NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DONZIE DEVERO, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 407 EDA 2010

Appeal from the Judgment of Sentence Entered January 15, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s):
CP-51-CR-0002797-2007
CP-51-CR-0008808-2008
CP-51-CR-0008810-2008
CP-51-CR-0008813-2008
MC-51-CR-1316665-2006

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY BENDER, J.: Filed: February 15, 2013

Appellant, Donzie Devero, appeals *pro se* from the judgment of sentence of 15 to 30 years' imprisonment, imposed after he was convicted of burglary in four separate cases. For the following reasons, we reverse in part and affirm in part.

Before setting forth the factual basis of Appellant's convictions, we note that Appellant's four cases were disposed of in two separate trials conducted in September and November of 2009. During these trials,

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* Retired Senior Judge assigned to the Superior Court.

Appellant represented himself with court approval and the assistance of a court-appointed public defender. ***See*** Trial Court Opinion, 3/13/12, at 1.

At Appellant's first trial commencing on September 1, 2009, the jury convicted him of burglarizing Alicia Carranco's home on North 3rd Street in Philadelphia. Appellant's second trial began on November 17, 2009, and at the close thereof, the jury found him guilty of committing burglaries at three different residences in Philadelphia.[1] On January 15, 2010, Appellant was sentenced in all four cases to an aggregate term of 15 to 30 years' imprisonment. He filed a timely *pro se* notice of appeal and, after conducting a hearing in accordance with ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998), the trial court granted him permission to proceed *pro se* herein. He raises the following four issues for our review:

> 1. Whether the evidence was sufficient to convict Appellant of burglary and attempted burglary?
> 2. Whether the evidence was sufficient to establish intent to commit burglary, attempted burglary, or any crime related to unlawfully possessing or taking another's property?
> 3. Whether the prosecution erred by presenting, and not correcting, an eyewitness who knowingly committed perjury at Appellants [*sic*] trial to secure this conviction?
> 4. Whether the trial [c]ourt erred in denying an extraordinary motion in which Appellant was seeking relief for his speedy trial rights being violated?

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[1] The jury acquitted Appellant of the burglary of a fourth home on East Comly Street in Philadelphia.

Appellant's Brief at 4.

In his first two issues, Appellant challenges the sufficiency of the Commonwealth's evidence to sustain his convictions. To begin, we note our standard of review:

> In reviewing a sufficiency of the evidence claim, 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 elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. ***Commonwealth v. Hartzell***, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno, supra*** at 136.

Commonwealth v. Koch, 39 A.3d 996, 1001 (Pa. Super. 2011).

In each of his four cases, Appellant was convicted of burglary.[2] A person commits the offense of burglary if they enter a building or occupied structure with the intent to commit a crime therein. 18 Pa.C.S. § 3502(a). Essentially, Appellant alleges that the Commonwealth's evidence failed to demonstrate that he entered any of the burglarized homes, or that he did so with the intent to commit crimes therein.

Appellant first challenges his conviction of burglarizing Ms. Carranco's home on North 3rd Street. He argues that the evidence was insufficient

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[2] While Appellant presents arguments regarding purported convictions of attempted burglary and theft by unlawful taking, he was not convicted of those offenses. Thus, we will disregard such assertions.

because Ms. Carranco, who was home at the time of the burglary, did not actually see Appellant enter her residence. Appellant claims that instead, Ms. Carranco's testimony only established that a door to her residence was touched.

Appellant's sufficiency challenge is meritless. Ms. Carranco testified that on the morning of December 21, 2006, she was asleep in her home on North 3rd Street in Philadelphia when she heard "very hard knocks" on her front door. N.T. Trial, 9/1/09, at 53-55. She went downstairs and "peek[ed] through the blinds" of her front windows, which were in close proximity to her front door. ***Id.*** at 55, 60. At trial, she identified Appellant as the man she saw "pounding" on her door. ***Id.*** at 60. Ms. Carranco testified that she had the opportunity to see Appellant's face, and stated that he was wearing a light blue suit and a black hat. ***Id.*** at 62-63. She stated that she observed Appellant knocking at her door for approximately one minute. ***Id.*** at 63. Ms. Carranco testified that because she did not know Appellant, she ignored his knocking and went back to bed upstairs. ***Id.*** at 62-63, 81.

After she returned to bed, Ms. Carranco "heard again a lot of pounding" and could not determine from where the noise was coming. ***Id.*** at 64. When she went downstairs to investigate, she realized that the pounding was emanating from the basement of her home. ***Id.*** at 65. Ms. Carranco then heard the sound of footsteps "[c]oming from the basement upstairs to [her] kitchen." ***Id.*** She testified that she "grabbed the phone[]

and called 911" as she ran back upstairs. ***Id.*** at 66. Ms. Carranco testified that she was on the phone with the 911 dispatcher when she looked out her bathroom window and saw Appellant "jumping the fence" in her backyard. ***Id.*** at 71. She again identified Appellant in court as the man she saw jumping over her backyard fence. ***Id.*** She also confirmed that the person jumping her fence was wearing a light blue suit and black hat. ***Id.*** at 72.

