

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF  
: PENNSYLVANIA  
Appellee :  
: v. :  
JOHN O'NEILL, :  
Appellant : No. 2250 EDA 2011

Appeal from the Judgment of Sentence May 31, 2011,  
Court of Common Pleas, Philadelphia County,  
Criminal Division at No. CP-51-CR-0011394-2008

BEFORE: GANTMAN, DONOHUE and PLATT\*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: January 4, 2013

John O'Neill ("O'Neill") appeals from the judgment of sentence entered following his conviction of aggravated assault, 18 Pa.C.S.A. § 2702(a)(1).

For the following reasons, we affirm.

The trial court summarized the facts underlying this appeal as follows:

Sometime between approximately 10:30 p.m. on Saturday[,] March 22, 2008 and approximately 3:17 p.m. on Easter Sunday[,] March 23, 2008, the victim, Marlene Vaughn, aged [sic] sixty, suffered injuries so severe, including brain injuries, that at the time of trial, in February 2011, she was unable to dress herself, bathe herself, or live on her own. The victim had spent the day of March 22, 2008 with her cousin, Helen Fish, shopping for Easter. The victim and Ms. Fish were together a great deal during the preceding week. The victim was not under the influence of any substances during that period of time. At one point, the victim, a strong walker, had helped Ms. Fish carry bundles during a trip to a store.

\*Retired Senior Judge assigned to the Superior Court.

The victim returned home at approximately 4 p.m. on that Saturday and showed Ms. Fish a basket she had made for the grandchildren of her boyfriend, [O'Neill]. Later, from approximately 9 p.m. to 10:30 p.m., Ms. Fish and the victim talked on the phone. According to Ms. Fish, the victim sounded 'fine' during this conversation. The victim was at home, and was getting ready to go to bed. She was planning to actually go to bed at 2 a.m. since she planned to arise early on Easter Sunday. The victim mentioned to Ms. Fish that [O'Neill] was also at home.

At approximately 9:00 a.m. on Easter Sunday, Ms. Fish received a phone call from [O'Neill]. [O'Neill] told Ms. Fish that the victim was 'acting weird,' falling against the wall, bleeding, and throwing up blood. When Ms. Fish told [O'Neill] to call 911[,] [O'Neill] replied that he told the victim to go lay down. [O'Neill] said he would check on her later and take her to the hospital if she was not better.

[O'Neill] did not call 911 until 3:17 p.m. that day, and the victim would not arrive at the hospital until 3:59 p.m. When she arrived at the hospital, the victim had multiple facial fractures, her face was bruised, she had a subdural hematoma, she was accumulating blood in her brain, and her brain was swelling. Shortly after arriving at the hospital, she lost consciousness. She eventually regained consciousness, but was not able to speak and 'have full alert status.' The victim underwent surgery, which removed a portion of her skull to relieve pressure on the brain and to remove the subdural hematoma. This method of treatment was described by the Commonwealth expert, Dr. Gregory McDonald, as one of the most life-threatening surgeries.

At the time of trial, in February 2011, nearly three years after the assault, the victim was still unable to live on her own. While the victim was

unable to feed herself, she was not able to dress, bathe or toilet herself without assistance. The victim was suffering from a seizure disorder with required medication. At the time of trial, she was still suffering from a broken arm and a fractured hip, which required surgery. The victim was trying to return to a normal routine ... .

[O'Neill] tried to convince those he came in contact with that the victim's injuries were accidental. [O'Neill] reported to EMTs that the victim had fallen out of bed twice during the night. [O'Neill] told Ms. Fish that he was unaware how [the victim] was injured but conjectured that the victim may have fallen out of bed or could have fallen in the bathroom. The swelling from the injuries indicated to Dr. McDonald that the injury had occurred sometime within the last day or so. ... .

Trial Court Opinion, 12/19/11, at 2-4 (footnotes and citations to notes of testimony omitted).

Following a bench trial, O'Neill was convicted of aggravated assault and sentenced to ten to 20 years of incarceration. O'Neill filed a post-sentence motion, which the trial court denied. This appeal followed. O'Neill presents the following eleven issues for our review:

- I. Did the Honorable Ramy I. Djerassi err in granting in part the Commonwealth's [m]otion to omit [sic] other crimes evidence?
- II. Did the [t]rial [c]ourt err in allowing evidence to be admitted at trial which was precluded by the Honorable Ramy I. Djerassi, the [m]otions [c]ourt [j]udge?
- III. Was trial counsel ineffective in failing to object to the admission of evidence

which was ordered to be precluded by the Honorable Ramy I. Djerassi, failing to object to improper hearsay statements at trial and at the prior [b]ad [a]cts hearing and ineffectively representing [O'Neill] at trial?

