NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: T. W. H., A MINOR,	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: T. W. H., A MINOR	No. 873 WDA 2016

Appeal from the Dispositional Order Entered May 11, 2016
In the Court of Common Pleas of McKean County
Criminal Division at No(s): CP-42-JV-0000099-2015

BEFORE: BENDER, P.J.E., OLSON, J., and STABILE, J.

MEMORANDUM BY BENDER, P.J.E.: FILED DECEMBER 08, 2017

Appellant, T.W.H. (a minor), appeals from the juvenile court's dispositional order, entered after he was adjudicated delinquent for Aggravated Assault, 18 Pa.C.S. § 2702(a)(2), Simple Assault, 18 Pa.C.S. § 2701(a)(1), and Harassment, 18 Pa.C.S. § 2709(a)(1). We affirm in part and reverse in part.

We briefly summarize the facts underlying this appeal. On June 28, 2015, Appellant — a resident at the Beacon Light Residential Treatment Facility ("Beacon Light") — was throwing furniture in the boys' unit. N.T., 9/17/2015, at 16. When a staff member attempted to remove him from the unit and stop him from "destroying the furniture and everything on the unit," Appellant turned around and spit in the staff member's face. Id. at 16-17. Staff members then tried to restrain Appellant. See id. at 17. After one staff member had Appellant's upper torso restrained, the victim — a mental health technician at Beacon Light — attempted to take control of Appellant's legs.

Id. However, Appellant was "struggling[,]" and "his knee hit [the victim] in the side of the head when she went to take over his legs … to try [to] control him to get him flat." Id. at 17-18. Further, while staff tried to restrain Appellant, he was swearing and acting verbally aggressive toward them. See id. at 21, 28, 32. As a result of Appellant's knee hitting her, the victim suffered a severe concussion, and has since experienced nausea, headaches, and a significant loss of strength on the right side of her body. Id. at 42-44.

Following a delinquency hearing, the juvenile court adjudicated Appellant delinquent of the above-stated offenses, and placed him on probation for 6-12 months, among other penalties. Appellant filed a timely notice of appeal on June 9, 2016. Subsequently, on June 15, 2016, the juvenile court issued an order directing Appellant to file a Pa.R.A.P. 1925(b) statement of matters complained of on appeal, and Appellant complied.[1]

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[1] In its order, the juvenile court stated that Appellant's Rule 1925(b) statement "shall be filed twenty-one days (21) days from the date of this Order's entry on the docket. Issues not included in the said statement and/or not raised in accordance with Pa.R.A.P. 1925(b) are waived." See Juvenile Court Order, 6/15/2016, at 1 (single page). However, the docket demonstrates that Appellant did not file his Rule 1925(b) statement until August 5, 2016, more than 21 days from when the juvenile court entered its order on the docket directing Appellant to do so. Moreover, our review of the record does not indicate that Appellant sought an extension of time for filing his Rule 1925(b) statement. Commonwealth v. Gravely, 970 A.2d 1137, 1145 (Pa. 2009) ("[A]n appellant who seeks an extension of time to file a Statement must do so by filing a written application with the trial court, setting out good cause for such extension, and requesting an order granting the extension. The failure to file such an application within the 21-day time limit set forth in Rule 1925(b)(2) will result in waiver of all issues not raised by that date.") (emphasis in original). Notwithstanding, this Court has stated

Presently, on appeal, Appellant raises the following issues for our review:

> Whether the [juvenile c]ourt — after the conclusion of the testimony of the Commonwealth's first witness — acted improperly and assisted a party, abusing its discretion, by alerting the Commonwealth to a need to amend the charges from a charge that the [juvenile c]ourt knew (as a result of the evidence already presented) could not be proven to a charge the [juvenile c]ourt believed (as a result of the evidence already presented) could potentially be proven?
>
> Whether [Appellant's] fact-finding counsel was ineffective for failing to object to the improper judicial conduct identified in the first question presented, and also in failing to object to the resulting amendment of charges?
>
> Whether the [juvenile c]ourt erred in finding that there was sufficient evidence of the requisite mens rea to adjudicate [Appellant] delinquent of the crime of Aggravated Assault under 18 Pa.C.S. § 2702(a)(2)?
>
> Whether the [juvenile c]ourt erred in finding that there was sufficient evidence of the requisite mens rea to adjudicate [Appellant] delinquent of the crime of Simple Assault under 18 Pa.C.S. § 2701(a)(1)?
>
> Whether the [juvenile c]ourt erred in finding that there was sufficient evidence of the requisite mens rea to adjudicate [Appellant] delinquent of the crime of Harassment under 18 Pa.C.S. § 2709(a)(1)?

Appellant's Brief at 4-5.

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that "if there has been an untimely filing, this Court may decide the appeal on the merits if the trial court had adequate opportunity to prepare an opinion addressing the issues being raised on appeal." Commonwealth v. Burton, 973 A.2d 428, 433 (Pa. Super. 2009). Here, the juvenile court has prepared an opinion addressing the issues Appellant raises on appeal. Therefore, we may decide Appellant's appeal on the merits.

First, Appellant argues that the juvenile court "acted improperly, abusing its discretion, by — after hearing testimony from a witness — alerting the Commonwealth to the fact that the lead charge in the case could not be proven, and assisting the Commonwealth in amending that charge." Id. at 16. Further, Appellant contends that the juvenile court "acted improperly in amending the Juvenile Petition in violation of the Rules of Juvenile Court Procedure." Id.

For context, after the Commonwealth's presentation of its first witness at the delinquency hearing, the following exchange took place between the juvenile court and the parties' counsel:

> [THE COMMONWEALTH]: My next witness would be Tony Sibbel.
>
> THE COURT: All right. Before you get the witness, Mr. Brown [the Commonwealth's attorney], and Mr. Conn [Appellant's attorney], if you want to look at the juvenile petition alleging delinquency. The charge for aggravated assault is under subsection A 3, which is different than the A 2 charge with respect to [a separate assault case involving Appellant].
>
> A charge under A 3 is a second degree felony, not first degree felony. And, the elements of that offense are different than A 2.
>
> Mr. Brown, what is the Commonwealth's position regarding the citation for the aggravated assault and the grading of that charge?
>
> [THE COMMONWEALTH]: May I have one moment to?
>
> THE COURT: Yes, you may.
>
> [THE COMMONWEALTH]: -- read this. I believe the correct subsection would be A 2, your Honor. Not A 3.
>
> THE COURT: Are you making a motion to amend the juvenile petition, then?
>
> [THE COMMONWEALTH]: Yes, your Honor.

> THE COURT: Mr. Conn?
>
> [APPELLANT'S ATTORNEY]: Your Honor, I don't have my (inaudible) book with me.
>
> THE COURT: All right. Mr. Conn, any objection to the Commonwealth's motion to amend count one to be a charge under 2702(a)(2), first degree felony?
>
> [APPELLANT'S ATTORNEY]: No, your Honor.
>
> THE COURT: All right. The charge is amended. Next witness, again, Mr. Brown?

N.T. at 26-27.

In its Pa.R.A.P. 1925(a) opinion, the juvenile court gave the following explanation for its above inquiry:

> [T]he [c]ourt did not "essentially" tell the Commonwealth to amend its Petition. The [c]ourt noted discrepancies between the grading, citation and factual allegations and merely asked … the Commonwealth "what is the Commonwealth's position with regard to the citation for the aggravated assault and the grading of that charge?" The Commonwealth indicated the appropriate statute and grading and the [c]ourt permitted an amendment to the Petition. Further, [] Appellant waived any issue regarding the [c]ourt's action or the amendment to Petition when counsel for [] Appellant was asked by the [c]ourt if he objected to the amendment and counsel responded "No, Your Honor." At no point later in the proceeding did Appellant's counsel raise or assert this issue. [] This issue has been waived for purposes of appeal.

