

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ADAM CARL BROOKS, JR.,	:	
	:	
Appellant	:	No. 838 MDA 2017

Appeal from the Judgment of Sentence April 13, 2017
in the Court of Common Pleas of Bradford County
Criminal Division at No(s): CP-08-CR-0000775-2016

BEFORE: OLSON, DUBOW, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED DECEMBER 22, 2017**

Adam Carl Brooks, Jr. (Appellant) appeals from the April 13, 2017 judgment of sentence of 90 days of imprisonment, plus the payment of costs and a \$300 fine, imposed following his conviction of the summary offense of harassment, 18 Pa.C.S. § 2709(a)(1). We affirm Appellant’s conviction, but vacate his judgment of sentence and remand for resentencing.

The relevant facts as elicited at trial are as follows: E.S. was 14 years of age at time of trial. Appellant was her mother’s ex-fiancé. Appellant lived with E.S., her mother and brother for about a year. E.S. got along fine with Appellant. E.S. was 14 when Appellant touched her inappropriately. This happened in her bedroom. E.S. was on her bed watching television. Appellant entered her room, sat on her bed and began rubbing her back. He had done this in the past. E.S. was wearing a t-shirt and shorts. Appellant then began rubbing her legs, inner thighs and went into her shorts. Appellant “put his hands into [her] underwear and started touching [her]” in her vaginal area. She did not want him to do this. She did not say anything, but just stayed there. Appellant then began rubbing her chest area on her breasts inside her shirt. Appellant then left her room. E.S. then

* Retired Senior Judge assigned to the Superior Court

“messed” a friend telling the friend what happened. The friend told her to tell her father which she did. Later, E.S.’s mother took her to her father’s home. Appellant had touched E.S.’s breast and inner thighs a couple of times in the past. These incidents “bothered” her.

E.S. was cross examined on a letter she had written to her mother stating that she lies about things, that she hated her mother and Appellant’s children.

* * *

Appellant was initially charged with indecent assault (less than 16 years of age), a misdemeanor of the second degree. The information was later amended to include [one] count of harassment, a summary [offense]. Prior to trial, the Commonwealth withdrew the indecent assault charge and proceeded to non-jury trial on the harassment charge. [Appellant] was found guilty of harassment on January 26, 2017.

Trial Court Opinion, 8/7/2017, at 1-2 (citations and unnecessary capitalization omitted). Appellant was sentenced on April 13, 2017. Appellant timely filed a post-sentence motion on Monday, April 24, 2017. Following the denial of his motion, Appellant timely filed a notice of appeal. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant presents the following questions for this Court’s review, which we have renumbered for ease of disposition.

1. Whether the evidence was insufficient to prove that [Appellant] committed the *actus reus* to commit the crime of summary harassment?
2. Whether the evidence was insufficient to prove that [Appellant] had the intent to “harass, annoy, or alarm” E.S. at the time of the alleged incident since the Commonwealth argued that [Appellant’s] intent was sexual gratification and the Commonwealth’s evidence, if believed, only demonstrated an intent of sexual gratification?

3. Whether the trial court abused its discretion by denying [Appellant's] motion for a new trial based on his challenge to the weight of the evidence concerning the trial court's credibility determination because the trial court failed to consider all the relevant evidence when making its determination?
4. Whether the sentence is illegal in violation of 42 Pa.C.S. § 9756(b)(1) because the trial court failed to set a minimum and maximum for [Appellant's] sentence of total confinement?
5. Whether a substantial question that [Appellant's] sentence is not appropriate exists because Appellant has laid out a plausible argument that [his] sentence violates a portion of the sentencing code and/or the sentence is contrary to the fundamental norms of sentencing?
6. Whether the trial court abused its discretion by ignoring or misapplying the sentencing code by sentencing [Appellant] to the statutory maximum total confinement without complying with 42 Pa.C.S. § 9725?
7. Whether the trial court abused its discretion by exercising its judgment at sentencing for reasons of partiality, bias, ill will, or prejudice and whether the trial court abused its discretion by issuing a manifestly unreasonable sentence when it sentenced [Appellant] to the statutory maximum sentence?

Appellant's Brief at viii-ix (suggested answers omitted).

Appellant's first two questions concern the sufficiency of the evidence to sustain his conviction. Accordingly, the following principles apply.

The standard of review for a challenge to the sufficiency of the evidence is to determine whether, when viewed in a light most favorable to the verdict winner, the evidence at trial and all reasonable inferences therefrom is sufficient for the trier of fact to find that each element of the crimes charged is established beyond a reasonable doubt. The Commonwealth may sustain its burden of proving every element beyond a reasonable doubt by means of wholly circumstantial evidence.

The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubt raised as to the accused's guilt is to be resolved by the fact-finder. As an appellate court, we do not assess credibility nor do we assign weight to any of the testimony of record. Therefore, we will not disturb the verdict 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.

Commonwealth v. Wanner, 158 A.3d 714, 717-18 (Pa. Super. 2017) (quoting **Commonwealth v. Vogel song**, 90 A.3d 717, 719 (Pa. Super. 2014) (citations and quotations omitted)).

"A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person: [] strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same[.]" 18 Pa.C.S. § 2709(a)(1). "An intent to harass may be inferred from the totality of the circumstances." **Commonwealth v. Cox**, 72 A.3d 719, 721 (Pa. Super. 2013) (citation and internal quotation marks omitted).

