NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH MILTON,	:	No. 487 EDA 2013
Appellant	:	

Appeal from the Order, January 25, 2013,
in the Court of Common Pleas of Philadelphia County
Municipal Division at No. MC-51-CR-0033296-2012

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

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 23, 2014**

Joseph Milton, appellant, repeatedly struck his five-month-old baby in the face, head, and neck with such force that the infant had visible welts when later examined at the hospital. Appellant was convicted of simple assault and recklessly endangering another person ("REAP"). Herein, he appeals the order of the Court of Common Pleas of Philadelphia County denying a petition for a writ of ***certiorari*** to the Municipal Court of Philadelphia. Appellant argues that the Municipal Court erred in admitting his statement to police in violation of the ***corpus delecti*** rule. He also claims that the evidence was not sufficient to sustain his convictions. We affirm.

The facts and procedural history of this case are as follows. On July 26, 2012, at approximately 3:00 p.m., Detective Brian Meissler was

called to Episcopal Hospital in Philadelphia regarding a complaint made by the mother of a five-month-old child who had suffered several injuries to the head and face. (Notes of testimony, 11/21/12 at 4-6.) Detective Meissler testified the child had welts on the side of the face, including the neckline right below the chin, above one of his eyes, between the eye and one of his ears, and on his hairline. (***Id.*** at 11-13.)

After taking photographs of the baby's injuries, Detective Meissler met with appellant. Appellant waived his ***Miranda***[1] rights and provided a statement, admitting to slapping the baby three times. Appellant admitted that he "may have been too aggressive" when he was "slapping him." (***Id.*** at 11.) Appellant also admitted to being "fatigue[d], frustrated and tired" when his son woke him up by crying at 3:00 in the morning. (***Id.*** at 12.)

> My son has a bruise on the side of his face because he fell and I caught him by his shoulders, and I laid him on the bed, and he looked disillusioned, like he was dizzy, and I slapped him on the face to make sure he was conscious. I see now that wasn't the right thing to do because after I was rubbing his face, he would cry harder every time I rubbed his face. Then his mother came in, saw welts on his face and asked me what happened, and I told her he almost fell, and he slapped his face against the table. I may have been too aggressive.

Id. at 10-11.

A trial was held in the Philadelphia Municipal Court before the Honorable Alfred J. DiBona, Jr., sitting without a jury. The sole witness

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

presented by the Commonwealth was Detective Meissler; at the conclusion of his testimony, the Commonwealth introduced four photographs of the baby's injuries taken by the detective at the hospital. (***Id.*** at 13-14.) On cross-examination, the detective acknowledged that the baby was not admitted to the hospital for treatment and was sent home that day. (***Id.*** at 14-15.)

On November 21, 2012, appellant was convicted of simple assault and REAP; appellant was found not guilty of endangering the welfare of a child. He was sentenced to 23 months' imprisonment for simple assault and two years of probation for REAP to run consecutively to the prison sentence. Appellant filed a timely petition for a writ of ***certiorari*** with the Court of Common Pleas. On January 25, 2013, after hearing argument, the Honorable Paula A. Patrick denied the petition. On February 8, 2013, appellant filed a timely notice of appeal. Appellant has filed a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

Herein the following issues have been presented for our review:

> 1. Did not the trial court err and violate the corpus delicti rule when it first, admitted [appellant's] statement in evidence even though the Commonwealth failed to establish a crime had occurred by a preponderance of the evidence and second, when it considered the statement during deliberation of the verdict even though the Commonwealth failed to

> prove that a crime had occurred beyond a reasonable doubt?
>
> 2. Was not the evidence insufficient for recklessly endangering another person where appellant merely slapped his son across the face to revive him and his behavior neither created a substantial risk of death nor caused serious bodily injury?
>
> 3. Was not the evidence insufficient to establish simple assault where [appellant] did not have the necessary intent to cause bodily injury when he slapped his son across the face to make sure he was still conscious?

Appellant's brief at 3. We address these issues ***seriatim***.

Appellant argues the court violated the ***corpus delicti*** rule by admitting his statement to the police into evidence and considering it in determining his guilt. Appellant argues that the Commonwealth failed to demonstrate that the injuries the child sustained were the result of a criminal act rather than the result of a fall or another innocuous reason. (Appellant's brief at 14-15.) He also avers that the Commonwealth failed to demonstrate, independent of the statement itself, that a crime had been committed.

"The ***corpus delicti*** rule is an evidentiary one. On a challenge to a trial court's evidentiary ruling, our standard of review is one of deference." ***Commonwealth v. Herb***, 852 A.2d 356, 363 (Pa.Super. 2004) (internal citations omitted).

> The admissibility of evidence is solely within the discretion of the trial court and will be reversed only

> if the trial court has abused its discretion. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.