Juvenile Court Opinion, 11/14/2016, at 1 (single page).

We agree with the juvenile court that Appellant's counsel has waived this issue by not objecting at the hearing. See Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); King v. Pulaski, 710 A.2d 1200, 1202-03 (Pa. Super. 1998) ("It is well-settled that, in order for a claim of error to be preserved for appellate review, a party must make a timely and specific objection before the trial court

at the appropriate stage of the proceedings. The failure to do so will result in waiver of the issue.") (citations omitted).

Nevertheless, even if not waived, we would still conclude that Appellant's argument is meritless. The aggravated assault statute states, in relevant part, the following:

> (a) Offense defined.--A person is guilty of aggravated assault if he:
>
> ...
>
> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation, while in the performance of duty;
>
> (3) attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty;
>
> ...
>
> (b) Grading.--Aggravated assault under subsection (a)(1), (2) and (9) is a felony of the first degree. Aggravated assault under subsection (a)(3), (4), (5), (6), (7) and (8) is a felony of the second degree.

18 Pa.C.S. § 2702(a)(2)-(3), (b).[2]

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[2] We note that subsection (c) — referred to in subsections (a)(2)-(3) supra — includes an "[o]fficer or employee of a correctional institution, county jail or prison, juvenile detention center or any other facility to which the person has been ordered by the court pursuant to a petition alleging delinquency under 42 Pa.C.S. Ch. 63 (relating to juvenile matters)." 18 Pa.C.S. § 2702(c)(9). The juvenile court observed that this subsection "include[s] individuals employed at a treatment facility where a juvenile has been sent because of a delinquency adjudication, such as the Beacon Light facility…." N.T. at 56. Appellant does not dispute that the victim qualifies as one of the persons enumerated in subsection (c).

In the petition, Appellant was charged with the following, which we produce verbatim:

Sect # 2702(a)(3)	Offense: Aggravated Assault	Grade: F-1
Sect # 2701(a)(1)	Offense: Simple Assault	Grade: M-2
Sect # 2709(a)(1)	Offense: Harassment	Grade: S

Juvenile Petition, 8/25/2015, at 1. As evident from the statutory language cited above, aggravated assault under subsection (a)(3) is a felony of the second degree, not first degree. Thus, the record reflects a discrepancy between the aggravated assault charge and the corresponding grading of that charge.

Despite this discernible mismatch, Appellant's principal argument on appeal is that "there was no discrepancy in the charge or the grading of the charge." Appellant's Brief at 20 (emphasis omitted). Instead, Appellant claims that the juvenile court — following the testimony of the Commonwealth's first witness — "intervened to help the Commonwealth" after "seeing that the Commonwealth was going to fail to prove its lead charge" because it "knew that the Commonwealth could not prove that [Appellant] intentionally or knowingly caused injury to [the victim]." Id. at 16-17, 20. He maintains that, in contravention of the Pennsylvania Canons of Judicial Conduct, the juvenile court's "actions in this matter were not consistent with the actions of a neutral, impartial, factfinder." See id.at 20-21 (emphasis in original).

We would reject this argument. Our review of the record indicates that there was, in fact, a discrepancy between the charge and its grading, and thus, we would not consider the juvenile court's inquiry as an impartial effort to "help" the Commonwealth.

Citing Pa.R.J.C.P. 334, Appellant also insists that that juvenile court "permitted an amendment of the Juvenile Petition without proper grounds for doing so." Appellant's Brief at 21. That Rule provides, in relevant part, the following:

> A. Amendment.
>
> (1) The court shall allow a petition to be amended when there is a defect in:
>
> (a) form;
>
> (b) the description of the offense;
>
> (c) the description of any person or property; or
>
> (d) the date alleged.

Pa.R.J.C.P. 334(A)(1).

