NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ROBERT JAMES STEVENS, Appellant	:	No. 3077 EDA 2011

Appeal from the Judgment of Sentence June 27, 2011
In the Court of Common Pleas of Monroe County
Criminal Division No(s).: CP-45-CR-0000245-2010
CP-45-CR-0000246-2010

BEFORE: PANELLA, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: March 7, 2013

Appellant, Robert James Stevens, appeals from the judgment of sentence[1] to serve a total of forty-six years' to ninety-two years' imprisonment imposed after a jury found him guilty of crimes including recklessly endangering another person, robbery, kidnapping, and two counts of rape.[2] We affirm.

By way of background to this appeal, Appellant and Complainant were involved in a domestic relationship. In the early morning hours of

* Former Justice specially assigned to the Superior Court.

[1] We have amended the caption to reflect that this appeal arises from the amended sentencing order of June 27, 2011.

[2] 18 Pa.C.S. §§ 2705, 3701(a)(1)(i), 2901(a)(3), 3121(a)(1), 3121(a)(3).

September 10, 2009, Complainant was at her home with her friend. Appellant arrived and became angry. Complainant told him that she was going to drive her friend home. As Complainant was driving her friend home, Appellant began following them in his own vehicle. Appellant used his vehicle to strike Complainant's vehicle and eventually forced her vehicle off the roadway.[3] Based on this incident, the Commonwealth charged Appellant with two counts of recklessly endangering another person and criminal mischief in case number CP-45-CR-0000245-2010. Appellant was taken into custody in that case on January 10, 2010.

Although Appellant was the subject of a temporary protection from abuse order restricting his contact with Complainant, he called her from jail and told her to post his bail. Complainant refused. Appellant, however, managed to arrange his bail through a third party based on promises that he would repay the cost of his bail and post bail for a fellow inmate. Appellant was released from jail on January 14, 2010, on the condition that he have no contact with Complainant, but he went directly to Complainant's house.

According to the Commonwealth, Appellant entered Complainant's home and began punching her in the face and head. He emptied Complainant's purse on the floor, took $400 in cash, and forced her to write a personal check for $2,000. He then bound her with duct tape and went

[3] Appellant suggested that he attempted to stop Complainant from driving because she was under the influence of drugs or alcohol and incapable of operating a motor vehicle safely.

outside to deliver the cash and check to the individuals who had posted his bail. He returned to the home and continued to strike Complainant until she lost consciousness. Complainant stated that when she momentarily regained consciousness, she was on the floor of her living room and Appellant was having sexual intercourse with her.

Appellant then took Complainant to her father's truck, which she had been using after the September 10, 2009 incident, and placed her in the front passenger seat. Appellant drove the truck, but went off the roadway, struck a tree, and then careened into a mailbox of a residence. The owner of the residence came out to investigate the accident. Appellant approached him, told him that his dog was injured, and asked him for a ride. He dropped Appellant off at a nearby home and drove back to his own home.

Upon further investigation around his mailbox, the owner of the residence saw Complainant in the front passenger seat of her father's truck with her head leaning against the passenger side window. There was blood on the window and around her head. He went inside his home to have his wife call 911. By the time, he was ready to go back outside, Appellant had borrowed a second vehicle, picked up Complainant, and driven away from the scene of the accident.

Appellant rented a motel room, and on the morning of January 15, 2010, drove Complainant to the home of their mutual friends. Complainant went inside the residence, but was so bruised that their friends did not

immediately recognize her. Appellant told them that she had been injured in a car accident. Complainant told one of the friends that Appellant had caused her injuries. The friend drove Complainant to a Pennsylvania State Police barracks where she gave a statement implicating Appellant.

Meanwhile, the other friend arranged for Appellant to go to a cabin, but called the State Police when Appellant left his residence. The State Police ultimately stopped and captured Appellant as he was driving on State Route 33. When searching Complainant's home, investigators discovered ropes tied to the bedposts of Complainant's bed. Complainant stated those ropes were not on the bed prior to the assault and suggested Appellant may have had intercourse with her on the bed.