Commonwealth v. Dent, 837 A.2d 571, 577 (Pa.Super. 2003), ***appeal denied***, 863 A.2d 1143 (Pa. 2004) (citations omitted).

"The ***corpus delicti*** rule places the burden on the prosecution to establish that a crime has occurred before a confession or admission of the accused connecting him to the crime can be admitted." ***Commonwealth v. Dupre***, 866 A.2d 1089, 1097 (Pa.Super. 2005), ***appeal denied***, 879 A.2d 781 (Pa. 2005). The purpose of this rule is to prevent the hasty and unguarded character that often attaches to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed. ***Commonwealth v. Otterson***, 947 A.2d 1239, 1249 (Pa.Super. 2008), ***appeal denied***, 958 A.2d 1047 (Pa. 2008), ***cert. denied***, 556 U.S. 1238 (2009).

To prove ***corpus delicti***, the Commonwealth must establish two elements: the occurrence of a loss or injury and that criminal conduct was the source of that injury. ***Commonwealth v. Forman***, 590 A.2d 1282, 1284 (Pa.Super. 1991). The identity of the person responsible for the criminal act is not part of the ***corpus delicti***. ***Commonwealth v. Elder***, 451 A.2d 236, 237 (Pa.Super. 1982). "That the ***corpus delicti*** can always be proved by circumstantial evidence is unquestionable." ***Commonwealth***

v. Nasuti, 123 A.2d 435, 441-442 (Pa. 1956). The evidence of a ***corpus delicti*** is insufficient if it is merely equally consistent with noncriminal acts as with criminal acts. ***Forman***, 590 A.2d at 1285. However, the Commonwealth's burden of establishing ***corpus delicti*** is admittedly slight; it must merely show that the injury occurred under circumstances more consistent with criminality than with natural causes. ***Commonwealth v. Meder***, 611 A.2d 213, 217 (Pa.Super. 1992), ***appeal denied***, 622 A.2d 1375 (Pa. 1993).

In Pennsylvania, the corpus delicti rule is two-tiered; it must first be considered as a rule of evidentiary admissibility using a prima facie standard, and later, under a beyond a reasonable doubt standard, as one of proof for the fact-finder's consideration at the close of the case. ***Commonwealth v. Cuevas***, 61 A.3d 292, 295 (Pa.Super. 2013).

We conclude that the Commonwealth's evidence was sufficient to permit the admission of appellant's confession. Here, the Commonwealth's evidence of the head injuries sustained by a five-month-old infant clearly satisfied the loss or injury element of ***corpus delicti***. Additionally, we find the evidence in this circumstance is more consistent with criminal activity than accident. As the trial court stated, "the child's injuries were well beyond those that would have originated from a simple fall." (Trial court opinion, 7/15/13 at 8.) Due to the nature of the injuries, the complainant brought the child to the hospital. The police were summoned and an

investigation ensued. The trooper testified to the numerous welts he observed on the child's face and neck. Certainly, common sense dictates that numerous welts on a five-month-old baby's head and neck are more consistent with a crime than with an accident or food allergy, as appellant suggests. (Appellant's brief at 14.) The Commonwealth was not required to eliminate the possibility that the injuries were accidental. ***Meder***, ***supra*** (explaining that the Commonwealth need not prove the existence of a crime beyond a reasonable doubt as an element in establishing the ***corpus delicti*** of a crime, but the evidence must be more consistent with a crime than with an accident).

Upon review, we find the trial court committed no abuse of discretion in concluding that the baby's injuries were more consistent with criminal means than with accident and that the Commonwealth met its burden here in establishing ***corpus delicti***. The trial court committed no error in admitting appellant's inculpatory statements as to all crimes with which he was charged.

Appellant also maintains that the trial court, as fact finder, should not have considered his confession in the guilt determination phase since the Commonwealth had not established the corpus delicti beyond a reasonable doubt. (Appellant's brief at 15.) However, we agree with the Commonwealth that this claim is waived as it was not presented in appellant's Rule 1925(b) statement. (Commonwealth's brief at 9.)

Appellant's 1925(b) statement only challenged the admission of the statement. (Docket #6, #8.) His 1925(b) statement includes the following issue related to corpus delicit:

> The trial court erred and abused its discretion when it permitted the Commonwealth to introduce [appellant's] statement of guilt where the Commonwealth failed to establish a corpus delicti for simple assault and recklessly endangering another person, prior to the introduction of this statement.

Id. (emphasis added.) Appellant did not maintain that the trial court, as fact finder, should not have considered his confession in the guilt determination phase. Any issues not raised in a Rule 1925(b) statement are deemed waived on appeal, whether or not they are raised in appellant's brief. ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998). This portion of his claim was not included in his concise statement.

The next two issues concern the sufficiency of the evidence.

