 560 Pa. 308, 319, 744 A.2d 745, 751-52 (2000); ***Commonwealth v. Brown***, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. ***Widmer***, 560 Pa. at 319-20, 744 A.2d at 752. Rather, "the role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'" ***Id.*** at 320, 744 A.2d at 752 (citation omitted). It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another

> opportunity to prevail." ***Brown***, 538 Pa. at 435, 648 A.2d at 1189.
>
> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:
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>> 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***. ***Brown***, 648 A.2d at 1189. 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. ***Commonwealth v. Farquharson***, 467 Pa. 50, 354 A.2d 545 (Pa.1976). 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.
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> ***Widmer***, 560 Pa. at 321-22, 744 A.2d at 753 (emphasis added).

Commonwealth v. Clay, 64 A.3d 1049, 1054-1055 (Pa. 2013).

Appellant raises two arguments in asserting that the verdict was against the weight of the evidence. First, appellant argues that if you compare the telephone records with the trial testimony of Auble, it proves that her version of events, particularly in regard to the attempted IDSI, was impossible. Second, appellant contends that Auble's various statements to

police and to a hospital nurse so contradicted her trial testimony that it rendered said testimony wholly unreliable.

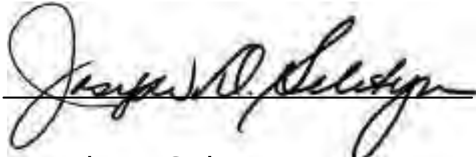
We begin by noting that appellant raised neither of these arguments before the trial court either in the post-sentence motion, in a supporting brief, or at the hearing on the motion. Appellant is improperly raising new theories of relief for the first time. Appellant's weight of the evidence claim, based upon these theories is, therefore, waived. Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A.

We also remind appellant that this court does not weigh or re-weigh the evidence in the first instance. We merely review the trial court's weighing of the evidence for an abuse of discretion. Where appellant fails to raise his particular theories before the trial court and the trial court does not, therefore, review those theories and weigh the evidence according to them, there is nothing for this court to review.

Instantly, the only weight issue presented to the trial court pertained to the attempted IDSI conviction. The trial court responded that this was essentially a "he said, she said" situation and the jury apparently chose to find the victim more credible. We see no abuse of discretion in that review. There is no error here.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/8/2014