NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ASHTON BUNTING Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2515 EDA 2011

Appeal from the Judgment of Sentence August 31, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0008055-2010

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY LAZARUS, J. Filed: January 4, 2013

Ashton Bunting appeals from the judgment of sentence imposed by the Court of Common Pleas of Philadelphia County following his conviction for attempted sexual assault,[1] simple assault,[2] and indecent exposure (M-1).[3] We affirm.

The trial court summarized the facts of this case as follows:

> On June 2, 2010, Vernell McMichael was inside her godmother's home . . . in the City of Philadelphia. McMichael lived in that home with her son, her godmother, a third roommate named Delores Goldwire, who had moved in a few months earlier, and Goldwire's two children. Goldwire had a child with Bunting and therefore, he was at the house nearly every day and shared the

---

[1] 18 Pa.C.S. § 3124.1.

[2] 18 Pa.C.S. § 2701(A)(1).

[3] 18 Pa.C.S. § 3127.

> common spaces of the home. From the first day that McMichael met Bunting, the two would "smoke" together.
>
> On the day of the encounter at issue for trial, McMichael, Goldwire, and Bunting went out to the back patio where they hung out and "smoked." A couple of hours later, the three returned inside the house. McMichael went to her room and Goldwire went to the bathroom. Bunting soon entered McMichael's room completely nude and made comments indicating he wanted to have a sexual encounter with her and Goldwire. Goldwire and McMichael may or may not have agreed to the encounter while on the patio; however, when confronted with the reality of Bunting's nudeness and his odd behavior, Goldwire and McMichael did not agree to have sex with Bunting and he became angry. He continued to lie on McMichael's bed and would not leave, although he did not touch or overpower McMichael and did not engage in any actions that could be considered "forcible compulsion" or threat of forcible compulsion, be it physical, intellectual, moral, emotional or psychological force. However, his words and rather incoherent demeanor made McMichael reasonably feel as though he planned to have sex with her and/or Goldwire without either of their consent. Nonetheless, McMichael was easily able to leave the room after which Bunting, Goldwire, and McMichael 'tussled." From the testimony, it was unclear where the tussle occurred, but the tussle was separate and apart from the attempted sexual assault and thus, was not forcible compulsion or a threat of forcible compulsion because it was not in furtherance of the attempted ménage à trois.

Trial Court Opinion, 1/31/12, at 2-3.

Evidence adduced at trial established that Goldwire's two daughters, ages three and nine, were present in the apartment. After escaping from Bunting and calling 9-1-1, McMichael asked a neighbor to remove the children from the apartment.

On June 27, 2011, following a non-jury trial, the court convicted Bunting of the above-referenced offenses. At the conclusion of a hearing on

August 31, 2011, the court sentenced him to three to eight years' incarceration plus two years' probation for attempted sexual assault and three years' probation for indecent exposure, to run consecutive to his incarceration and concurrent to the other probationary tail. He received no further penalty on the simple assault conviction.

Bunting filed a timely notice of appeal, and the trial court directed him to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Bunting filed his Rule 1925(b) statement on December 27, 2011, and the trial court filed its Rule 1925(a) opinion on January 31, 2012.

On appeal, Bunting raises the following issues for our review:

> 1. Was not the evidence insufficient to find [Bunting] guilty of indecent exposure in that the evidence did not indicate that [he] exposed himself in public or that [he] exposed himself in the presence of persons where such conduct was likely to offend, affront or alarm?
>
> 2. Did not the lower court err in sentencing [Bunting] for the offense of false imprisonment in that the court found [him] not guilty of that offense?

Brief of Appellant, at 3.

With respect to Bunting's first issue, we apply the following standard of review to challenges to the sufficiency of the evidence:

> Whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all elements of the offense beyond a reasonable doubt. We may not weigh the evidence or substitute our judgment for that of the factfinder. Additionally, the evidence at trial need not preclude every possibility of innocence, and the factfinder is free to resolve any doubts regarding a defendant's guilt unless the evidence is so weak and inconclusive that as a matter of law no

> facts supporting a finding of guilty may be drawn. The factfinder, when evaluating the credibility and weight of the evidence, is free to believe all, part, or none of the evidence.

Commonwealth v. Faulk, 928 A.2d 1061, 1069 (Pa. Super. 2007).

Bunting was found guilty of indecent exposure, which is defined as follows:

> **§ 3127. Indecent exposure**
>
> **(a) Offense defined.** – A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know this conduct is likely to offend, affront or alarm.
>
> **(b) Grading.** – If the person knows or should have known that any of the persons present are less than 16 years of age, indecent exposure under subsection (a) is a misdemeanor of the first degree. Otherwise, indecent exposure under subsection (a) is a misdemeanor of the second degree.

18 Pa.C.S. § 3127.

The evidence presented at trial indicated that Bunting walked naked into McMichael's bedroom from another part of the apartment. He then chased her into the hallway (a common area), where a scuffle ensued. Bunting remained naked in the apartment until the police arrived.

The trial court recognized that Bunting did not expose himself in public. However, it noted that "young children . . . were present in the home and that Bunting should have known that they were home and that his conduct was likely to affront or alarm them." Trial Court Opinion, 1/31/12, at 6. Bunting argues that the Commonwealth did not establish that the children actually saw his genitals, and therefore the exposure did not occur

under circumstances in which he knew his conduct was likely to cause affront or alarm. Brief of Appellant, at 9. This argument is contrary to our case law.

In ***Commonwealth v. Tiffany***, 926 A.2d 503 (Pa. Super. 2007), the defendant challenged the sufficiency of the evidence supporting his conviction for indecent exposure when he was found swimming naked in a quarry with three teenage boys. He argued that the Commonwealth was required to prove that "affront or alarm" was actually caused. This Court rejected this argument, relying on ***Commonwealth v. King***, 434 A.2d 1294 (Pa. Super. 1981), in which an appellant charged with indecent exposure unsuccessfully asserted that the victim's failure to testify that she was actually affronted or alarmed was fatal to the Commonwealth's case. "For purposes of Section 3127, it is sufficient to show that Appellant knew or should have known that his conduct is likely to cause affront or alarm." ***Tiffany***, 926 A.2d at 511. Accordingly, there was sufficient evidence to support Bunting's conviction for indecent exposure.

With respect to the second issue, it is clear from the June 27, 2011 trial transcript that the court found Bunting not guilty of false imprisonment. N.T. Trial, 6/17/12, at 12. Nevertheless, due to a clerical error, he was sentenced to "no further penalty" on the false imprisonment charge. Once the trial court was advised of the clerical error in Bunting's Rule 1925(b) statement, it corrected the error. Accordingly, no further remedy is required.

Judgment of sentence affirmed.