Appellant was apprehended close to Ms. Carranco's home and when police officers brought him back to her residence, Ms. Carranco identified Appellant as the person she saw knocking on her front door and jumping over the fence in her backyard. ***Id.*** at 74-76. Ms. Carranco then observed that the door leading from outside her residence into her basement "was totally broken," including the hinges and locks. ***Id.*** at 76. Ms. Carranco testified that she had never given Appellant permission to enter her home. ***Id.*** at 79.

On cross-examination, Ms. Carranco admitted that she did not actually see who broke her basement door, or at any time observe Appellant inside her home. ***Id.*** at 82. However, the testimony summarized above was sufficient to indicate that Appellant did in fact enter Ms. Carranco's residence. Ms. Carranco identified Appellant as the man she saw knocking on her front door, shortly after which she heard pounding in her basement and footsteps on her stairs. Ms. Carranco then saw Appellant fleeing the scene by jumping over the fence in her backyard. From this testimony, the jury was able to draw a reasonable inference that Appellant entered Ms.

Carranco's home and did so with the intent to commit a crime therein. Therefore, his challenge to the sufficiency of the evidence to sustain this conviction is meritless.

Appellant next attacks the sufficiency of the evidence to support his conviction of burglarizing a residence on Robbins Street in Philadelphia. Appellant claims that "[t]he only evidence linking [him] to this crime was the statement and testimony of Mrs. Eileen Kite," who was "not a reliable witness." Appellant's Brief at 11. Essentially, Appellant contends that Ms. Kite's testimony was contradictory and varied so greatly from her preliminary hearing testimony as to constitute perjury. He also reiterates his argument that the evidence did not demonstrate he entered the Robbins Street home intending to commit a crime.

Initially, Appellant's attack on Mrs. Kite's credibility constitutes a challenge to the weight of the evidence, not the sufficiency. ***Commonwealth v. Wilson***, 825 A.2d 710, 713-14 (Pa. Super. 2003) (citation omitted). Because Appellant failed to raise this claim before the trial court, it is waived. Pa.R.Crim.P. 607(a).

Nevertheless, even if this argument had been properly preserved, we see no extraordinary contradictions in Mrs. Kite's testimony that would call into question the jury's verdict of guilt. When called to the stand, Mrs. Kite stated that on May 21, 2008, she heard loud "crashing, slamming and banging" coming from her neighbor Steven Pugh's home on Robbins Street. N.T. Trial, 11/18/09, at 34-35. Believing Mr. Pugh's home was being

burglarized, she called 911. ***Id.*** at 36. While doing so, she saw Appellant, whom she identified in court, leaving Mr. Pugh's residence. ***Id.*** Mrs. Kite testified that Appellant "came out the back door" of Mr. Pugh's home, travelled "up the alley" between Mr. Pugh's home and another residence, and "approached the front" of the house. ***Id.*** at 37-38. Mrs. Kite testified that as Appellant reached the front of Mr. Pugh's house, the "storm door" of Mrs. Kite's home "blew open with the wind, hit the brick wall, and [Appellant] turned around," at which point Mrs. Kite observed Appellant's face from about 15 feet away. ***Id.*** at 38. She explained that Appellant began walking away from Mr. Pugh's home very quickly, and then started to run when he saw police officers arriving in the area. ***Id.*** at 40. The police apprehended Appellant a short distance away, and Mrs. Kite identified him as the man she had seen outside Mr. Pugh's residence. ***Id.*** at 42.

On cross-examination, Appellant confronted Mrs. Pugh with her testimony at the preliminary hearing that she did not actually see Appellant's exiting Mr. Pugh's home. ***Id.*** at 43. When asked why she had just testified that she did see Appellant come out of Mr. Pugh's house, Mrs. Kite clarified:

> [Mrs. Kite]: Basically, I was standing at the front window. I saw [Appellant] coming from in between the houses. When the storm door banged against the brick wall, [Appellant] turned around. I saw [him].

Id. at 44.

On appeal, Appellant contends that the contradiction between Mrs. Kite's preliminary hearing testimony and her statements at trial amounted to

perjury. We disagree. While initially, Mrs. Kite's trial testimony was somewhat confusing in regard to whether she *actually saw* Appellant walk out of the door to Mr. Pugh's residence, when questioned further by Appellant on cross-examination, she clearly stated that she did not witness Appellant's exiting the home. Such testimony does not amount to perjury. Moreover, the other inconsistencies in Mrs. Kite's testimony cited by Appellant are minor and did not render her statements so unreliable that the jury could not have reasonably relied on it in finding Appellant guilty. Therefore, even had Appellant preserved this argument, we would conclude it is meritless. Moreover, Mrs. Kite's testimony was sufficient to prove that Appellant entered Mr. Pugh's home, and that he did so with the intent to commit a crime therein.

