J-S67044-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JOSUE EDUARDO RIVERA,	:	
Appellant	:	No. 474 MDA 2013

Appeal from the Judgment of Sentence entered on January 24, 2013 in the Court of Common Pleas of York County, Criminal Division, No. CP-67-CR-0007615-2010

BEFORE: SHOGAN, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 23, 2013**

Josue Eduardo Rivera ("Rivera") appeals from the judgment of sentence imposed after he was convicted of simple assault as a third degree misdemeanor and harassment.[1] We affirm.

The pertinent facts and procedural history of this case are as follows:

> A criminal complaint was filed in this case on December 1, 2010[,] charging [Rivera] with one count of Simple Assault, 18 Pa.C.S.A. [§] 2701(a)(1)[,] and one count of Harassment, 18 Pa.C.S.A. [§] 2709(a)(1). The charges arose from a road rage incident that occurred on Route 30 in Hellam Township, York County on November 17, 2010. A witness to the incident said that a white male exited a black SUV and punched the victim[,] Sean Riker ["Riker"]. (Affidavit of Probable Cause). According to the Affidavit, [Rivera] told police that the victim was driving a Saturn in such a manner as to prevent other vehicles from being able to pass. [Rivera] said that he motioned for the Saturn to pull over and that the Saturn did pull over. Both [Rivera] and the victim exited their vehicles

[1] 18 Pa.C.S.A. §§ 2701(a)(1), (b)(1); 2709(a)(1).

> and approached one another. [Rivera] struck [the victim] several times and then got back in his vehicle and left.
>
> [Rivera] applied to the Accelerated Rehabilitative Disposition (ARD) program and was accepted on April 26, 2011. [Rivera] violated the conditions of ARD and a hearing was scheduled and continued several times. [Rivera] was removed from the ARD program on January 26, 2011[,] and a pre-trial conference was scheduled for March 22, 2012[,] and continued several times at the request of [Rivera]. The pre-trial conference was held on October 18, 2012[,] and [Rivera's] trial was listed for the December term.
>
> [Rivera's] jury trial began on December 4, 2012[,] and the jury returned with a verdict on December 5, 2012[,] finding [Rivera] not guilty of Simple Assault but guilty of Simple Assault by Mutual Consent, a misdemeanor three. [The trial court sentenced Rivera to a prison term of ten days to eleven months.]
>
> [Rivera] filed a Motion for Post-Sentence Relief raising all of the issues raised on appeal. [The trial court] held a hearing on February 20, 2013[,] and denied [Rivera's] Motion on that same date. [Rivera] timely filed his Notice of Appeal on March 13, 2013.

Trial Court Opinion, 5/15/13, at 2-3.

Rivera raises the following issues on appeal:

> 1. Whether the trial court abused its discretion by sentencing [Rivera] to an aggravated range [] sentence under the Sentencing Guidelines without properly considering [Rivera's] mitigating factors?
>
> 2. Whether the evidence was insufficient to find [Rivera] guilty of simple assault, fight or scuffle by mutual consent, where the evidence failed to establish that the complainant suffered bodily injury?
>
> 3. Whether the verdict was against the weight of the evidence where the jury could have relied on inadmissible evidence in determining whether the complainant suffered bodily injury?

Brief for Appellant at 6.

Rivera first contends that the sentencing court abused its discretion by sentencing him to an aggravated range sentence without properly considering his mitigating factors. Rivera asserts that his mitigating factors included no prior criminal record, his age of thirty-six, steady employment, a wife and five children, college and graduate degrees, an honorable discharge from the U.S. Army, and that he suffers from post-traumatic stress disorder and insomnia. Brief for Appellant at 17-18. Rivera asserts that a sentence of probation would have been appropriate. ***See id.*** (citing 42 Pa.C.S.A. § 9722). Rivera's claims challenge the discretionary aspects of his sentence.

There is no automatic right to appeal from the discretionary aspects of a sentence. ***Commonwealth v. Mastromarino***, 2 A.3d 581, 585-86 (Pa. Super. 2010).

> To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code[.]
>
> A substantial question will be found where an appellant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms which underlie the sentencing process. At a minimum, the Rule 2119(f) statement must articulate what particular provision of the code is violated, what fundamental norms the sentence violates, and the manner in which it violates that norm.

Id. (citations omitted).

In the instant case, Rivera filed a timely Notice of appeal, preserved the issue in a post-sentence Motion, and has included a Rule 2119(f) Statement of reasons for allowance of appeal. Thus, we must determine if Rivera has set forth a substantial question justifying this Court's review.

"[T]his Court has held on numerous occasions that a claim of inadequate consideration of mitigating factors does not raise a substantial question for our review." ***Commonwealth v. Bullock***, 868 A.2d 516, 529 (Pa. Super. 2005).

However, Rivera has cited ***Commonwealth v. Hyland***, 875 A.2d 1175, 1183 (Pa. Super. 2003) (*en banc*), in which this Court held that "[a] substantial question is raised where an appellant alleges the sentencing court erred by imposing an aggravated range sentence without consideration of mitigating circumstances." ***Id.*** However, in ***Hyland***, the Court determined that the sentencing court had "virtually ignored" the relevant mitigating factors. ***See id.***

In the instant case, however, the record shows that the sentencing court was aware of *all* mitigating factors, as the judge was properly informed by a pre-sentence report. ***See*** N.T., 1/24/13, at 1; ***see also Commonwealth v. Devers***, 546 A.2d 12, 18 (Pa. 1988) (holding that where a pre-sentence report exists, there is a presumption that the sentencing judge was aware of and adequately considered information

relevant to the defendant's character, as well as any mitigating factors). Further, Rivera's attorney indicated at sentencing that he had reviewed the pre-sentence report with Rivera, and stated that there were no errors or omissions in the report. N.T., 1/24/13, at 2. Thus, under these circumstances, we conclude that Rivera has failed to state a substantial question.[2]

Rivera next contends that the evidence was insufficient to find him guilty of simple assault as a misdemeanor of the third degree. Rivera asserts that the evidence did not support a finding of "bodily injury" beyond a reasonable doubt.