- IV. Did the Commonwealth commit prosecutorial misconduct by introducing evidence which was ordered precluded by the Honorable Ramy I. Djerassi?
- V. Did the [t]rial [c]ourt err in failing to have a forthwith competency exam of the complaining witness in this matter?
- VI. Did the [t]rial [c]ourt err in not granting [O'Neill's] right to compulsory process of [s]ubpoenaed witnesses, who were subpoenaed by [O'Neill], but failed to appear at trial?
- VII. Did the [m]otions [c]ourt err in denying [O'Neill's] [m]otion to [q]uash, as the evidence presented by the Commonwealth at [O'Neill's] preliminary hearing[] failed to make out a prima facie case?
- VIII. Did the [t]rial [c]ourt err in failing to allow [O'Neill] to remain on bail pending appeal due to severe medical conditions and several meritorious issues on appeal?
- IX. Was the verdict against the weight of [the] evidence?
- X. Was the evidence insufficient to support the guilty verdict?
- XI. Did the [t]rial [c]ourt err in denying [O'Neill's] post-sentence motion?

Appellant's Brief at 4-5.

O'Neill's first issue challenges the trial court's ruling on the Commonwealth's motion *in limine*. "A motion in limine is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered. As a result, our consideration of the trial court's order is governed by an abuse of discretion standard." ***Commonwealth v. Valle-Velez***, 995 A.2d 1264, 1267 (Pa. Super. 2010), *appeal denied*, 608 Pa. 666, 13 A.3d 478 (2010).

The Commonwealth's motion *in limine* sought the admission of O'Neill's prior bad acts pursuant to Pa.R.E. 404(b). The evidence the Commonwealth sought to have admitted involved four incidents in which the victim sought medical treatment for injuries. The incidents occurred on December 9, 2000, April 16, 2001, July 8, 2001, and March 30, 2007. In the first three incidents, the victim told the persons rendering medical care that her injuries were caused by her long-term boyfriend, whom the Commonwealth intended to establish was O'Neill.<sup>1</sup> In the fourth incident,

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<sup>1</sup> On December 9, 2000, the police responded three times to the victim's residence (which she shared with O'Neill) for domestic violence calls, culminating in the victim's transport to the emergency room for a fractured wrist. At the hospital, the victim told the nurses that she had been beaten by her boyfriend of ten years. On April 16, 2001, the victim again appeared at the emergency room, this time seeking care for injuries to her right ankle, leg and arm. She reported that she had been thrown down the stairs by her boyfriend. On July 8, 2001, the victim was treated for bruises and abrasions

which occurred on March 30, 2007, the victim did not implicate her boyfriend as the source of her injuries, but rather stated that her injuries were caused when she slipped and fell while performing housework. Commonwealth's Motion *in Limine*, 3/11/09, at 2-3. Following argument before the Honorable Ramy I. Djerassi,<sup>2</sup> the Commonwealth's motion was granted in part. Judge Djerassi ruled that the Commonwealth could admit the evidence of the first three incidents "assuming evidence of the term 'boyfriend' to [sic] Defendant O'Neill is established." Trial Court Opinion, 8/24/10, at 1. The lower court further ruled that evidence of the March 30, 2007 incident could not be admitted because "its relevance to alleged physical abuse by [O'Neill] is not shown." *Id.* at 2.

The relevant rule provides as follows:

**Other crimes, wrongs, or acts.**

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

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on both arms. She stated that her boyfriend had hit her on both arms and thrown a chair at her. Commonwealth's Motion *in Limine*, 3/11/09, at 2-3.

<sup>2</sup> While Judge Djerassi presided over the pre-trial motions, this case was tried before the Honorable Denis P. Cohen.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Pa.R.E. 404(b).

O'Neill now argues that evidence of the first three incidents was not properly admissible pursuant to Pa.R.E. 404(b) because the lapse in time between the prior incidents and the incident at issue "was too long of [a] period for such allegations to be admitted at trial." Appellant's Brief at 12. We do not agree.

In *Commonwealth v. Drumheller*, 570 Pa. 117, 808 A.2d 893 (2002), the Pennsylvania Supreme Court held explicitly that there is no "express limitation that only evidence of acts occurring within a certain period of time prior to the charged offense are admissible" pursuant to Pa.R.E. 404(b). *Id.* at 137, 808 A.2d at 905. In *Drumheller*, the Commonwealth sought to admit evidence of four protection from abuse petitions the victim filed against Drumheller over three years leading up to the victim's death. After first acknowledging that evidence of prior acts of abuse against a victim are admissible to establish an accused's intent, motive, malice and ill-will pursuant to Pa.R.E. 404(b)(2), the Supreme Court

reaffirmed the principle that “our courts will allow evidence of prior bad acts where the distinct ... bad act was part of a chain or sequence of events which formed the history of the case and was part of its natural development.” *Id.* at 137, 808 at 905 (citation omitted). It then ruled that evidence of Drumheller’s prior bad acts as documented in all four of the PFA petitions was properly admissible as it “shows the chain or sequence of events that formed the history of the case, is part of the natural development of the case, and demonstrates Drumheller's motive, malice, intent, and ill-will toward [his victim].” *Id.* In reaching this decision, the Supreme Court noted that the remoteness of the prior acts is a matter that affects the weight ascribed to the evidence, and not its admissibility. *Id.*

