NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MATTHEW RICHARD MIHALYO, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2110 EDA 2012

Appeal from the Judgment of Sentence April 19, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No.: CP-09-CR-0000137-2012

BEFORE: PANELLA, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: March 18, 2013

Appellant, Matthew Richard Mihalyo, appeals from the judgment of sentence entered after his conviction of one count of theft by unlawful taking and two counts of receiving stolen property.[1] We affirm.

The trial court aptly set forth the relevant facts, as follows:

> Appellant was charged with the theft and subsequent disposal of several pieces of jewelry owned by Susan Crescenzo and her daughter, Staci Crescenzo. Susan and Staci Crescenzo resided, together with Susan's son, in a townhome in Langhorne, Middletown Township, Bucks County. (***See*** N.T. Trial, 4/19/12, at 6-7). Appellant was a friend of Staci, (***see id.*** at 14), and he was present several times in the home between March 10, 2011, and the end of May of that same year. (***See id.*** at 27).

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 3921(a) and 3925(a), respectively.

Staci Crescenzo testified that between early March and late May of 2011, Appellant was welcome in the Crescenzo home. Staci and Appellant were sometimes alone in the home, and Appellant would stop by "to take a shower, just to hang out." (***Id.*** at 27-28). On one occasion, Appellant wished to use the shower and Staci gave Appellant permission to retrieve a towel from Susan's bathroom, which Appellant could reach by passing through Susan's master bedroom. . . . Staci noticed that Appellant seemed to be taking an inordinate amount of time collecting a towel, so she went to check on Appellant and saw him coming out of Susan's bathroom. Staci testified that at that time, she did not suspect Appellant of any wrongdoing. (***See id.*** at 28). At that time, Susan was away from home for the weekend and Staci and Appellant were then the only occupants of the home. (***See id.***).

Susan Crescenzo testified that between March and May, 2011, the same time period in which Appellant frequented the home, she noticed that jewelry, a necklace and two rings, had disappeared from her bedroom. (***See id.*** at 7, 10-11). She normally kept these pieces on a tray on her bedroom bureau. (***See id.*** at 8). . . .

Susan testified that her necklace disappeared first, near the middle or end of March 2011, and then the rings went missing near the beginning of May. (***See id.*** at 13, 20). Susan estimated her necklace had a value of approximately $650, and it featured an amethyst and diamond pendant. . . .

Susan's rings were both custom designs. One again featured an amethyst and diamond, her children's birthstones, and it was valued at approximately $400. The second ring displayed a blue topaz and had a value of approximately $750. (***See id.*** at 12-13). Susan testified that she never gave anyone permission to use, take or sell her rings or her necklace. (***See id.*** at 14-15).

Staci testified that one of her necklaces also disappeared during that spring of 2011. She testified that she ordinarily kept a white gold and diamond necklace in the soap dish in her bathroom in the upstairs hallway. (***See id.*** at 25-26). . . . It featured a charm or pendant that spelled out "Staci," with a diamond dotting the "I," and had a value of approximately $500. (***See id.*** at 26, 58). Staci testified that she regularly kept her

necklace in the soap dish, and that she did not notice it was missing from its regular resting place until it subsequently turned up in records the local police later obtained from a local pawn shop. (***See id.*** at 29, 36). Staci further testified that she never gave Appellant, nor anyone else, permission to take her necklace or sell it. (***See id.*** at 29-30).

Justin Malaszecki, an employee of Gold Buyers at the Neshaminy Mall in Bensalem Township, testified as to his interactions with Appellant in the spring of 2011. Gold Buyers is a cash-for-gold business where individuals can liquidate their jewelry and other gold items. Gold Buyers pays customers in cash or via a prepaid Visa card. Malaszecki testified that it is Gold Buyers' practice, when buying an item from a customer, to take that customer's picture, scan the customer's identification, scan or take a picture of the item itself, and keep that information for the business's records. (***See id.*** at 37-38).

Malaszecki testified that Appellant first came to the Bensalem Township Gold Buyers on April 2, 2011, with the necklace depicted in Exhibit C-2, which included a copy of Appellant's photo identification. (***See id.*** at 42). Malaszecki assisted Appellant during both of his visits to that particular Gold Buyers and he was easily able to identify Appellant in the courtroom. (***See id.*** at 41-42). According to Malaszecki, Appellant received a small amount of cash in exchange for the necklace. (***See id.*** at 42-44). Susan Crescenzo later identified the necklace as the one missing from her bedroom. . . . (***See id.*** at 18).

