NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CORDARRYL BRAXTON	:	
Appellant	:	No. 1376 EDA 2018

Appeal from the Judgment of Sentence October 2, 2015
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0012048-2014

BEFORE: PANELLA, P.J., OLSON, J., and NICHOLS, J.

MEMORANDUM BY OLSON, J.: **FILED JANUARY 27, 2020**

Appellant, Cordarryl Braxton, appeals from the judgment of sentence entered on October 2, 2015, following his jury trial convictions for rape by forcible compulsion, aggravated indecent assault, and sexual assault.[1] Upon review, we affirm Appellant's convictions, vacate Appellant's illegal sentence, and remand for resentencing consistent with this decision.

We briefly summarize the facts and procedural history of this case as follows. On October 6, 2014, Rashika and Ronaldo Lynton, residents of a rooming house in Philadelphia County, Pennsylvania, heard a woman crying and repeatedly saying, "stop" through a vent in a wall of the bathroom they used. Appellant lived in the room on the other side of the bathroom. Ronaldo Lynton recorded the incident on his wife's cellular telephone. Rashika Lynton

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[1] 18 Pa.C.S.A. §§ 3121(a)(1), 3125, and 3124.1, respectively.

then went to Appellant's room and banged on the door so hard that it swung open. Rashika Lynton saw Appellant, completely naked, and a frightened woman with her pants around her ankles. Rashika Lynton asked the woman if she were okay and Appellant responded, "she okay." The victim stated that she was not okay and Rashika Lynton took her back to the Lynton's room. Rashika Lynton saw Appellant gathering condoms and liquor from the floor, witnessed him walk into the bathroom, and flush the toilet. Ronaldo Lynton blocked the hallway until police arrived. Back in the Lynton's room, the victim told Rashika Lynton that she went to Appellant's room to look at his CD and DVD collection. Appellant became angry when the victim did not agree to have sex with him and he would not let her leave. The victim told Rashika Lynton that Appellant raped her and would not stop despite her protest. At the rooming house, police interviewed Rashika Lynton and listened to the recording on her cellular telephone. She later went to the police station to give a statement and allowed a detective to listen to the audio recording. Rashika Lynton tried to e-mail the audio recording unsuccessfully to the police. The recording was deleted sometime later and was not turned over to police before it was lost.

A jury trial commenced on the aforementioned charges on June 12, 2015. On June 22, 2015, the jury found Appellant guilty of all charges. The trial court sentenced Appellant to eight to 16 years of incarceration for rape and a consecutive term of six to 12 years of imprisonment for aggravated indecent assault. Appellant's sexual assault conviction merged with his

conviction for rape. Accordingly, in total, the trial court sentenced Appellant to an aggregate term of 14 to 28 years of incarceration. This timely appeal resulted.[2]

On appeal, Appellant presents the following issues for our review:

A. Did the trial court err when it found Appellant [] guilty of rape, aggravated indecent assault, and sexual assault, as an analysis of the DNA evidence taken in this matter excluded [Appellant] as the source of the DNA, therefore raising reasonable doubt that there was sufficient evidence to convict [Appellant] of these criminal offenses?

B. Did the trial court err when it permitted Philadelphia Police Detective Mark Webb to make mention of an audio recording that was made by Commonwealth witness Rashika Lynton on her cell[ular] [tele]phone, which she told him about in her interview in this matter?

C. Did the trial court err when it permitted the Assistant District Attorney to argue, in her closing argument, that Appellant [] had "consciousness of guilt," based on a statement that he made to Philadelphia Police Officer Brian Purtle, which Officer Purtle thought was an admission of guilt?

D. Did the trial court err when it sentenced Appellant [] to six years to twelve years['] incarceration for aggravated indecent assault, which is an illegal sentence, as this criminal offense is a felony of the second degree?

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[2] Appellant filed a timely notice of appeal, but failed to comply with the trial court's order directing him to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Ultimately, the appeal was dismissed on March 31, 2016. Appellant subsequently filed petitions pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546, alleging ineffective assistance of counsel and requesting that his appellate rights be reinstated *nunc pro tunc*. The trial court granted these requests. After several extensions of time, the transcription of all of the notes of testimony from trial, and the appointment of counsel, the trial court ordered Appellant to file a Rule 1925(b) statement. Counsel for Appellant complied timely. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on December 21, 2018.

Appellant's Brief at 2-3 (parentheticals and complete capitalization omitted).

In his first issue presented on appeal, Appellant argues that the evidence was insufficient to convict him of the aforementioned crimes because "an analysis of the DNA evidence taken in this matter excluded [Appellant] as the source of DNA, therefore raising reasonable doubt[.]" ***Id.*** at 23.

