NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LEO McNEIL,	:	No. 1795 EDA 2008
Appellant	:	

Appeal from the Judgment of Sentence, February 4, 2008,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0000455-2007

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 30, 2014**

This is an appeal from the judgment of sentence imposed following appellant's convictions for attempted rape, attempted involuntary deviate sexual intercourse ("IDSI"), sexual assault, incest, endangering the welfare of children, corruption of the morals of a minor, indecent assault, simple assault, and recklessly endangering another person. Appellant challenges the sufficiency of the evidence regarding his conviction for attempted IDSI and attempted rape. We affirm in part and reverse in part.

The trial court found the following facts:

> H.J., [Appellant's] niece, testified to several sexual contacts between [Appellant] and herself as a minor. H.J. testified that at the age of five, [Appellant] called her downstairs. [Appellant] told H.J. to take her pants off. When H.J. did not take them off, [Appellant] took her pants off. [Appellant] laid H.J. on her stomach on the bed. [Appellant]

> pulled his pants down to his knees, putting his penis on H.J. H.J. testified that [Appellant] put his penis between H.J.'s buttocks. H.J. testified that he was rubbing his penis on her front part as well. When asked about her front part, H.J. testified that [Appellant's] penis was touching H.J.'s vagina. H.J. testified that the penis was touching the two lips on the side of her vagina.
>
> When H.J. was around eleven or twelve, H.J. testified that [Appellant] asked to pay H.J. to take her virginity. After the [sic] H.J. told [Appellant] no, [Appellant] offered to raise the price to have sex with H.J. On another occasion [Appellant] and H.J. were in a car when she was nine or ten. H.J. testified that the Defendant was rubbing his penis on her butt.

Trial court opinion, 7/8/13 at 2 (footnotes omitted).

Following a bench trial, appellant was sentenced to an aggregate period of incarceration of 22 to 44 years to be followed by 20 years' probation. A timely post-sentence motion was filed and subsequently denied by operation of law. This appeal followed. The trial court ordered appellant to file a Pa.R.A.P. 1925(b) statement and appellant timely complied.

Appellant argues that there was insufficient evidence to support his convictions of attempted IDSI and attempted rape. Appellant asserts that he engaged in illegal sexual conduct that constituted an indecent assault. (Appellant's brief at 10.)

In reviewing a sufficiency of the evidence claim, the standard we apply 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." ***Commonwealth v. Barnes***, 871 A.2d 812, 819 (Pa.Super. 2005), ***affirmed***, 924 A.2d 1202 (Pa. 2007). In applying the above test, this court may not weigh the evidence and substitute its judgment for that of the fact-finder. ***Id.*** 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." ***Id.*** The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by circumstantial evidence. ***Id.*** This court must evaluate the entire record and consider all evidence actually received. ***Id.*** In passing upon the credibility of witnesses and the weight of the evidence produced, the trier of fact is free to believe all, part or none of the evidence. ***Id.*** A mere conflict in testimony does not render the evidence insufficient. ***Commonwealth v. Jones***, 771 A.2d 796, 798 (Pa.Super. 2001).

A person is guilty of IDSI if he "[E]ngages in deviate sexual intercourse with a complainant who is less than 13 years of age." 18 Pa.C.S.A. § 3123(b). Deviate sexual intercourse is defined as "Sexual intercourse per os or per anus between two human beings." 18 Pa.C.S.A. § 3101. Sexual intercourse, "In addition to its ordinary meaning, includes

intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa.C.S.A. § 3101.

"A person commits the offense of rape of a child, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age." 18 Pa.C.S.A. § 3121(c).

The Crimes Code defines criminal attempt as follows:

> **(a) Definition of attempt.--**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.A. § 901(a). The two elements of the offense of criminal attempt are: (1) intent to commit a specific crime, and (2) a substantial step toward completion of that crime. ***Commonwealth v. Henley***, 474 A.2d 1115, 1118 (Pa. 1984). "The substantial step test broadens the scope of attempt liability by concentrating on the acts the defendant has done and does not any longer focus on the acts remaining to be done before the actual commission of the crime." ***Commonwealth v. Gilliam***, 417 A.2d 1203, 1205 (Pa.Super. 1980). Thus, the Commonwealth needed to demonstrate that appellant had intent to commit IDSI and rape and that appellant committed an act constituting a substantial step towards the commission of those crimes. ***Id.***

In the instant case, H.J. [the "victim"] testified regarding four incidents with appellant. At the time of her testimony, the victim was 19 years old.