Thus, there is no *per se* rule as to how long ago an act must have occurred before it may not be admitted as evidence of prior bad acts pursuant to Pa.R.E. 404(b); rather, the trial court must perform the same balancing between the probative nature of proposed evidence and the possible resulting prejudice that it is required to perform for the admission of any relevant evidence. *Id.* In the present case, despite the seven-year time lapse, the trial court found that the probative value of this evidence outweighed the prejudicial effect because it established a history of abuse by O'Neill (*i.e.*, his intent) over the course of their 18 year relationship. Trial Court Opinion, 2/16/12, at 6-7. This is a proper basis for the admission of

this evidence, and O'Neill has not provided us with any argument to the contrary.

Moreover, the trial court found that evidence of these events was highly relevant to establish absence of mistake or accident, as the Commonwealth anticipated that O'Neill would argue that the victim injured herself. It concluded that "evidence of prior abuse ... against [the victim] was necessary to prove intent and/or absence of mistake or accident." *Id.* at 7. As this is also a proper basis for the admission of this evidence, *see* Pa.R.E. 404(b)(2), we can find no error in this determination.<sup>3</sup>

Despite the trial court's ruling prohibiting the mention of the March 30, 2007 hospital visit, the Commonwealth questioned multiple witnesses about the hospital record for this visit during trial. O'Neill now argues that the Commonwealth committed prosecutorial misconduct by violating the trial court's motion *in limine* ruling in this manner. Appellant's Brief at 18.<sup>4</sup>

It is axiomatic that "[i]n order to preserve an issue for appellate review, a party must make a timely and specific objection at trial.

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<sup>3</sup> In his brief, O'Neill also argues that the admission of this evidence was improper because the medical records were inadmissible hearsay. Appellant's Brief at 12. O'Neill failed to raise this argument in a response to the Commonwealth's motion or at argument on the Commonwealth's motion. *See* N.T., 7/20/10, at 5-14. "[A] new and different theory of relief may not be successfully advanced for the first time on appeal." *Commonwealth v. Santiago*, 980 A.2d 659, 666 n.6 (Pa. Super. 2009). Therefore, we decline to address this argument.

<sup>4</sup> O'Neill addresses this violation of the motion *in limine* ruling by the Commonwealth in his second and fourth issues. We address them together.

**Commonwealth v. Schoff**, 911 A.2d 147, 158 (Pa. Super. 2006). Failure to do so results in waiver of that issue on appeal. **Id.** "The purpose of contemporaneous objection requirements respecting trial-related issues is to allow the court to take corrective measure and, thereby, to conserve limited judicial resources." **Com. v. Sanchez**, \_\_\_ Pa. \_\_\_, \_\_\_, 36 A.3d 24, 42 (2011). In this case, O'Neill failed to object to the Commonwealth's violations of the trial court's motion *in limine* ruling at any time during trial. Thus, this issue is waived for purposes of appeal.

O'Neill also argues that in the absence of his objection, the trial court erred by not *sua sponte* prohibiting the Commonwealth from referencing the victim's March 30, 2007 hospital visit at trial. Appellant's Brief at 13. However, O'Neill has provided us with no authority or argument to support this novel contention; accordingly, this claim is waived as well. **See Commonwealth v. Farmer**, 758 A.2d 173, 180-81 (Pa. Super. 2000) (holding that where an appellant fails to develop any argument, cite any authority in support of his contentions, the issue is deemed waived), Pa.R.A.P. 2119(a).

O'Neill next argues multiple instances of his trial counsel's ineffectiveness. Appellant's Brief at 13-17. O'Neill recognizes that the Pennsylvania Supreme Court has held that claims of ineffectiveness are properly raised on collateral, rather than direct, appeal; however, he believes that pursuant to **Commonwealth v. Celestin**, 825 A.2d 670 (Pa.

Super. 2003), his claims may be heard on direct appeal because he raised them in a post-sentence motion. O'Neill is mistaken. This Court "cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an express, knowing and voluntary waiver of PCRA review." ***Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011) (en banc). Here, there was no hearing on O'Neill's post-sentence motion and there is nothing of record to suggest that there was an express, voluntary waiver of O'Neill's PCRA rights; thus, we cannot address these claims on direct appeal. O'Neill's ineffectiveness claims must wait for collateral review.