Next, Appellant attacks the sufficiency of the evidence to sustain his convictions of burglary in regard to residences on Reach Street and Newtown Avenue, alleging that the only "eyewitness," Alexander Shahalij, could not identify Appellant as the perpetrator, and fingerprint evidence relied upon by the Commonwealth was inadequate to sustain his convictions.

In regard to these two burglaries, the Commonwealth presented the following evidence. Mr. Shahalij testified that he lived at 6128 Reach Street when, on March 20, 2008, he saw a "black [man], about early 40s" carrying a black and blue duffle bag and walking near his neighbor's home at 6130

Reach Street.[3] N.T. Trial, 11/18/09, at 6-7. Minutes after Mr. Shahalij saw this man, he heard "a lot of banging" inside 6130 Reach Street. N.T. Trial, 11/18/09, at 10. Mr. Shahalij testified that he went outside to his yard where he was met by a police officer. ***Id.*** at 10-11. The officer asked Mr. Shahalij to stay where he was while the officer entered the residence at 6130 through a side door that had been broken open. ***Id.*** at 11. While the perpetrator of the burglary was not inside the home when the officer entered, a blue and black duffle bag was recovered from the scene. ***Id.*** at 12. Inside the bag, police found "a glass jar with change," as well as "seven DVDs and a chess set." ***Id.*** at 67.

Those items and the duffle bag were subsequently identified as belonging to Lauren Kennedy. Ms. Kennedy testified that she resided in a house on Newtown Avenue. ***Id.*** at 56. On March 20, 2008, she arrived home to find "a card in [her] screen door saying that [she] needed to contact the police." ***Id.*** at 57. Ms. Kennedy indicated that she did not "notice anything unusual about [her] house or damage to [her] house."[4] ***Id.***

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[3] The Commonwealth presented evidence that Reach Street is approximately four blocks away from Mr. Pugh's residence on Robbins Street. N.T. Trial, 11/17/09, at 51. Moreover, Appellant was described by other witnesses for the Commonwealth as a black male who was "about 40 years of age." ***Id.*** at 106.

[4] Testimony by Detective Sarah Valentino indicated that investigating officers believed the perpetrator of the burglary entered Ms. Kennedy's home through an open window in her kitchen. ***Id.*** at 75.

However, she "later" realized that DVDs she kept in her bedroom were missing. ***Id.*** at 57-58. Ms. Kennedy testified that she went to the police station and was shown the duffle bag, DVDs, change jar, and chess board set, which she identified as belonging to her. ***Id.*** at 58-59. On one of the DVDs, a fingerprint of Appellant was discovered. ***Id.*** at 79, 117. However, further processing of Ms. Kennedy's home did not reveal any additional fingerprints of Appellant at that location. ***Id.*** at 75.

Based on this evidence, we conclude that Appellant's burglary conviction relating to the residence on Reach Street must be sustained. The Commonwealth established that Mr. Shahalij saw a man fitting the description of Appellant carrying a blue and black duffle bag close to the home at 6130 Reach Street. That Reach Street residence was a mere four blocks away from Mr. Pugh's home on Robbins Street that Appellant subsequently burglarized. Similarly to Mr. Pugh's home on Robbins Street, and Ms. Carranco's house on North 3rd Street, the perpetrator of the Reach Street burglary broke down the door of the residence in order to enter. While the perpetrator of the Reach Street burglary was not apprehended at the scene, the blue and black duffle bag was recovered. That bag contained a DVD with Appellant's fingerprint on it. This evidence was sufficient to permit the jury to conclude, beyond a reasonable doubt, that Appellant entered the Reach Street home with the intent to commit a crime therein.

However, Appellant's conviction of burglarizing Ms. Kennedy's Newtown Avenue home was not supported by sufficient evidence. The mere

fact that Appellant's fingerprint was discovered on a DVD that had been removed from Ms. Kennedy's home at some unidentified time is inadequate to prove that Appellant was the person who *entered* her residence. Appellant's fingerprints were not found inside Ms. Kennedy's home, and there was no witness testimony placing Appellant at the scene of that crime. ***See id.*** at 75. Moreover, unlike Appellant's method of breaking down the doors to the homes on North 3rd, Robbins, and Reach Streets, here there was no damage to Ms. Kennedy's home or doors. In fact, she did not even realize that items were missing from her home until some "later" point after she was contacted by police. In sum, based on the evidence presented by the Commonwealth, the jury could have only surmised that Appellant committed the Newtown Avenue burglary. Therefore, his conviction of that offense must be reversed.