The first incident occurred when she was 5 years old, while visiting her grandmother. At the time, appellant lived in the basement. (Notes of testimony, 10/23/07 at 181.) Appellant called for the victim to come to the basement; she had her brother accompany her. (***Id.***) Appellant sent the victim's brother back upstairs to get a light bulb. (***Id.*** at 181-182.) When the victim stated she wanted to go back upstairs, appellant told her to stay in the basement with him. (***Id.*** at 182.) Next, appellant told her to take off her pants. (***Id.*** at 182-183.) When she did not take her pants off, the victim stated that "[appellant] took them off. [H]e grabbed me and took them off." (***Id.*** at 183.) When asked what happened next, she responded as follows:

> [THE COMMONWEALTH]: And what happened when he took them off?
>
> [THE VICTIM]: He laid me on the bed on my stomach, and I laid there tight, and he put his penis on me.
>
> Question: When you say that he laid you on the bed on your stomach, where was he compared to you?
>
> Answer: Where was he?
>
> Question: Yeah.
>
> Answer: He was on top.
>
> Question: Okay. And what part of his body was touching what part of your body?
>
> Answer: He laid on me, so his penis was touching my butt. And he was basically laying on me, so, most likely, his upper body was too.

> Question: Okay. And when you say that his penis was touching your butt, did he have his clothes on or were his clothes in some other way?
>
> Answer: No, he didn't.
>
> Question: Where were his clothes? If you know.
>
> Answer: They was down a little bit.
>
> Question: Still on his body but just pulled down?
>
> Answer: Yes.
>
> Question: Okay. So what part -- what could you actually feel on your backside?
>
> Answer: His penis.

Id. at 183-184.

The victim provided additional testimony as to what occurred during that first incident. The victim testified as follows:

> [THE COMMONWEALTH]: Do you remember whether or not he touched any other part of your body besides your butt that day?
>
> [THE VICTIM]: I know he like -- when he touched my butt, he was just rubbing his stuff on me and on my front but down a little bit, I guess.
>
> Question: Okay. When you say your front, what part of your body are you talking about?
>
> Answer: My vagina.
>
> Question: Okay. And when you say "his stuff," what are you talking about?
>
> Answer: His penis.

> Question: Okay. So when you are talking about him rubbing his stuff on you, did his penis come into contact with your vagina?
>
> Answer: It touched, but he didn't put anything in there.
>
> Question: Okay. And when you say that his penis touched your vagina -- do you know how there's like two lips on the side of the vagina?
>
> Answer: Yes.

Id. at 185-186.

The second incident occurred when the victim was either 11 or 12 years of age. She testified that while she was in her mother's room, appellant came in and offered to pay her to "take [her] virginity." (***Id.*** at 188-189.) When asked how much money appellant offered, she replied, "ten or twenty dollars." (***Id.*** at 190.)

The victim related a third incident that occurred when she was 9 or 10 years old. (***Id.*** at 191.) According to the victim, her family was packed into a car and her mother made her sit on appellant's lap. (***Id.*** at 192.) The victim's mother was unaware of appellant's behavior towards the victim. (***Id.***) As the victim sat on appellant's lap, he began "grinding" and rubbing his penis on her backside. (***Id.*** at 193.)

The fourth incident testified to by the victim occurred when she was 12 or 13 years old. (***Id.*** at 195.) She was in a kitchen and appellant grabbed her from behind. (***Id.***) Appellant's penis was on the victim's

backside and he was grinding. Both appellant and the victim were clothed. (***Id.*** at 195-196.)

Instantly, appellant complains that the trial court's reliance on ***Commonwealth v. Jacob***, 867 A.2d 614 (Pa.Super. 2005), to support his conviction for attempted IDSI is misplaced. In ***Jacob***, this court found the evidence was sufficient to establish criminal attempt to commit IDSI where the defendant took substantial steps to meet a purported 12-year-old girl who was really a law enforcement officer posing as a minor on the internet; the defendant engaged in sexually explicit internet communications with the purported minor, and the defendant arrived at a prearranged location to meet the purported minor with condoms in his possession. Appellant contends in the instant case "there are no communications" and "we are left to rely solely on what happened." (Appellant's brief at 15.)

The ***Jacob*** case does not set a requirement of explicit communication of intent as a necessity to prove IDSI. The ***Jacob*** court was merely addressing the circumstances in that case that involved conversations concerning sex over the internet followed by subsequent plans to meet. Regarding what constitutes a "substantial step," the ***Jacob*** court further explained:

> Although no reported appellate opinions address the issue of what constitutes a substantial step toward involuntary deviate sexual intercourse, those of other jurisdictions provide guidance as to the outer boundaries of this concept. "[T]he more clearly the intent to commit the offense is shown, the less

> proximate the acts need to be to consummation of the crime." ***Hatch v. [Superior Court] People***, 80 Cal.App.4th 170, 187–88, 94 Cal.Rptr.2d 453 (2000). "The plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the over[t] act requirement." ***Id.*** at 188, 94 Cal.Rptr.2d 453. Moreover, "child molesting is a sufficiently serious crime to justify drawing a fairly early line to identify and sanction behavior as an attempt." ***Ward v. State***, 528 N.E.2d 52, 54 (Ind.1988).