Appellant, after waiving his ***Miranda***[4] rights, admitted that he had gone to Complainant's home after being released on bail. Appellant also stated that they had consensual sexual intercourse three times, that Complainant had been driving her father's truck at the time of the accident, and that she sustained her injuries in that accident.

The Commonwealth charged Appellant with aggravated assault, kidnapping, robbery, unauthorized use of a motor vehicle, simple assault, rape (forcible compulsion), rape (unconscious victim), terroristic threats, burglary, criminal trespass, sexual assault, and unlawful restraint in case number CP-45-CR-0000246-2010. Appellant, while in custody, continued to

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

correspond with Complainant, and, in one instance, wrote "that pussy is mine so a long time ago you said . . . just take it right[.] You can't rap [sic] something that is mine[.]" Commonwealth's Exhibit F-3.

Appellant proceeded to a consolidated jury trial on the charges listed in CP-45-CR-0000245-2010 and CP-45-CR-0000246-2010. The jury found Appellant guilty of all charges on November 2, 2010. The trial court, on June 15, 2011, sentenced Appellant to a total of forty-seven to ninety-two years' imprisonment. On June 27, 2011, the trial court amended the sentencing order to an aggregate term of imprisonment of forty-six to ninety-two years' imprisonment. Appellant filed post-trial motions, which the trial court denied. This timely appeal followed.[5]

Appellant presents the following questions for our review:

> Did the Court err when it permitted Trooper Thomas Slavin to testify regarding blood spatter patterns when a report was never provided to defense regarding what his expert testimony would be and in fact, defense counsel was never informed that the Commonwealth would be calling him as an expert on blood splatter patterns?
>
> Did the Court violate [Appellant's] Sixth Amendment right to present a defense when it refused to permit counsel to question the victim regarding any history of consensual bondage with the defendant during the course of their relationship when the Commonwealth alleged that [Appellant] held [Complainant] against her will and the [Complainant] testified that Mr. Stevens bound her with duct tape?

[5] Appellant timely complied with the order requiring him to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

Appellant's Brief at 8.

Appellant first argues that the trial court erred in overruling his objection to expert testimony from Trooper Thomas Slavin. Specifically, Appellant asserts that the Commonwealth violated Pa.R.Crim.P. 573 by failing to provide notice that Trooper Slavin would testify as an expert in blood spatter and by failing to provide a report containing Trooper Slavin's expert opinions. Appellant further contends that he was entitled to the preclusion of Trooper Slavin's testimony that blood spatter evidence from Complainant's father's truck was inconsistent with injuries suffered in a motor vehicle accident. We find Appellant is not entitled to relief.

"Decisions involving discovery in criminal cases lie within the discretion of the trial court. The court's ruling will not be reversed absent abuse of that discretion." ***Commonwealth v. Smith***, 955 A.2d 391, 394 (Pa. Super. 2008) (citations omitted) (*en banc*). An abuse of discretion will not be found "unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." ***Commonwealth v. Fleming***, 794 A.2d 385, 387 (Pa. Super. 2002) (citation and internal quotation marks omitted).

Pa.R.Crim.P 573 governs the production and disclosure of expert report. Subsection (B)(1)(e) of the Rule states:

> *Mandatory*. In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney

> all of the following requested items or information, provided they are material to the instant case . . .
>
> > (e) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth[.]

Pa.R.Crim.P. 573(B)(1)(e).

Subsection (B)(2)(b) of the Rule further provides:

> *Discretionary With the Court*.
>
> * * *
>
> > (b) If an expert whom the attorney for the Commonwealth intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare, and that the attorney for the Commonwealth disclose, a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

Pa.R.Crim.P. 573(B)(2)(b).