Again, Appellant's primary contention is that "[t]here was no such defect in this matter, rather, there was a 'discrepancy' between the offense charged and the proof thereof." Appellant's Brief at 21 (internal citations omitted).[3] Because we have already determined that there was a grading defect for the reasons discussed supra, we would consider this argument unpersuasive.

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[3] Appellant does not advance a developed argument that a grading error does not constitute one of the specific defects enumerated under Pa.R.J.C.P. 334(A)(1). Instead, he seems to argue that there was no defect at all.

Second, Appellant alleges that his "fact-finding counsel was ineffective for failing to object to the improper [j]udicial conduct outlined above, and for failing to object to an amendment of the charges." See id. at 22 (unnecessary capitalization and emphasis omitted).[4] This Court has previously explained:

> With regard to ineffectiveness claims, counsel is presumed to be effective, and the appellant bears the burden of proving otherwise. In re A.D., 771 A.2d 45, 50 (Pa. Super. 2001). In reviewing ineffectiveness claims:
>
> > [W]e must first consider whether the issue underlying the charge of ineffectiveness is of arguable merit. If not, we need look no further since counsel will not be deemed ineffective for failing to pursue a meritless issue. If there is arguable merit to the claim, we must then determine whether the course chosen by counsel had some reasonable basis aimed at promoting the client's interests. Further, there must be a showing that counsel's ineffectiveness prejudiced Appellant's case. The burden of producing the requisite proof lies with Appellant.
>
> Id. (citations omitted).

In re K.A.T., Jr., 69 A.3d at 699.

Because we have determined that the juvenile court's conduct was not improper and that it appropriately allowed an amendment of the Juvenile Petition due to the grading defect, we do not believe that the issue underlying the charge of ineffectiveness is of arguable merit. Consequently, Appellant

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[4] "Because of a juvenile's lack of access to collateral review, we have concluded that it is necessary to review a juvenile's ineffective assistance of counsel claims on direct appeal, when properly raised." In re K.A.T., Jr., 69 A.3d 691, 697 (Pa. Super. 2013) (citation omitted). Further, "juveniles are permitted to raise ineffectiveness claims for the first time in a Pa.R.A.P. 1925(b) statement, without otherwise preserving those issues first before the trial court." Id. at 698 (citation omitted).

has not met the burden of proving that his counsel was ineffective on this basis.

Appellant's remaining three issues challenge the sufficiency of the evidence underlying his adjudication as delinquent for the offenses of aggravated assault, simple assault, and harassment. We apply the following standard of review:

> In reviewing sufficiency of evidence claims, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all the elements of the offense. Additionally, to sustain a conviction, the facts and circumstances which the Commonwealth must prove[ ] must be such that every essential element of the crime is established beyond a reasonable doubt. Admittedly, guilt must be based on facts and conditions proved, and not on suspicion or surmise. Entirely circumstantial evidence is sufficient so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. 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 fact[-]finder is free to believe all, part, or none of the evidence presented at trial.

In re K.A.T., Jr., 69 A.3d at 696 (citation omitted; brackets in original).

We begin by reviewing the evidence underlying Appellant's adjudications for aggravated assault and simple assault. Appellant challenges both adjudications on the basis that the evidence does not support the juvenile

court's finding that he recklessly caused bodily injury, or serious bodily injury, to the victim.[5] We set forth the applicable elements of these offenses:

> § 2702. Aggravated assault
>
> (a) Offense defined.--A person is guilty of aggravated assault if he:
>
> ...
>
> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation, while in the performance of duty;

18 Pa.C.S. § 2702(a)(2).

> § 2701. Simple assault
>
> (a) Offense defined.-- Except as provided under section 2702 (relating to aggravated assault), a person is guilty of assault if he:
>
> (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;

18 Pa.C.S. § 2701(a)(1).

In addition, significant to Appellant's argument on appeal, we recognize:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree

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[5] We address these sufficiency claims together because Appellant submits that "[t]he intent element of simple assault and aggravated assault are identical, with the exception that serious bodily injury is attempted or caused in an aggravated assault whereas bodily injury is attempted or caused in a simple assault." See Appellant's Brief at 29 (citations omitted). As a result, in his simple assault sufficiency argument, Appellant incorporates his analysis regarding why the evidence was insufficient to prove he committed aggravated assault. Id.