Malaszecki also described Appellant's second visit to Gold Buyers. On May 26, 2011, Appellant brought two rings to the store. These rings are pictured in Exhibit C-1, along with Appellant's photo identification. Malaszecki again assisted Appellant with his transaction. Gold Buyers paid Appellant $150 in exchange for the rings via a prepaid Visa card. (***See id.*** at 39-41). Susan Crescenzo later identified both of the rings pictured in Exhibit C-1 as the rings that had disappeared from her bedroom bureau earlier that spring.

Detective Gregory Kneiss, of the Middletown Township Police Department, initiated an investigation into the Crescenzos' missing jewelry following a call from Susan Crescenzo. He testified that his investigation revealed additional evidence of

> Appellant's sale of jewelry at another Gold Buyers located at the Oxford Valley Mall in Middletown Township, Bucks County. (***See id.*** at 48-49). The detective's investigation uncovered the documents identified as Exhibits C-1 and C-2, as well as the document identified as Exhibit C-3, all of which had been provided to the detective by the Gold Buyers outlets in the Neshaminy and Oxford Valley Malls. (***See id.*** at 49-50). . . . Staci Crescenzo identified the necklace depicted in Exhibit C-3 as her aforementioned "Staci" necklace.

(Trial Court Opinion, 8/29/12, at 2-5 (record citation formatting provided)). After the close of testimony in Appellant's bench trial and argument from counsel, the court convicted Appellant of the three aforesaid crimes. The court sentenced Appellant to no less than six nor more than twenty-three months' incarceration on the theft charge, plus two years' probation, consecutive to the incarceration on the first receiving stolen property charge. The court imposed no further sentence on the second receiving stolen property charge, but ordered Appellant to pay total restitution in the amount of $2,250.00. The court denied Appellant's motion to reconsider sentence and this timely appeal followed.[2]

Appellant raises three issues for this Court's review:

> 1. Did the trial court err in imposing a sentence on both theft by unlawful taking and receiving stolen property?

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[2] Appellant filed a timely statement of matters complained of on appeal on August 6, 2012, and the court filed an opinion on August 29, 2012. ***See*** Pa.R.A.P. 1925.

> 2. Did the trial court abuse its discretion in sentencing Appellant by imposing a manifestly excessive sentence and failing to consider all relevant factors?
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> 3. Whether the evidence was insufficient to find the Appellant guilty beyond a reasonable doubt of theft by unlawful taking?

(Appellant's Brief, at 5).

In Appellant's first issue, he challenges the legality of his sentence, which included separate punishments on both the theft by unlawful taking and receiving stolen property charges, and argues that "the aforementioned offenses merge for the purposes of sentencing." (***Id.*** at 13; ***see id.*** at 5, 11-13).[3] This issue does not merit relief.

> In reviewing an illegal sentence claim, [t]he issue . . . is a question of law and, as such, our scope of review is plenary and our standard of review is *de novo.* Section 9765 of our Judicial Code provides:
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> > No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing

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[3] We note that Appellant's Rule 1925(b) statement makes only the general claim that "[t]he [trial] court erred in imposing an illegal sentence upon [him]." (Statement of Matters Complained of on Appeal, 8/06/12, at 1 ¶ 2). This vague claim fails to identify the alleged error to be reviewed on appeal properly. ***See Commonwealth v. Hansley***, 24 A.3d 410, 415 (Pa. Super. 2011), *appeal denied*, 32 A.3d 1275 (Pa. 2011) (noting that a Rule 1925(b) statement "must be specific enough for the trial court to identify and address the issue [an appellant] wishe[s] to raise on appeal") (internal quotation marks and citation omitted). However, we are precluded from deeming Appellant's challenge waived because a merger claim "is a nonwaivable challenge to the legality of the sentence." ***Commonwealth v. Pettersen***, 49 A.3d 903, 911 (Pa. Super. 2012) (citation omitted).

> purposes, the court may sentence the defendant only on the higher graded offense.
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> 42 Pa.C.S.A. § 9765. This Court has assessed a merger issue by examining whether the charges arose out of a single set of facts and whether all the statutory elements of one offense coincide with the statutory elements of the other offense.

Commonwealth v. Lomax, 8 A.3d 1264, 1267-68 (Pa. Super. 2010) (case citations and quotation marks omitted). "If the offenses stem from two different criminal acts, merger analysis is not required." ***Commonwealth v. Williams***, 958 A.2d 522, 527 (Pa. Super. 2008) (citation omitted). Likewise, even "a single act which injures multiple victims may form the basis for multiple sentences[.]" ***Commonwealth v. Sayko***, 515 A.2d 894, 896 (Pa. 1986) (citation omitted).