In his third issue, Appellant alleges that the Commonwealth's witness, Detective Valentino, committed perjury, and that the Commonwealth erred by not correcting her dishonest testimony. Namely, Appellant claims that Detective Valentino dishonestly reported to a local newspaper that "she had an eyewitness who allegedly saw [Appellant] force open the basement door of a neighbor's house and that Police recovered fingerprints matching [Appellant's] from all three residences.'" Appellant's Brief at 20 (internal quotation marks omitted). Appellant claims that Detective Valentino's providing the information in this article was done in order to "prejudice the potential jury pool." ***Id.*** at 22.

However, as the trial court notes, Appellant fails to "provide any indication whatsoever that any juror was influenced by or even saw this article or that its publication had any other affects whatsoever on his convictions." T.C.O. at 18. Furthermore, Detective Valentino's alleged statements to this newspaper do not amount to perjury. ***See*** 18 Pa.C.S. § 4902(a) (emphasis added) ("A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement *under oath* or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true."). Therefore, this argument is meritless.

Appellant also contends that Detective Valentino testified dishonestly when she opined that the residences burglarized by Appellant were in close proximity to one another. However, Appellant did not object to the detective's statements in this regard. ***See*** N.T. Trial, 11/18/09, at 89. Therefore, any challenge to that testimony is waived. ***See*** Pa.R.E. 103(a) (claim of error may not be predicated on improperly admitted testimony unless a timely and specific objection, motion to strike, or motion *in limine* appears of record). Moreover, even if not waived, Appellant offers no support for his claim that the detective's testimony was erroneous. Instead, he simply states that her testimony was "patently false and can easily be verified by checking an aerial photograph of Philadelphia." Appellant's Brief at 22. Such generalized assertions do not convince us that Detective Valentino committed perjury.

In his fourth and final issue, Appellant argues that the court improperly denied his motion to dismiss the burglary charge relating to the North 3rd Street residence of Ms. Carranco. Specifically, Appellant contends that "[t]he Commonwealth took thirty[-]three (33) months" to bring him to trial and, thus, it violated Pa.R.Crim.P. 600 warranting the dismissal of that burglary charge. Appellant's Brief at 24.

"Rule 600 generally requires the Commonwealth to bring a defendant on bail to trial within 365 days of the date the complaint was filed." ***Commonwealth v. Hyland***, 875 A.2d 1175, 1189 (Pa. Super. 2005) (citation omitted). "In assessing a Rule 600 claim, the court must exclude from the time for commencement of trial any periods during which the defendant was unavailable, including any continuances the defendant requested and any periods for which he expressly waived his rights under Rule 600." ***Id.*** at 1189 -1190 (citing Pa.R.Crim.P. 600(C)). Additionally,

> [o]ur standard of review in evaluating Rule 600 issues is whether the trial court abused its discretion.... The proper scope of review in determining the propriety of the trial court's ruling is limited to the evidence on the record of the Rule [600] evidentiary hearing and the findings of the lower court. In reviewing the determination of the hearing court, an appellate court must view the facts in the light most favorable to the prevailing party.

Commonwealth v. McNear, 852 A.2d 401, 404 (Pa. Super. 2004) (citations and internal quotation marks omitted).

Instantly, Appellant's Rule 600 claim is inadequate to permit us meaningful review. Appellant merely states the dates on which he was

incarcerated and released on bail, and the date on which his trial commenced. He provides no discussion of the procedural history of the case or what inexcusable delays were caused by the Commonwealth. Therefore, his Rule 600 issue is waived. ***Commonwealth v. Hardy***, 918 A.2d 766, 771 (Pa. Super. 2007), *appeal denied*, 940 A.2d 362 (Pa. 2008) (citations omitted) ("[W]hen defects in a brief impede our ability to conduct meaningful appellate review, we may dismiss the appeal entirely or find certain issues to be waived.").

To conclude, only Appellant's challenge to the sufficiency of the evidence to sustain his conviction of burglarizing the Newtown Avenue residence warrants relief. For that conviction, the court imposed a term of five to ten years' imprisonment to run concurrently with Appellant's sentences in his other three cases. Accordingly, our decision to reverse Appellant's judgment of sentence for that offense does not alter his aggregate term of 15 to 30 years' incarceration; thus, we need not remand for resentencing. N.T. Sentencing Hearing, 1/15/10, at 32; ***Commonwealth v. Robinson**,* 817 A.2d 1153, 1163 n. 14 (Pa. Super. 2003) (no need to remand for resentencing where sentence that was reversed had been ordered to run concurrently to sentence imposed on another conviction).

Judgment of sentence affirmed in part, reversed in part. Jurisdiction relinquished.