> that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

18 Pa.C.S. § 302(b)(3).

Appellant contends that he "did not recklessly cause serious bodily injury" to the victim. Appellant's Brief at 25. He asserts that he "did not consciously disregard a substantial and unjustifiable risk that the material element — in this case, serious bodily injury to [the victim] — existed our [sic] would result from his conduct." Id. Instead, he claims that this was "a freak accident" because the victim "was attempting to hold his legs down; she had her head within six inches of [Appellant's] knee; and in the course of struggling to get free [from the restraint], [his] knee hit [the victim] in the head, causing her a severe concussion." Id. at 26. Further, he avers that his "actions were not a 'gross deviation from the standard of conduct' for a reasonable patient in an inpatient psychiatric facility who is being restrained." Id. at 27.[6]

In finding that Appellant committed the offense of aggravated assault under 2702(a)(2), the juvenile court determined that Appellant acted recklessly, explaining:

> With respect to the causation of [the victim's serious bodily injury], I find that the juvenile acted in a reckless manner on that

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[6] In support, Appellant refers to the testimony of one mental health technician at Beacon Light, who stated that she "would struggle too … if three people were holding me down." N.T. at 39.

> date. He was angered. Had been an ongoing thing that day. Throwing furniture. Endangering people in that manner.
>
> But, more importantly, as he is placed in a therapeutic hold, he continues to flail his arms, kick his legs, and struggle.
>
> That reckless conduct resulted in the injuries to [the victim]. And, I disagree with the witness that said everybody acts like that, and in that situation, because a lot of juveniles will submit to a therapeutic hold, can control their anger, their reckless behavior, because they are in an environment that teaches triggers and how to control it.
>
> So, I completely disagree with that testimony. And, I find [Appellant's] conduct was reckless. That he kneed [the victim] in the head. And as a result, she suffered a serious bodily injury.

N.T. at 58. The juvenile court relied on its above-analysis in finding that Appellant also committed simple assault. Id. at 59.

Our examination of the hearing transcript supports the juvenile court's findings. Witnesses testified that, on the day in question, Appellant "trashed our unit. Throwing furniture. Verbally assaulting staff." Id. at 28. While being restrained, Appellant was "pulling, swinging" his arms and legs, and "was very aggressive. He was fighting the restraint." Id. at 21, 33. We determine that the evidence adduced at the hearing supports the juvenile court's finding that Appellant acted recklessly, consciously disregarding a substantial and unjustifiable risk that someone could sustain serious bodily injuries from his behavior, and agree that Appellant's conduct involves a gross deviation from the standard of conduct that a reasonable person would observe in his situation. See 18 Pa.C.S. § 302(b)(3). Thus, we conclude that the evidence was sufficient to sustain Appellant's adjudications of delinquency for aggravated assault and simple assault.

However, we determine that the evidence does not support Appellant's adjudication of delinquency for harassment. The statute at issue states:

> (a) Offense defined.--A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:
>
> > (1) 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).

Appellant argues that he "did not act with an intent to harass, annoy, or alarm the alleged victim[.]" Appellant's Brief at 29. He states that the juvenile court's "finding that [Appellant] acted recklessly — even assuming arguendo that [Appellant] did act recklessly — does not satisfy the intent element of the crime of Harassment. The crime of Harassment requires proof that someone acts with the 'intent to harass, annoy, or alarm another.'" Id. at 29-30 (citing 18 Pa.C.S. § 2709(a)(1); emphasis in original). Moreover, Appellant maintains that although he "was described several times as angry and making rude comments," those comments were not directed at the victim. Id. at 30 (citation omitted). He points out that he "did not even recognize that [the victim] had been injured until after the incident, at which he point he denied kneeing her in the head." Id. at 30 (citation omitted).