The standard we apply in reviewing the sufficiency of the evidence 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. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note 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. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact[,] while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.

Commonwealth v. Stiles, 143 A.3d 968, 981 (Pa. Super. 2016) (citation omitted).

Moreover, this Court has stated:

> In addition to proving the statutory elements of the crimes charged beyond a reasonable doubt, the Commonwealth must also establish the identity of the defendant as the perpetrator of the crimes. Evidence of identification need not be positive and certain to sustain a conviction. As our Supreme Court has stated any indefiniteness and uncertainty in the identification testimony

> goes to its weight. Direct evidence of identity is, of course, not necessary and a defendant may be convicted solely on circumstantial evidence.

Commonwealth v. Smyser, 195 A.3d 912, 915 (Pa. Super. 2018) (internal citations and quotations omitted).

Furthermore,

> [a]s to the content of a victim's testimony, this Court has repeatedly indicated that such testimony, if believed by the fact-finder, may be sufficient to establish all the elements of a sexual offense.
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> > In ***Commonwealth v. Gabrielson***, 536 A.2d 401 (Pa. Super. 1988), this Court held that the uncorroborated testimony of a rape victim, if believed by the jury, is sufficient to support a rape conviction and no medical testimony is needed to corroborate a victim's testimony if the testimony was rendered credible by the jury. ***See also Commonwealth v. Trimble***, 615 A.2d 48, 50 (Pa. Super. 1992) (where a five-year-old victim's testimony that defendant placed his "weiner," penis, in her "tooter," vaginal area, established penetration and supported the rape conviction); ***see also Commonwealth v. Kunkle***, 623 A.2d 336, 338 (Pa. Super. 1993) (holding that uncorroborated testimony of the sex offense victim may be sufficient to establish the guilt of the accused); ***Commonwealth v. Cody***, 584 A.2d 992 (Pa. Super. 1991) (holding that sex offense victim's testimony alone provided sufficient evidence to establish defendant's guilt of involuntary deviate sexual intercourse, indecent assault, and corruption of minors beyond a reasonable doubt); ***Commonwealth v. White***, 491 A.2d 252, 258 (Pa. Super. 1985); ***Commonwealth v. Stoner***, 425 A.2d 1145 (Pa. Super. 1981) (holding that the uncorroborated testimony of a 12–year-old victim was sufficient to establish defendant's guilt in a prosecution for statutory rape, involuntary deviate sexual intercourse, and corrupting morals of a minor).
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> ***Commonwealth v. Poindexter***, 646 A.2d 1211, 1214 (Pa. Super. 1994).

> The Crimes Code specifically expresses this principle in the context of sexual offenses. ***See*** 18 Pa.C.S.A. § 3106 ("The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.")

Commonwealth v. Johnson, 180 A.3d 474, 479–480 (Pa. Super. 2018) (internal quotations, citations, and original emphasis omitted).

Moreover, we have stated that, "[i]n DNA as in other areas, an absence of evidence is not evidence of absence." ***Commonwealth v. Brooks***, 875 A.2d 1141, 1147 (Pa. Super. 2005) (citation omitted); ***see also Commonwealth v. Williams***, 35 A.3d 44 (Pa. Super. 2011) (even if appellant's DNA were not found, record contained overwhelming evidence of appellant's guilt including three unshakable eyewitnesses, appellant's confession, and appellant's access to weapon used in crimes). Stated differently, the lack of DNA does not exculpate a defendant or necessarily rule that person out as the perpetrator.

In this case, the trial court initially noted that the DNA evidence presented in this case was inconclusive, not exculpatory. Trial Court Opinion, 12/21/2018, at 20-21. It further opined that the absence of Appellant's DNA was supported by evidence that Appellant wore a condom during the incident and flushed it down the toilet before police arrived. ***Id.*** at 21. Moreover, the trial court concluded that the victim's testimony that she did not consent and Appellant committed sexual misconduct by forcible compulsion was sufficient

to support Appellant's convictions. Finally, as set forth above, the Lyntons were first-hand witnesses who corroborated the victim's version of events. The absence of Appellant's DNA simply does not establish that he was not the perpetrator in light of the additional evidence presented at trial. Based upon all of the foregoing, we discern no abuse of discretion or error of law in the trial court's finding that there was sufficient evidence to support Appellant's identity as the perpetrator.

Next, Appellant asserts that "[t]he trial court erred when it permitted Philadelphia Detective Mark Webb to make mention of an audio recording that was made by [] Rashika Lynton on her cell[ular] [tele]phone, which she told him about in her interview in this matter." Appellant's Brief at 26. Detective Webb testified that he listened to the audio recording and heard a female voice saying "no" and "stop." ***Id.*** Because the audio recording was erased and the jury was not able to hear it at trial, Appellant claims that Detective Webb's testimony was hearsay, but also unfairly prejudicial under Pa.R.E. 403. ***Id.*** at 26-29.