Appellant's challenge arises out of the following exchange regarding Trooper Slavin's analysis of Complainant's father's truck:

> [Commonwealth:] And then from there Trooper, again, I guess moving along the passenger side, do you make any notations or observe anything on the area right above the seatbelt, right above that area?
>
> [Trooper Slavin:] This is the area above the B post, which is separating the back compartment and the passenger side door, and up top here you see again another transfer [blood stain]. Again, interesting, is this transfer actually produced a spatter, which again, means that an object with blood had struck this area, causing a spatter which

flowed away towards the windshield, which once, what we call it is directionality, which is the traveling of blood until it hits an object and then that will tell you the direction it was flowing, **which interestingly with this picture, is it's not consistent with the motor vehicle accident**.

[Commonwealth:] And then also, going further down the B post, and again, the B post, what is that in a car? What typically is that?

[Trooper Slavin:] That's the area right behind the passenger side door, where your seatbelt mechanism is.

[Commonwealth:] Then what's that a photograph of?

[Trooper Slavin:] Again, this is the B post, the seatbelt, and a large area of transfer stains, now we're back to the transfer stain where it's just a swipe, an object has either come to rest against it, no real striking motion.

[Appellant's Counsel:] Can we approach for a moment.

(The following sidebar discussion was held)

[Appellant's Counsel:] Technically, he's never really been certified as an expert. I don't have an issue necessarily stipulating to his being an expert, testifying with respect to —

* * *

My only issue is that I have no report. I've never been given a report. I didn't know he was going to testify as an expert.

* * *

[Commonwealth:] [Trooper Slavin] processed the scene along with Trooper Skotleski, they're both trained in processing the scene. Trooper Skotleski did a report and it does mention that Trooper Slavin also was there talking to them. I sent [Appellant's Counsel], once I talked to Trooper Slavin myself, I sent her an additional letter indicating that I was going to have him testify, as opposed

> to Skotleski, and that he was going to testify as to the crime scene processing, blood spatter, which is what this is, and also some of the evidence collection. . . .
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> * * *
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> The Court: [to Appellant's Counsel] You're not implying that you didn't receive that?
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> * * *
>
> You received that letter?
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> [Appellant's Counsel:] I believe so, yes, yeah.

N.T., 10/27/10, at 203–05 (emphasis added).

The trial court called a recess, after which Appellant's counsel renewed her objection based upon an alleged discovery violation.

> [Appellant's Counsel:] Blood spatter, my problem is that I never received a report, specifically as to blood transfer, blood spatter, I don't have anything like that.
>
> [Commonwealth:] He didn't do an actual report, but once I talked to him **I did send a letter to you, indicating that I was going to call [Trooper Slavin], that he's referenced in Skotleski's report, and he's going to testify about evidence collection, I said he was going to testify about blood spatter** —
>
> [Appellant's Counsel:] Um-hmm.
>
> * * *
>
> The Court: Was [Appellant's Counsel] given a copy of Trooper Skotleski's report?
>
> [Appellant's Counsel:] **I have his report, yes**.

Id. at 207–08 (emphasis added). Thereafter, the trial court overruled Appellant's objection.

Thus, Appellant's assertions that he was unaware that the Commonwealth would seek to elicit expert blood spatter opinions from Trooper Slavin are not supported by the record. Counsel for Appellant conceded that she had notice that Trooper Slavin would testify in lieu of Trooper Skotleski and that the Commonwealth would seek to introduce blood spatter evidence. The record further belies Appellant's contentions that the Commonwealth violated the mandatory discovery provisions of Pa.R.Crim.P. 573(B)(1)(e), because the Commonwealth provided him with the only relevant report that existed and was in its possession, specifically, Trooper Skotleski's report. ***See Commonwealth v. Blasioli***, 685 A.2d 151, 160 (Pa. Super. 1996) (noting that report that never existed could not have been within possession or control of Commonwealth). Lastly, the sole basis for the preparation of an additional expert report by Trooper Slavin required the filing of a motion under Pa.R.Crim.P. 573(B)(2)(b) and an order by the trial court granting discretionary discovery. Therefore, we find no error or abuse of discretion in the decision of the trial court to overrule Appellant's objection based on an alleged discovery violation.

