NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: N.B.C., A MINOR	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: N.B.C., A MINOR,	:	No. 2067 MDA 2012
Appellant	:	

Appeal from the Order Dated October 25, 2012,
in the Court of Common Pleas of Luzerne County
Juvenile Division at No. CP-40-JV-0000361-2011

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND PLATT,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED DECEMBER 24, 2013**

N.B.C. appeals from the dispositional order of October 25, 2012, following his adjudication of one count of simple assault. We affirm.

An adjudication hearing was held on September 7, 2012, before the Honorable Tina Polachek Gartley. The victim, E.W., testified that on April 27, 2011, he and some friends were gathered at a park in Ashley. (Notes of testimony, 9/7/12 at 15-16.) They were under the pavilion when appellant arrived. (***Id.*** at 17.) E.W. testified they were "messing around" when appellant put E.W. in a choke hold. (***Id.*** at 18-19.)

B.P. also testified that they had been "fooling around," engaging in horseplay. (***Id.*** at 34.) She testified they were "chin checking" each other, ***i.e.***, lightly slapping each other on the chin. (***Id.*** at 34, 38-39.) According to B.P., they were just laughing and joking around. (***Id.*** at 39.)

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* Retired Senior Judge assigned to the Superior Court.

E.W. testified that appellant placed him in a choke hold for approximately 50-60 seconds until he passed out. (***Id.*** at 19.) Appellant released him and he struck his head on the concrete. (***Id.*** at 25, 31.) Appellant then left the scene. (***Id.*** at 31.) E.W. was bleeding and an ambulance was called. (***Id.*** at 20, 32.) E.W. was transported to the hospital where he remained for approximately two hours and received four staples in his head. (***Id.*** at 43, 45.)

Appellant also testified at the adjudication hearing. According to appellant, E.W. slapped him in the face. (***Id.*** at 49.) After the second time, appellant told E.W. to stop. (***Id.*** at 50.) E.W. then hit him a third time, at which point appellant "restrained him" by placing him in a head lock. (***Id.***) According to appellant, he only held E.W. for 2-3 seconds and was not aware he was unconscious when he released him. (***Id.*** at 50-51.)

Appellant was adjudicated delinquent of one count of simple assault as a second-degree misdemeanor, 18 Pa.C.S.A. § 2701(a)(1). The juvenile court found appellant not guilty of the summary offenses of disorderly conduct and harassment. A dispositional review hearing was held on October 25, 2012, following which appellant was placed on formal probation and ordered to obey curfew and participate in anger management, together with other conditions. Appellant was also ordered to pay restitution of $50 and have no contact with the victim or his family.

Notice of appeal was filed on November 21, 2012. New counsel was appointed to represent appellant on appeal. On December 5, 2012, appellant was ordered to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., within 21 days. (Docket #13.) Appellant did not file his Rule 1925(b) statement until January 25, 2013. (Docket #17.) Therein, he raised a single issue for appeal: "Whether the trial court erred in finding that the Appellant was guilty of Simple Assault, 18 Pa.C.S.A. 2701(a)(1)?" (***Id.***)

On March 7, 2013, Judge Gartley filed a Rule 1925(a) opinion, finding the issue waived for failure to timely comply with her order. Judge Gartley also noted the Commonwealth's response to appellant's concise statement, in which it argued that the statement was too vague to allow the court to identify the issues raised on appeal. (Trial court opinion, 3/7/13 at 3.)

Initially, we note that the untimely filing of a court-ordered Rule 1925(b) statement constitutes ***per se*** counsel ineffectiveness. ***See Commonwealth v. Burton***, 973 A.2d 428, 433 (Pa.Super. 2009) (***en banc***) ("Thus untimely filing of the 1925 concise statement is the equivalent of a complete failure to file. Both are ***per se*** ineffectiveness of counsel from which appellants are entitled to the same prompt relief.") (footnote omitted). Ordinarily, we would be compelled to remand for a supplemental trial court opinion addressing the issue raised on appeal. ***Id.***; ***see also*** Rule 1925(c)(3) ("If an appellant in a criminal case was ordered to

file a Statement and failed to do so, such that the appellate court is convinced that counsel has been ***per se*** ineffective, the appellate court shall remand for the filing of a Statement ***nunc pro tunc*** and for the preparation and filing of an opinion by the judge.”).