This Court has explained:

> Admission of evidence is within the sound discretion of the trial court and will be reversed only where the court clearly abused that discretion. Proper judicial discretion conforms to the law and is based on facts and circumstances before the court. An abuse of discretion is not a mere error of judgment but, rather, involves partiality, prejudice, bias, ill-will, or manifest unreasonableness.
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> Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less probable. Pa.R.E. 401. All relevant evidence is admissible unless otherwise provided by law. Pa.R.E. 402. Although relevant, a trial court may exclude

> evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Pa.R.E. 403.
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> * * *
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> Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. Pa.R.E. 801(c). Sometimes, out-of-court statements are offered not to prove the truth of the matter asserted but, for example, to explain the course of conduct undertaken by an investigating police officer. Such statements are not hearsay.
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> Even if a court does wrongly admit hearsay, this Court will not disturb a verdict on that basis alone if the admission constitutes harmless error. Error is harmless if: (1) the prejudice to the appellant was nonexistent or *de minimis*; (2) the erroneously admitted evidence was merely cumulative of other untainted, substantially similar and properly admitted evidence; or (3) the properly admitted and uncontradicted evidence was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Hardy, 918 A.2d 766, 776–777 (Pa. Super. 2007) (case citations omitted).

Upon review of the certified record, including the transcripts from trial, while Appellant objected to Detective Webb's testimony regarding the audio recording as hearsay, the jury, without objection, already heard testimony regarding the audio recording from the Lyntons and Officer Allen Carroll. Rashika Lynton testified that from inside the bathroom she could hear a female saying "no" and "stop." N.T., 6/15/2015, at 25. Ronaldo Lynton recorded the incident on her cellular telephone. ***Id.*** Rashika Lynton told a responding officer about the audio recording and played it for him. ***Id.*** at 37. She also

played the audio recording for a detective later that night. ***Id.*** at 41. Appellant did not object to this testimony. Ronaldo Lynton also testified that he heard the victim "crying and begging to stop" and that he began recording the sounds with his wife's cellular telephone. ***Id.*** at 152. He testified that Rashika Lynton later played the recording for police. ***Id.*** at 163. Appellant did not object to this testimony. Officer Carroll was called to secure the scene and he testified that, when he arrived, Rashika Lynton played the audio recording for him and that he heard a female's voice saying, "stop, stop, stop[.]" N.T., 6/16/2015, at 117-122. Appellant did not object to this testimony. Detective Webb testified on the last day of trial, after the jury had already heard the Lyntons and Officer Carroll testify about the recording. N.T., 6/18/2015, at 13-59. After the trial court overruled Appellant's hearsay objection, Detective Webb testified that he "heard what appeared to be a female voice saying no and stop" from an audio recording on Rashika Lynton's cellular telephone. ***Id.*** at 19.

Here the jury already heard extensive testimony regarding the audio recording before Appellant objected to Detective Webb's strikingly similar testimony. On the record before us, we conclude that Detective Webb's testimony was both cumulative of other evidence admitted without objection. Hence, any alleged error was insignificant and could not have contributed to the verdict. As such, Appellant's second issue lacks merit.

In his third issue presented, Appellant argues that the trial court erred by permitting the Commonwealth to argue, during closing statements, that

Appellant showed a consciousness of guilt when Appellant made a statement to Officer Brian Purtle. Appellant's Brief at 29-37. More specifically, Appellant argues, in sum:

> When Officer Purtle was processing [Appellant] at the Philadelphia Police – Special Victims Unit, [Appellant] made a statement saying, "maybe this happened for a reason, may[be] this will help straighten out my life." This statement was not memorialized in a [written document], nor repeated to any other officers. This statement was not brought to anyone's attention until [four days] prior to trial (June 11, 2015 []). The defense therefore did not have adequate notice regarding this statement, so as to either move for its suppression or otherwise defend against it, as it was not received by the defense as part of discovery. Moreover, the admission of this statement and the allowance of the [Commonwealth] to mention it [during] closing argument and argue "consciousness of guilt" had a prejudicial effect that far outweighed its probative value.

Id. at 29-30.

As previously stated, we review the admissibility of evidence for an abuse of discretion. ***Hardy***, 918 A.2d at 776. Pursuant to Pa.R.Crim.P. 573(B)(1)(b), the Commonwealth is required to disclose "the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth." There is a continuing duty to disclose such evidence upon discovery prior to, or during, trial by promptly notifying the opposing party or the court. Pa.R.Crim.P. 573(D). "The Commonwealth does not violate Rule 573 when it fails to disclose to the defense evidence that it does not possess and of which it is unaware." ***Commonwealth v. Collins***, 957 A.2d 237, 253 (Pa. 2008)

(citation omitted). "[W]hen the evidence is exclusively in the custody of police, possession is not attributed to the Commonwealth for purposes of Rule 573." ***Id.*** (citation omitted).