Fifth, O'Neill argues that the trial court erred in failing to order a competency examination of the victim. O'Neill contends that the victim would have testified "that he did not hurt her in any manner." Appellant's Brief at 18. It appears from our review of the record that O'Neill never sought a competency examination of the victim. Thus, this issue is waived because O'Neill failed to raise it in the trial court. ***Commonwealth v. Rush***, 959 A.2d 945, 949 (Pa. Super. 2008); 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."). Moreover, the Commonwealth commented at trial that "[b]ased on a prior determination by a different judge" the victim was determined to be incompetent to testify at trial. N.T., 2/28/11, at 72. Notably, at this point, O'Neill did not object or otherwise indicate on the record that the Commonwealth's statement was incorrect. Accordingly, in

addition to the claim being waived, it also appears that the victim was evaluated and determined to be incompetent to testify.

Sixth, O'Neill contends that "several witnesses that were subpoenaed" failed to appear. The purported witnesses were allegedly favorable to O'Neill. Appellant's Brief at 19-20. He argues that "the subpoenaed witnesses should have been served with compulsory process and [o]rdered to appear at trial, to vindicate [O'Neill] of the crimes charged." *Id.* at 20. O'Neill appears to be arguing that the trial court should have taken steps to enforce the subpoenas issued for these witnesses. Our review of the record reveals that O'Neill never made such a request of the trial court. We cannot review the trial court's alleged failure to act when O'Neill never made such a request of the trial court. Again, claims not raised in the trial court may not be raised for the first time on appeal. *Rush*, 959 A.2d at 949; Pa.R.A.P. 302(a). Thus, this claim, too, is waived.

In his seventh issue on appeal, O'Neill argues that the trial court erred by not granting at the preliminary hearing his motion to quash the bills of information. He contends that the Commonwealth "failed to make out a *prima facie* case" against him at the preliminary hearing, and so this motion should have been granted. Appellant's Brief at 20-21. As the trial court points out in its opinion, however, an adjudication of guilt on a charge renders moot any allegation that Commonwealth failed to establish a *prima facie* case for that charge at the preliminary hearing. *Commonwealth v.*

*Lee*, 541 Pa. 260, 270, 662 A.2d 645, 650 (1995). Therefore, there is no merit to this claim.

In his eighth allegation of error, O'Neill claims that the trial court erred in denying his motion for release on bail pending the outcome of this appeal. Appellant's Brief at 21. Addressing this claim in its opinion, the trial court states that although O'Neill filed a motion seeking release on bail pending his sentencing, O'Neill "never presented [the trial court] with a post-sentence bail motion, and thus ... the issue is waived." Trial Court Opinion, 12/19/11, at 19. We agree. The record does not contain any request, written or oral, for bail pending the resolution of O'Neill's appeal. As O'Neill never raised this issue before the trial court, it is waived. *Rush*, 959 A.2d at 949.

In his ninth issue, O'Neill argues that his conviction is contrary to the weight of the evidence. This Court cannot entertain, in the first instance, a claim that the verdict is against the weight of the evidence. *Commonwealth v. Holley*, 945 A.2d 241, 245-46 (Pa. Super. 2008). Such a claim must be raised before the trial court in a motion for a new trial prior to sentencing or in a post-sentence motion. Pa.R.Crim.P. 607(A). O'Neill did not file a motion for a new trial prior to sentencing, and although he did file a post-sentence motion, he did not include a challenge to the weight of the evidence therein. Accordingly, this issue is waived.

O'Neill also challenges the sufficiency of the evidence supporting his conviction of aggravated assault. Aggravated assault, for purposes of

O'Neill's conviction, is defined as follows: "A person is guilty of aggravated assault if he: (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life[.]" 18 Pa.C.S.A. § 2702(a)(1).

In order to preserve a challenge to the sufficiency of the evidence, an appellant must specify the element or elements for which the evidence was insufficient in his/her Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The failure to do so results in waiver of the issue. *Commonwealth v. Williams*, 959 A.2d 1252, 1257-58. In his Rule 1925(b) statement, O'Neill states only, "[t]he evidence was insufficient to support the guilty verdict." Statement of Matters Complained of on Appeal, 10/6/11, at 2. Thus, the issue is waived.

In his final issue, O'Neill asks whether the trial court erred in denying his post-sentence motion. In support of this issue, O'Neill presents only the following two-sentence statement: "[O'Neill's] new post verdict counsel filed a concise [p]ost [t]rial [m]otion raising the issue of ineffective assistance of trial counsel. [O'Neill] respectfully requests this Honorable Court to consider [i]ssue three (III) above in it's [sic] entirety in considering this issue on appeal." Appellant's Brief at 27. This final issue seems to be no more than a plea that we review his third issue presented on appeal, which raised

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claims of ineffectiveness of counsel. As we discussed above, O'Neill must wait to raise such claims on collateral appeal.

Judgment of sentence affirmed.