In the case before us, the trial court noted:

> Appellant's crimes arose from distinct acts. Appellant committed theft each time he took unlawful possession of Susan and Staci Crescenzo's jewelry. Once Appellant disposed of that property by selling the jewelry at multiple Gold Buyers location[s], he committed the crime of Receiving Stolen Property. Clearly, these charges arose from separate and distinct, though related, criminal acts . . . .

(Trial Ct. Op., 8/29/12, at 11). We agree.

Appellant was charged with theft based on his stealing of jewelry from the two victims over a period of months. (***See*** Affidavit of Probable Cause, 12/08/11, at 1-2; Information, 2/02/12, at 1; N.T. Trial, 4/19/12, at 7, 10-11, 13, 20, 29-30, 36). He also was charged with two counts of receiving stolen property premised on his sale of Susan Crescenzo's necklace and

rings at the Nashiminy Mall and Staci Crescenzo's necklace at the Oxford Valley Mall. (***See*** Affidavit of Probable Cause, 12/08/11, at 1-2; Information, 2/02/12, at 1; N.T. Trial, 4/19/12, at 18, 39-42, 48-50). Therefore, because Appellant's offenses arose from more than one criminal act involving multiple victims, the court properly found that Appellant's charges did not merge for sentencing purposes. ***See Sayko***, ***supra*** at 896; ***Williams***, ***supra*** at 527. Appellant's first issue does not merit relief.

In his second issue, Appellant challenges the discretionary aspects of his sentence, which "must be considered a petition for permission to appeal." ***Commonwealth v. Kelly***, 33 A.3d 638, 640 (Pa. Super. 2011) (citation omitted). To preserve claims relating to the discretionary aspects of a sentence properly, an appellant must first raise them with the trial court. ***See Commonwealth v. Foster***, 960 A.2d 160, 163 (Pa. Super. 2008), *affirmed*, 17 A.3d 332 (Pa. 2011).

Further,

> [w]hen challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. Two requirements must be met before we will review this challenge on its merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. That is, the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. We examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists. Our inquiry must focus on

> the **reasons** for which the appeal is sought, in contrast to the **facts** underlying the appeal, which are necessary only to decide the appeal on the merits.

Commonwealth v. Ahmad, 961 A.2d 884, 886-87 (Pa. Super. 2008) (case citations, internal quotation marks and footnotes omitted) (emphases in original).

Appellant properly preserved his challenge to the discretionary aspects of his sentence by raising it in his motion for reconsideration. (***See*** Motion to Modify and Reconsider Sentence, 4/25/12, at 2 ¶ 5). Also, his brief includes a Rule 2119(f) statement. (***See*** Appellant's Brief, at 14-15). Accordingly, we must consider whether Appellant's statement raises a substantial question. ***See Ahmad***, ***supra*** at 886-87. Appellant's Rule 2119(f) statement asserts, in its entirety:

> The trial court sentenced Appellant to serve not less than six (6) nor more than twenty-three (23) months of incarceration with a consecutive two (2) years['] probation. In imposing said sentence, the court failed to consider all relevant factors. Furthermore, the court did not adequately set forth its reasons on the record for imposing said sentence. A substantial question is raised where there is an allegation that the sentencing court did not adequately explain its reason for the sentence.

(Appellant's Brief, at 14-15 (citations omitted)). Appellant's allegation that the court failed to consider all relevant factors does not raise a substantial question. ***See Commonwealth v. Moury***, 992 A.2d 162, 175 (Pa. Super. 2010) ("That the court refused to weigh the proposed mitigating factors as

Appellant wished, absent more, does not raise a substantial question.") (citations omitted).[4]

Appellant's second ground for challenging the discretionary aspects of his sentence, that the court failed to adequately set forth its reasons for imposing Appellant's aggravated range sentence, does raise a substantial question. (***See*** Appellant's Brief, at 14); ***see also Commonwealth v. Wagner***, 702 A.2d 1084, 1086 (Pa. Super. 1996) ("[A] claim that the sentencing court did not adequately explain its reasons for sentencing outside of the sentencing guidelines does raise a substantial question which may be reviewed on appeal.") (citation omitted). However, because Appellant did not raise this issue in his Rule 1925(b) statement, it is waived and we are precluded from reviewing its merits. ***See Commonwealth v. Hill***, 16 A.3d 484, 494 (Pa. 2011) (reaffirming well-settled bright-line rule that "any issues not raised in a Rule 1925(b) statement will be deemed waived [and] the courts lack the authority to countenance deviations from the Rule's terms").[5]

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[4] In fact, the court considered the particular circumstances of Appellant's case, including the impact on the victims, Appellant's "significant drug addiction," his lack of remorse, the protection of the public and Appellant's rehabilitative needs in fashioning its sentence. (Trial Ct. Op., 8/29/12, at 10).