Appellant next argues that the trial court erred in precluding his cross-examination of Complainant about her past sexual conduct, in particular, that Complainant consented to sexual bondage on prior occasions. Appellant claims that this evidence was necessary to exculpate himself of the charges of rape. No appellate relief is due.

When reviewing a claim that the trial court erred in denying a proffer of the past sexual conduct of a sexual assault complainant, we are mindful of the following principles:

> A trial court's ruling on the admissibility of evidence of the sexual history of a sexual abuse complainant will be reversed only where there has been a clear abuse of discretion. . . .
>
> . . . [T]he Pennsylvania Rape Shield Statute . . . provides:
>
> **§ 3104. Evidence of victim's sexual conduct**
>
> **(a) General rule.—**Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.
>
> **(b) Evidentiary proceedings.**—A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).
>
> The purpose of the Rape Shield Law is to prevent a trial from shifting its focus from the culpability of the accused toward the virtue and chastity of the victim. The Rape Shield Law is intended to exclude irrelevant and abusive inquiries regarding prior sexual conduct of sexual assault complainants.

Commonwealth v. Burns, 988 A.2d 684, 689 (Pa. Super. 2009) (*en banc*) (citations and footnote omitted).

At trial, Appellant attempted to cross-examine Complainant on whether he had previously bound her with her consent. ***See*** N.T., 10/26/10, at 113. The Commonwealth objected on relevance. ***Id.*** At a sidebar conference, Appellant's counsel offered that the question was relevant in order to rebut the Commonwealth's allegations that Appellant had "tied her up and bound her and then raped her." ***Id.*** at 114. The trial court ruled that the proffer was not relevant because there was no testimony that Appellant had used ropes to bind Complainant in the incident at issue. ***Id.***

Following our review, we do not agree that Appellant's proffer was inadmissible in light of the Commonwealth's objection to relevance. ***See*** Pa.R.E. 402. Complainant did refer to a possible sexual assault that occurred in the bedroom ***after*** the sexual assault that occurred in the living room. ***See*** N.T., 10/26/10, at 127 (Complainant reciting her statement to State Police that "[she] believe[d] [she] was also raped while unconscious in the bedroom too," and that "she believe[d] this because I was questioned about rope on the bed and it wasn't there before"). Moreover, the Commonwealth focused the attention of the jury on the presence of rope in the bedroom during closing argument as evidence of rape. ***See*** N.T., 11/2/10, at 17–18. Therefore, the specific ruling that the evidence was

inadmissible in light of the Commonwealth's general objection to "relevance" was not proper.[6]

However, as the trial court noted in its Pa.R.A.P. 1925(a) opinion, Appellant's proffer of past consensual bondage is governed by the Rape Shield Law, which requires, *inter alia*, the filing of a written motion in support of the admission of evidence of past sexual conduct. ***See*** 18 Pa.C.S. § 3104(b); ***Burns***, 988 A.2d at 690–691. The failure to make a written motion, in turn, is fatal to a claim of trial court error in the preclusion of such evidence. ***See Commonwealth v. Beltz***, 829 A.2d 680, 684 (Pa. Super. 2003).

Here, Appellant did not file a written motion seeking the admission of the evidence of Complainant's past sexual conduct. Therefore, the present claim must be deemed waived. ***See id.***[7]

Judgment of sentence affirmed.

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[6] Moreover, the trial court's suggestion that there was a single act of rape that did not involve bindings is inconsistent with its subsequent imposition of consecutive sentences based on two subsections of the rape statute, specifically, 18 Pa.C.S. § 3121(a)(1) (rape by forcible compulsion) and 18 Pa.C.S. § 3121(a)(3) (rape of unconscious victim). ***See generally Commonwealth v. Provenzano***, 50 A.3d 148, 157 (Pa. Super. 2012) (trial court improperly imposed separate sentences for one instance of conduct that coincidentally violated two separate subsections of same statute).

[7] In any event, it strains reason to believe that Appellant's proffer of prior instances of consensual sexual bondage was probative on the question of consent in light of the trial evidence that Appellant beat Complainant into a state of unconsciousness and then raped her.