However, here, appellant’s concise statement was not only untimely, but also exceedingly vague. ***See Burton***, ***supra*** (“Our holding does not apply when there has been an improper filing of a concise statement.”). As quoted above, appellant’s concise statement fails to specify how the trial court erred by adjudicating him delinquent of simple assault. Appellant’s statement is mere boilerplate.

> It has been held that when the trial court directs an appellant to file a concise statement of matters complained of on appeal, any issues that are not raised in such a statement will be waived for appellate review. ***Commonwealth v. Dowling***, 778 A.2d 683, 686 (Pa.Super.2001), citing ***Commonwealth v. Lord***, 553 Pa. 415, 418, 719 A.2d 306, 308 (1998). Similarly, when issues are too vague for the trial court to identify and address, that is the functional equivalent of no concise statement at all. ***Id.*** Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. ***Commonwealth v. Lemon***, 804 A.2d 34, 37 (Pa.Super.2002). Thus, Rule 1925 is a crucial component of the appellate process. ***Id.*** “When the trial court has to guess what issues an appellant is appealing, that is not enough for meaningful review.” ***Id.***, citing ***Dowling***, ***supra***.

Commonwealth v. Smith, 955 A.2d 391, 393 (Pa.Super. 2008) (***en banc***).

On appeal, appellant challenges the sufficiency of the evidence and argues that the defense of justification applied where he was being slapped by E.W. Appellant did not raise sufficiency or justification in his Rule 1925(b) statement; he merely alleged trial court error. Appellant did not specify which elements of the offense were not met. Appellant did not state how or why the evidence was insufficient.

> In ***Commonwealth v. Williams***, 959 A.2d 1252, 1257 (Pa.Super. 2008), this Court stated, "[i]f Appellant wants to preserve a claim that the evidence was insufficient, then the 1925(b) statement needs to specify the element or elements upon which the evidence was insufficient. This Court can then analyze the element or elements on appeal."

Commonwealth v. Manley, 985 A.2d 256, 261-262 (Pa.Super. 2009), ***appeal denied***, 606 Pa. 671, 996 A.2d 491 (2010). "As this Court stated in ***Williams***, the 1925(b) statement is required to determine '[w]hich elements of which offense[s] were unproven? What part of the case did the Commonwealth not prove?'" ***Id.*** at 262, quoting ***Williams***, 959 A.2d at 1257. Appellant's vague Rule 1925(b) statement is manifestly inadequate to preserve the issue.

At any rate, the testimony recounted above was clearly sufficient to sustain the trial court's adjudication. The simple assault statute provides, in relevant part, as follows: "**(a) Offense defined.**--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.A. § 2701(a)(1). Here, the

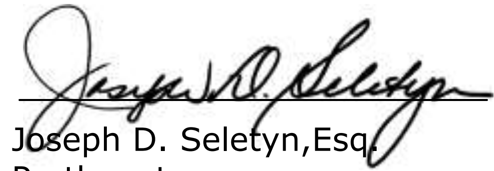
trial court could find appellant intentionally or at least recklessly caused bodily injury to E.W. by placing him into a choke hold, causing him to lose consciousness and hit his head on the concrete. E.W. was bleeding profusely as a result and required four staples to close the wound. The trial court was free to reject appellant's self-serving testimony that he only "restrained" E.W. for a few seconds.

Similarly, both E.W. and B.P. testified that they were merely playing around and "chin checking" each other, thereby defeating appellant's justification defense. Putting E.W. in a choke hold for nearly a minute until he passed out and then dropping him onto the concrete would not be a reasonable, necessary, and proportional response to a light slap or tap. ***See Commonwealth v. Pollino***, 503 Pa. 23, 28, 467 A.2d 1298, 1301 (1983) ("force may be met with force so long as it is only force enough to repel the attack"); 18 Pa.C.S.A. § 505(a) ("The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."). As such, appellant's sufficiency claim, even if it were properly preserved for appeal, would fail in any event.

Order affirmed.

J. S63011/13

Judgment Entered.



Joseph D. Seletyn,Esq.
Prothonotary

Date: 12/24/2013