> Our standard of review in a sufficiency of the evidence challenge is to determine if the Commonwealth established beyond a reasonable doubt each of the elements of the offense, considering all the evidence admitted at trial, and drawing all reasonable inferences therefrom in favor of the Commonwealth as the verdict-winner. The trier of fact bears the responsibility of assessing the credibility of the witnesses and weighing the evidence presented. In doing so, the trier of fact is free to believe all, part, or none of the evidence.

Commonwealth v. Newton, 994 A.2d 1127, 1131 (Pa.Super. 2010), ***appeal denied***, 8 A.3d 898 (Pa. 2010), quoting ***Commonwealth v. Pruitt***, 951 A.2d 307, 313 (Pa. 2008) (citations omitted).

First, appellant avers that the evidence was insufficient to sustain a conviction for REAP. Appellant argues that he "merely slapped his son across the face to revive him" after the baby had "accidently fallen." (Appellant's brief at 16.) While he admittedly slapped his son, he claims this conduct did not rise to the level of reckless endangerment. Further, there was no evidence that the baby was "in danger of dying or suffering from permanent disfigurement." (***Id.***)

Recklessly endangering another person is defined as follows:

> A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

18 Pa.C.S.A. § 2705. Serious bodily injury is defined in 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 essentially argues that the offense of REAP was not made out because the Commonwealth failed to establish that the baby was placed in danger by appellant's actions. We disagree. Certainly, a five-month-old baby was placed in danger when a grown man struck it in the head three times. The baby was struck with such force that he still had welts and bruises that went up the side of his face, including on his neckline, above one of his eyes, between that eye and one of his ears, and on his hairline.

Consequently, even without the hospital reports, we conclude the Commonwealth has presented sufficient evidence that appellant engaged in conduct which placed the victim in danger of death or serious bodily injury.

Appellant also claims that he did not act with the necessary ***mens rea***, as he merely slapped the baby a few times to make sure he was conscious. The trial court obviously did not accept this version of events. The law is clear that the trial court is free to believe all of or part of or none of a defendant's statements, confessions, or testimony. ***Newtown***, ***supra***. In his statement, appellant explained that the child's crying woke him and that he was "fatigue[d], frustrated, and tired." (Notes of testimony, 11/21/12 at 12.) These facts establish that appellant acted not only consciously but, indeed, with specific intent.

Therefore, the judge could reasonably infer that when a frustrated, 42-two-year-old man[2] strikes the child in the head leaving welts, the victim was placed in danger of death or serious bodily injury. We conclude the necessary elements for establishing the offense of REAP were met at trial.

Next, appellant claims the evidence was insufficient to sustain his conviction for simple assault.

A person commits simple assault if he "attempts to cause or intentionally, knowingly, or recklessly causes bodily injury to another." ***See*** 18 Pa.C.S.A. § 2701(a)(1). Bodily injury is the "impairment of physical

[2] The certified record indicates that appellant was born on February 1971.

condition or substantial pain." ***See*** 18 Pa.C.S.A. § 2301. "For the crime of Simple Assault, 'the existence of substantial pain may be inferred from the circumstances surrounding the use of physical force even in the absence of a significant injury.'" ***Commonwealth v. Smith***, 848 A.2d 973, 976 (Pa.Super. 2004), ***quoting Commonwealth v. Ogin***, 540 A.2d 549, 552 (Pa.Super. 1988). In order to obtain a conviction for simple assault, the Commonwealth was required to demonstrate beyond a reasonable doubt that appellant knowingly injured the victim. ***See In re Maloney***, 636 A.2d 671, 673-674 (Pa.Super. 1994).

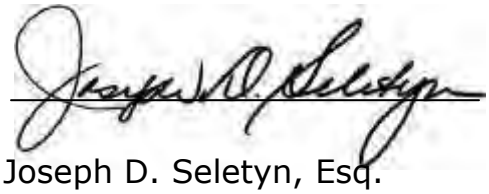
Appellant argues that the Commonwealth failed to establish that he intended to cause bodily injury by slapping his son "across the face in order to revive him. [Appellant's] intent was to make sure his son was conscious after accidently falling and hitting his head against a table." (Appellant's brief at 20.) Appellant likens his actions to "that of an emergency rescue worker who oftentimes must inflict some pain in order to save a person's life." (***Id.*** at 21.) We are frankly aghast at such a comparison.

Again, based on our standard of review, in the light most favorable to the Commonwealth, we have no hesitation in concluding the evidence supports this conviction. Appellant's own testimony enabled the Commonwealth to establish these elements. Again, appellant admitted to striking the baby and also stated that he "may have been too aggressive." (Notes of testimony, 11/21/12 at 11.) The baby was struck with such force

that when later examined at the hospital, the welts remained. Certainly his conduct caused the child substantial pain. The factfinder was free to disbelieve appellant's version of the incident in question.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/23/2014