We agree with Appellant that the Commonwealth did not establish that he kneed the victim with the intent to harass, annoy, or alarm.[7] Our review of the hearing transcript does not demonstrate such intent:

> [ANDREA PHINNEY[8]]: [Appellant] took it upon himself to throw furniture around the boys[']' unit, and just cause a scene. And then when our staff member Melinda McLaughlin attempted to remove him from the unit, to get him to stop, I guess, basically, destroying the furniture and everything on the unit, he turned around and spit in her face. And that's when he was put into an upper torso and the restraint began.
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> [THE COMMONWEALTH]: Upper torso. How is an upper torso restraint performed?
>
> [ANDREA PHINNEY]: A[n] upper torso, it's when you are standing behind the client, and you take your arms and sweep them in through their arms, and you are holding onto the back of his shirt.
>
> [THE COMMONWEALTH]: Okay. And, after that restraint was administered, what happened next?

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[7] Neither the juvenile court, nor the Commonwealth, provide any analysis regarding the evidence underlying Appellant's harassment adjudication. In finding that Appellant committed harassment, the juvenile court merely remarked, "I have already found that [Appellant] recklessly caused serious bodily injury. So, he is found guilty at count two simple assault. Likewise, the conduct amounted to the summary offense of harassment under 2709(a)(1), that's graded as a summary offense." See N.T. at 59 (emphasis added). See also Commonwealth's Brief at 16 ("As there was sufficient evidence on the aggravated assault offense, it follows that the evidence was sufficient to sustain that adjudications for simple assault and harassment."). We further note that the written allegation represents that Appellant committed the offense of harassment by "caus[ing] serious bodily injury to the victim … by kneeing her in the head causing a concussion and having limited use of her right arm to this day." See Written Allegation, 8/21/2015, at 3. See also Juvenile Petition, 8/25/2015, at 1 (referring to the written allegation to describe Appellant's alleged offenses).

[8] Andrea Phinney was a mental health technician at Beacon Light when the incident at issue occurred. N.T. at 15.

[ANDREA PHINNEY]: At that point in time, [another mental health technician] had his upper torso, like his, the top half of his body, and [the victim] took over his legs. And, [the victim] was having difficulty getting his legs down, because one of his knees, you know, hit her in the side of the head.

[THE COMMONWEALTH]: Okay.

[ANDREA PHINNEY]: So, I helped her straighten his legs out so she could control his legs.

[THE COMMONWEALTH]: How did he hit her in the head with his knee? Was he -- How did that happen?

[ANDREA PHINNEY]: He was just struggling. And, his knee hit her in the side of the head when she went to take over his legs --

[THE COMMONWEALTH]: Okay.

[ANDREA PHINNEY]: -- to try [to] control him to get him flat. And, she wasn't able to get them flat on her season [sic], so I helped her flatten his legs out, so that the hold was a proper hold.

...

[APPELLANT'S ATTORNEY]: All right. And, so, did you personally observe this knee in the head?

[ANDREA PHINNEY]: Yes.

[APPELLANT'S ATTORNEY]: And, during this time, [Appellant] was basically struggling to get out, to get out of the restraint, is that fair to say?

[ANDREA PHINNEY]: Correct.

[APPELLANT'S ATTORNEY]: So ... he was trying to get ... out of the, his arms and legs ... being held, is that correct?

[ANDREA PHINNEY]: Correct.

[APPELLANT'S ATTORNEY]: And, the time this kneeing took place, where was [the victim's] head located?

[ANDREA PHINNEY]: She was, had, she was laying towards the top of his, like her body was positioned towards the top of his thigh area, trying to get his legs straight.

[APPELLANT'S ATTORNEY]: [] How far from his thigh was she?