Initially we note that Appellant concedes that he received Officer Purtle's report and that the document did not memorialize the challenged statement purportedly made by Appellant. Officer Purtle testified that he failed to include Appellant's statement in his report and first told the Commonwealth about it four days before trial. N.T., 6/16/2015, at 159. The Commonwealth, in turn, notified defense counsel and sent him written correspondence "as to what the officers would testify to" the day that the information became available to the Commonwealth. N.T., 6/12/2015, at 13. The trial court gave defense counsel the opportunity to speak with Officer Purtle regarding the purported statement prior to trial and noted that Appellant could cross-examine and impeach him at trial. ***Id.*** at 14. Accordingly, the trial court "considered the late nature of [the proposed] testimony and believed that the Commonwealth turned over this information as soon as it became known to them." Trial Court Opinion, 12/21/2018, at 29. Moreover, the trial court noted that Appellant's statement that "maybe this happened for a reason, maybe this will help straighten my life out" was "not so exculpatory as to be a shocking admission of his guilt[,]" because "the statement was vague and could be interpreted by the jury in a number of ways." ***Id.*** at 30.

We agree with the trial court's assessment. Officer Purtle was the only person with knowledge of Appellant's statement and he had not memorialized

it in writing. As such, the Commonwealth did not have the information in its possession and was unaware of it until shortly before the commencement of trial. When the challenged statement was discovered, the Commonwealth promptly disclosed it to both Appellant and the trial court. We discern no violation of Rule 573.

Finally, we note that upon review of the certified record, there are no transcripts of the closing arguments for us to review.[3] Thus, Appellant has waived the portion of his claim pertaining to the Commonwealth's closing argument and consciousness of guilt. Accordingly, for all of the foregoing reasons, Appellant's third issue fails.

In his final issue, Appellant contends that his sentence of six to 12 years for aggravated indecent assault is illegal. Appellant's Brief at 37-38. He claims that the Pennsylvania Crimes Code grades this offense as a second-degree felony for which the statutory maximum penalty is five to 10

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[3] This Court has previously held:

> [T]he Rules of Appellate Procedure require an appellant to order and pay for any transcript necessary to permit resolution of the issues raised on appeal. Pa.R.A.P. 1911(a). […]When the appellant [] fails to conform to the requirements of Rule 1911, any claims that cannot be resolved in the absence of the necessary transcript or transcripts must be deemed waived for the purpose of appellate review. It is not proper for either the Pennsylvania Supreme Court or the Superior Court to order transcripts nor is it the responsibility of the appellate courts to obtain the necessary transcripts.

Commonwealth v. Preston, 904 A.2d 1 (Pa. Super. 2006) (case citation omitted).

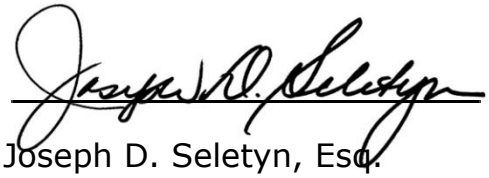
years of incarceration. ***Id.*** at 37. In its opinion, the trial court *sua sponte* determined that the sentence is illegal and recommends remanding for correction. Trial Court Opinion, 12/21/2018, at 31.

Aggravated indecent assault pursuant to 18 Pa.C.S.A. § 3125(a), the subsection under which Appellant was convicted, is a second-degree felony. ***See*** 18 Pa.C.S.A. § 3125(c)(1). A person convicted of a second-degree felony is subject to a maximum sentence of ten years of imprisonment. 18 Pa.C.S.A. § 106(b)(1)(3). Here, the trial court sentenced Appellant to a maximum term of 12 years of imprisonment for aggravated indecent assault. As such, the sentence is illegal and we vacate it. ***Commonwealth v. Foster***, 17 A.3d 332, 349 (Pa. 2011) ("The classic claim of an illegal sentence is where the sentence exceeded the statutory maximum for the offense. A court is simply unauthorized to impose such a sentence.") (citation and parenthetical omitted). Because the trial court imposed the illegal sentence consecutively to the sentence it imposed for rape, "our disposition has upset the overall sentencing scheme of the trial court [and] we must remand so that the trial court can restructure its sentence plan." ***Commonwealth v. Thur***, 906 A.2d 552 (Pa. Super. 2006).

Convictions affirmed. Case remanded for resentencing in accordance with this memorandum. Jurisdiction relinquished.

Judge Nichols did not participate in the consideration or decision of this case.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/27/20