Id. at 618.

Instantly, we believe the facts as testified to by the victim fail to indicate appellant took a substantial step to commit IDSI. We find merit to appellant's argument that he committed an indecent assault.

The crime of indecent assault is defined as follows:

> **§ 3126. Indecent assault**
>
> **(a) Offense defined.--**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 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:
>
> (1) the person does so without the complainant's consent;
>
> (2) the person does so by forcible compulsion;
>
> (3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;

> . . .
>
> (7) the complainant is less than 13 years of age; or
>
> (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

18 Pa.C.S.A. § 3126. The Crimes Code further defines the phrase "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.A. § 3101.

Instantly, appellant engaged in a pattern of physical intimidation of the victim by grinding and rubbing his penis on her backside while she sat on his lap in a crowded car; by grinding his penis on her backside when he grabbed her from behind; and when he was lying on top of her naked in a basement bedroom with his penis on her naked backside. While all these acts are reprehensible, there is no evidence that appellant took a substantial step to commit IDSI. ***See Commonwealth v. Smith***, 863 A.2d 1172 (Pa.Super. 2004) (where appellant groped and fondled the intimate parts of the victim's body and continually addressed her with sexual innuendo and with threats constituted indecent assaults); and ***Commonwealth v. Ricco***, 650 A.2d 1084 (Pa.Super. 1994) (where the defendant placed the victim's hand on his

underwear-clad genitals was prohibited contact and constituted an indecent assault).

We conclude that even when viewing the evidence in the light most favorable to the Commonwealth, the evidence was insufficient to establish that appellant had taken a substantial step towards committing the crime of IDSI. At most, appellant's actions amounted to indecent assaults on the victim.

Regarding appellant's conviction for attempt to commit rape, he argues he did not take the required substantial step. We disagree as the record indicates otherwise. The victim testified as follows:

> The Commonwealth: Do you remember whether or not he touched any other part of your body besides your butt that day?
>
> The victim: I know he like -- when he touched my butt, he was just rubbing his stuff on me and on my front but down a little bit, I guess.
>
> Question: Okay. When you say your front, what part of your body are you talking about?
>
> Answer: My vagina.
>
> Question: Okay. And when you say "his stuff," what are you talking about?
>
> Answer: His penis.
>
> Question: Okay. So when you are talking about him rubbing his stuff on you, did his penis come into contact with your vagina?
>
> Answer: It touched, but he didn't put anything in there.

> Question: Okay. And when you say that his penis touched your vagina -- do you know how there's like two lips on the side of the vagina?
>
> Answer: Yes.

Id. at 185-186.

Appellant argues that because nothing stopped him from engaging in rape or IDSI, his specific intent could not be inferred from the evidence. In support of this argument, appellant cites the case of ***Commonwealth v. Owens***, 462 A.2d 255, 257 (Pa.Super. 1983), where the evidence indicated the child victim was struck and then forcibly led into a garage where appellant removed her clothing. Appellant was about to sexually assault her when a woman entered the garage and appellant aborted the attempt. ***Id.*** Appellant also cites ***Commonwealth v. Russell***, 460 A.2d 316, 321 (Pa.Super. 1983), which held that specific intent to commit rape could properly be inferred when the crime was not completed because "[a]ppellant was interrupted when the police rang the doorbell." Appellant appears to be arguing that a person could only be convicted of an attempt crime if, while engaged in the underlying crime, there is some sort of interruption.

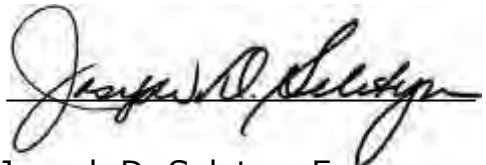
Appellant's argument fails as the criminal attempt statute does not require close proximity to completion of the crime; rather, it merely requires that the actor "does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S.A. § 901(a); ***Gilliam***, ***supra***.

Instantly, the victim testified that appellant rubbed the lips of her vagina with his penis although she could not recall whether his penis had gone between the lips. (Notes of testimony, 10/23/07 at 185-187). This testimony was sufficient to convict appellant of attempted rape. It is well established that entrance in the labia constitutes "penetration, however slight." ***Commonwealth v. Hunzer***, 868 A.2d 498, 505-506 (Pa.Super. 2005), ***appeal denied***, 880 A.2d 1237 (Pa. 2005). Again, viewing the evidence in the light most favorable to the Commonwealth, we conclude that the evidence was sufficient to establish that appellant had taken a substantial step towards committing the crime of rape.

Accordingly, we affirm the judgment of sentence regarding criminal attempt to commit rape. We reverse the judgment of sentence with respect to criminal attempt to commit IDSI. Case remanded for resentencing. Jurisdiction relinquished.

Wecht, J. files a Concurring Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/30/2014