[ANDREA PHINNEY]: The time of the kneeing, she was just going into it. So,

[APPELLANT'S ATTORNEY]: All right. All right, so a few inches?

[ANDREA PHINNEY]: Six inches, maybe.

...

[THE COURT]: While this was going on, did [Appellant], was he saying anything? Was --

[ANDREA PHINNEY]: Yeah. He was swearing at [one of the mental health technicians]. Calling her a dumb broad, a stupid cunt and other various names.

[THE COURT]: All right. At some point did he recognize that [the victim] had been injured?

[ANDREA PHINNEY]: Afterward, yes.

[THE COURT]: And, did he make any statements regarding her injuries?

[ANDREA PHINNEY]: I do believe he did deny kneeing her in the head.

...

[APPELLANT'S ATTORNEY]: You said that he said some things towards [one other mental health technician]. Did he say anything towards [the victim]?

[ANDREA PHINNEY]: Not directly reference [sic] towards her. No.

* * *

[APPELLANT'S ATTORNEY]: And, do you remember where everybody was positioned in that hold who was holding where?

[TONY SIBBEL[9]]: I know Andrea [Phinney] and [the victim] were on his legs, and myself and [another mental health technician] were on arms.

[APPELLANT'S ATTORNEY]: Do you remember if [Appellant] was saying anything during this time?

[TONY SIBBEL]: He was angry. Verbally aggressive and swearing.

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[9] Mr. Sibbel is a "MH shift manager" at Beacon Light. N.T. at 28.

> [APPELLANT'S ATTORNEY]: Okay. Was he directing his comments towards anyone in particular?
>
> [TONY SIBBEL]: Nobody in particular. No.
>
> ...
>
> [THE COMMONWEALTH]: During the hold, what was [Appellant's] reaction? Did he just sit there?
>
> [TONY SIBBEL]: No. He was struggling and angry.
>
> [THE COMMONWEALTH]: What do you mean struggling? What was he doing?
>
> [TONY SIBBEL]: Trying to get his arms and legs free.
>
> [THE COMMONWEALTH]: Okay. What was he doing with his arms and legs?
>
> [TONY SIBBEL]: Pulling, swinging. They were being held down, so he didn't always get them free, but.
>
> * * *
>
> [THE COMMONWEALTH]: And, during this hold, did anything occur?
>
> [MELINDA MCLAUGHLIN[10]]: [Appellant] was, he was struggling with us. I would, too, if I had people holding me down. And, and, I honestly didn't see. Like, he was struggling. And, then at first, I had the top part of him, and [the victim] had his feet. And then, [the victim] started to look like she wasn't, like, feeling just, like something wasn't right....

N.T. at 16-18, 23-25, 32, 33, 35-36.

All of the Beacon Light employees who are able to remember the incident characterized Appellant as "struggling" to break free of the restraint. Their testimony does not support a finding that Appellant kneed the victim with the intent to harass, annoy, or alarm her. In addition, the juvenile court

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[10] Ms. McLaughlin was employed as a mental health technician at Beacon Light. N.T. at 34.

discerned that Appellant "acted in a reckless manner" as he continued to "flail his arms, kick his legs, and struggle" in the therapeutic hold. N.T. at 58. Thus, the evidence demonstrates that Appellant acted in a manner where he consciously disregarded the substantial and unjustifiable risk that someone would be seriously injured by his struggling, see 18 Pa.C.S. § 302(b)(3), and that he did not knee the victim in the interest of harassing, annoying, or alarming her. Therefore, we deem the evidence insufficient, and reverse Appellant's adjudication of delinquency for harassment.[11]

Adjudications for aggravated assault and simple assault affirmed. Adjudication for harassment reversed. Jurisdiction relinquished.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/8/2017

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[11] Because we do not believe that reversal of Appellant's adjudication for harassment will upset the juvenile court's dispositional order, we do not remand this matter to the juvenile court to enter a new dispositional order.