[5] We also note that Appellant failed to raise this issue as a ground for relief in his statement of questions involved, and does not provide any pertinent citation or argument in support of this challenge. (***See*** Appellant's Brief, at

(Footnote Continued Next Page)

In his third issue, Appellant argues that "the evidence presented at trial was insufficient to convict Appellant of theft by unlawful taking." (Appellant's Brief, at 20). This issue is waived and would lack merit.

It is well-settled that:

> when challenging the sufficiency of the evidence on appeal, the Appellant's 1925 statement must "specify the element or elements upon which the evidence was insufficient" in order to preserve the issue for appeal. [***Commonwealth v.***] ***Williams***, 959 A.2d [1252,] 1257 [(Pa. Super. 2008)] (quoting ***Commonwealth v. Flores***, 921 A.2d 517, 522-23 (Pa. Super. 2007)). . . . Here, Appellant . . . failed to specify which elements he was challenging in his 1925 statement . . . . While the trial court did address the topic of sufficiency in its opinion, we have held that this is "of no moment to our analysis because we apply Pa.R.A.P. 1925(b) in a predictable, uniform fashion, not in a selective manner dependent on an appellee's argument or a trial court's choice to address an unpreserved claim." ***Id.*** at 1257 (quoting ***Flores*** at 522-23).

Commonwealth v. Gibbs, 981 A.2d 274, 281 (Pa. Super. 2009), *appeal denied*, 3 A.3d 670 (Pa. 2010).

In the case before us, Appellant's Rule 1925(b) statement does not identify which element or elements of theft by unlawful taking the Commonwealth allegedly failed to prove. (***See*** Statement of Matters

(Footnote Continued) ––––––––––––––––––––––

5, 18); ***see also Commonwealth v. Irby***, 700 A.2d 463, 464 (Pa. Super. 1997) ("[A]rguments which are not sufficiently developed are waived.") (citation omitted); Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the [Rule 1925(b)] Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived."); Pa.R.A.P. 2116(a) ("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby."); Pa.R.A.P. 2119(a)-(c) (mandating that argument section of brief shall contain pertinent discussion and citation of authorities).

Complained of on Appeal, 8/06/12, at 1 ¶ 1). Specifically, his statement merely claims that "[t]he verdict was not supported by sufficient evidence in that the Commonwealth failed to establish the elements of theft by unlawful taking beyond a reasonable doubt." (***Id.***). Accordingly, because he fails to identify which specific elements the Commonwealth allegedly failed to prove, Appellant's challenge to the sufficiency of the evidence is waived. ***See Gibbs***, ***supra*** at 281.

Moreover, even if Appellant had not waived his sufficiency claim, it would not merit relief. Specifically, Appellant claims that the Commonwealth failed to prove theft by unlawful taking as a felony of the third degree because it "failed to establish beyond a reasonable doubt that Appellant unlawfully took an amethyst and diamond necklace belonging to Susan Crescenzo approximately valued at $650 that caused the amount involved to exceed $2,000."[6] (Appellant's Brief, at 20-21). We disagree.

Our standard of review of a challenge to the sufficiency of the evidence is well-settled:

> [i]n 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

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[6] We note that Appellant does not challenge his conviction as it relates to the unlawful taking of Staci Crescenzo's necklace. (***See*** Appellant's Brief, at 20-22).

> 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.

Commonwealth v. Moreno, 14 A.3d 133, 136 (Pa. Super. 2011), *appeal denied*, 44 A.3d 1161 (Pa. 2012) (citations omitted).

Section 3921 of the Crimes Code provides, in pertinent part, that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa.C.S.A. § 3921(a). Further, pursuant to Section 3903(a.1), "theft constitutes a felony of the third degree if the amount involved exceeds $2,000[.]" 18 Pa.C.S.A. § 3903(a.1).

In the case *sub judice*, the evidence established that, at the time that Ms. Crescenzo noticed that her necklace was missing, Appellant had unrestricted access to the areas of her home where she kept her jewelry. (***See*** N.T., 4/19/12, at 11, 27-28). An employee of the pawn shop where Susan Crescenzo's necklace was sold identified Appellant as the individual who pawned it. (***See id.*** at 18, 42-43). Appellant also provided a copy of his photo identification at the time he sold the necklace, as part of the pawn shop's customary business practice. (***See id.*** at 42, 49-50).

Based on the foregoing, and viewing the evidence in the light most favorable to the Commonwealth, we conclude that it was sufficient to convict Appellant of theft by unlawful taking. ***See Moreno***, ***supra*** at 136. Appellant's third issue does not merit relief.

Judgment of sentence affirmed.