Appellant contends that the Commonwealth proved neither that Appellant committed a prohibited *actus reus* nor that he possessed the requisite *mens rea*. Appellant's Brief at 25-27. Specifically, he contends that the touching claimed by E.S. "was sexual touching to cause arousal—not physical pain," *id.* at 25, and that such evidences "the intent to satisfy a corrupt sexual desire" rather than the intent to harass, annoy, or alarm E.S. *Id.* at 27.

The trial court addressed Appellant's claims as follows.

It certainly could be inferred that the facts as testified to by the victim indicated an intent on the part of Appellant to sexually gratify himself. This does not mean his intent was not to harass, annoy or alarm the victim. The totality of the circumstances—that Appellant is an adult residing with victim’s mother, that victim is a child 14 years of age, that [A]ppellant touched her breasts and vagina; that there were no words spoken, that victim just laid there—infer [*sic*] that Appellant intended to harass, annoy or alarm the victim.

Trial Court Opinion, 8/7/2017, at 3.

We agree with the trial court that the evidence was sufficient to establish both elements of the crime. Appellant cites no authority to support his claim that such contact was not “the type of physical contact prohibited by the statute.” Appellant’s Brief at 25. Rather, the plain language of the statute requires proof that Appellant struck, shoved, kicked, “**or otherwise subject[ed] the other person to physical contact.**” 18 Pa.C.S. § 2709(a)(1) (emphasis added). There is no question that E.S.’s testimony that Appellant rubbed various parts of her body was sufficient to prove that Appellant subjected her to physical contact.

Further, Appellant’s intent to gratify himself is not mutually exclusive with an intent to harass, annoy, or alarm his victim. Under the totality of the circumstances present in this case, the trial court was free to infer that Appellant intended to harass E.S. ***See, e.g., Commonwealth v. Duncan,*** 363 A.2d 803, 806 (Pa. Super. 1976) (holding intent to annoy the victim was properly inferred where it should have been clear to a reasonable person that

Duncan's repeated entreaties for sex acts were offensive). Accordingly, Appellant's first two issues merit no relief.

Appellant next claims that the verdict was against the weight of the evidence. Appellant's Brief at 27-36. Although the trial court addressed the claim in its opinion, we conclude that the claim is waived.

"[A] weight of the evidence claim must be preserved either in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing. Failure to properly preserve the claim will result in waiver, even if the trial court addresses the issue in its opinion." **Commonwealth v. Griffin**, 65 A.3d 932, 938 (Pa. Super. 2013) (citations and internal quotation marks omitted). "Because '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,'" this Court has nothing to review on appeal when an appellant's "failure to challenge the weight of the evidence before the trial court deprived that court of an opportunity to exercise discretion on the question of whether to grant a new trial." **Commonwealth v. Sherwood**, 982 A.2d 483, 494 (Pa. 2009) (quoting **Commonwealth v. Widmer**, 744 A.2d 745, 753 (Pa. 2000)).

Our review of the record reveals that Appellant did not challenge the weight of the evidence orally in the transcripts of his trial and verdict, or his sentencing. In his post-sentence motion, Appellant makes two arguments for

judgment of acquittal; he does not request a new trial or even include the term “weight of the evidence.” Accordingly, the claim is waived.¹

We next consider Appellant’s claim that his sentence is illegal. Appellant’s Brief at 36-37. Although Appellant raises this claim for the first time on appeal, we may address it. ***Commonwealth v. Batts***, 163 A.3d 410, 434 (Pa. 2017) (“A challenge to the legality of a particular sentence may be reviewed by any court on direct appeal; it need not be preserved in the lower courts to be reviewable and may even be raised by an appellate court *sua sponte*.”).

Except under circumstances not present here,² a sentencing court must impose a minimum sentence that does not exceed half of the maximum. 42 Pa.C.S. § 9765(b)(1). Here, the trial court imposed a flat 90-day sentence. Appellant properly contends that the flat sentence is illegal in this case, and the Commonwealth “is constrained by the existing law to agree.” Commonwealth’s Brief at 7. ***See Commonwealth v. Mitchell***, 986 A.2d

¹ Even if it were not waived, we discern no abuse of discretion in the trial court’s determination that Appellant’s weight-of-the-evidence claim was meritless. ***See*** Trial Court Opinion, 8/7/2017, at 3 (“Here, the trial court found the victim’s testimony credible and consistent. Th[e trial c]ourt was free to believe all, part or none of the evidence. The fact that the victim wrote a letter telling her mother that she lies [] does not present inconsistent testimony regarding the allegations and testimony about Appellant’s actions.”).

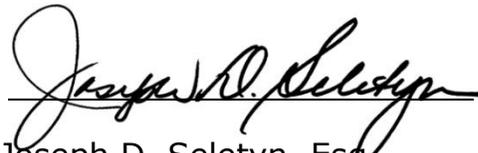
² Those circumstances include imprisonment for no more than 30 days for certain summary offenses, 42 Pa.C.S. § 9765(c), and confinement of up to 90 days followed immediately by a period of county intermediate punishment, 42 Pa.C.S. § 9765(c.1).

1241, 1244 (Pa. Super. 2009) (“[T]he flat sentence of 90 days of incarceration for harassment is illegal.”)).

Therefore, Appellant is entitled to relief in the form of resentencing. Because we vacate Appellant’s sentence as illegal and remand for imposition of a new sentence, his other challenges to the now-vacated sentence are moot. ***Commonwealth v. Tanner***, 61 A.3d 1043, 1046 n.3 (Pa. Super. 2013).

Convictions affirmed. Judgment of sentence vacated. Case remanded for resentencing. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2017