> When evaluating a sufficiency [of the evidence] claim, our standard is whether, viewing all the evidence and reasonable inferences in the light most favorable to the Commonwealth, the factfinder reasonably could have determined that each element of the crime was established beyond a reasonable doubt. This Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. We do not weigh the evidence or make credibility determinations. Moreover, any doubts concerning a defendant's guilt were to be resolved by the factfinder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence.

Commonwealth v. Kane, 10 A.3d 327, 332 (Pa. Super. 2010).

[2] Even if Rivera had stated a substantial question, we would conclude, for the reasons stated in the trial court's Opinion, that the trial court did not abuse its discretion in sentencing Rivera. ***See*** Trial Court Opinion, 5/16/13, at 3-7.

The offense of simple assault as a misdemeanor of the third degree is defined as follows:

> **§ 2701. Simple assault**
>
> **(a) Offense defined.--**A person is guilty of assault if he:
>
> (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
>
> * * *
>
> **(b) Grading.--**Simple assault is a misdemeanor of the second degree unless committed:
>
> (1) in a fight or scuffle entered into by mutual consent, in which case it is a misdemeanor of the third degree ….

18 Pa.C.S.A. § 2701. "Bodily injury" is defined as "impairment of physical condition or substantial pain." ***Id.*** § 2301.

In the instant case, the trial court set forth the pertinent evidence adduced at trial as follows:

> [] Riker, the victim in this case[,] testified that he was taken to the hospital after the incident and his ear and jaw were hurting, there was bleeding behind his ear, his ear turned black and blue, and the inside of his gums were cut and bleeding. (N.T. 12/4/12 p. 73). He further testified that when he left the hospital, he was still nauseous, had headaches, was sensitive to light, and was told not to go to work. (N.T. 12/4/12 p. 74).
>
> Officer Justin Golder, who responded to the scene, testified that [] Riker was seated in his car when he arrived but was very dazed and … could not form a sentence. (N.T. 12/4/12 p. 94). Officer Golder observed that [] Riker had a split lip, was bleeding from the mouth, had a swollen ear, and bruising to his right ear. (***Id.*** at 95). He also testified that he was unable to take a statement from [] Riker at that time because he was very incoherent. (***Id.*** at 96).

> [Rivera] also testified at trial. When asked what he did after he struck [] Riker, [Rivera] responded, "Like I said, I hit him a couple times. I saw he started going down, so I just let him be and I went back into my vehicle and I left." (N.T. 12/4/12 p. 115). On cross-examination, [Rivera] confirmed that he struck the victim five or six times in the face, that he was not struck by the victim, and that he is the one that waved the victim over to the side of the road in order to fight with him. (N.T. 12/4/12 pp. 117-119). [Rivera] stated that "[the victim] got over to the side of the road. He got out, he pulled over because he wanted to fight. I got out because I was going to fight him and he lost the fight and then he wants to go cry to the cops and pretend like he is a victim when he was part of the problem." (***Id.*** at pp. 118-119).

Trial Court Opinion, 5/15/13, at 5-7.

Based on our review of the record, we conclude that the evidence was sufficient to sustain Rivera's conviction of simple assault. We affirm on the basis of the trial court's well-reasoned Opinion with regard to this claim. ***See id.*** at 5-9.

Finally, Rivera contends that the verdict was against the weight of the evidence because Riker wanted to appear completely innocent of wrongdoing when he had engaged in some culpable conduct, and the three photographs of Riker's injuries showed that the injuries were superficial. ***See*** Brief for Appellant at 27. Rivera also argues that his trial testimony was consistent with the statement he made to the police in November 2010, and the trial court failed to give his testimony appropriate weight. ***Id.*** at 27-28.

Our standard of review of a weight of the evidence claim is as follows:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part,

> or none of the evidence presented and determines the credibility of the witnesses. As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. Our appellate courts have repeatedly emphasized that "[o]ne of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence."

Furthermore,

> where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

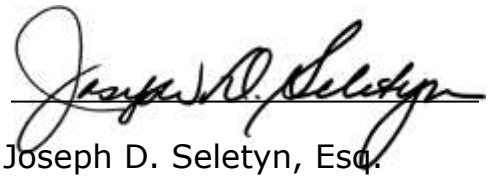
Commonwealth v. Rabold, 920 A.2d 857, 860-61 (Pa. Super. 2007) (citations omitted).

In the instant case, the trial court determined that Rivera's weight of the evidence claim lacked merit. ***See*** Trial Court Opinion, 5/15/13, at 9. Upon review of the record, we conclude that the trial court did not palpably abuse its discretion in ruling on the weight of the evidence claim. We affirm

on the basis of the trial court's Opinion with regard to this claim. ***See id.***[3]

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2013

[3] We note that Rivera failed to include the photographs of Riker, upon which he relies for this argument, in the certified record. ***See Commonwealth v. Bongiorno***, 905 A.2d 998, 1000 (Pa. Super. 2006) (holding that it is the appellant's responsibility to ensure that the record certified on appeal is complete). Also, Rivera's argument that his testimony was consistent with the statement he made to the police in November 2010 was not raised in his Rule 1925(b) Concise Statement. Therefore, that claim is waived. ***See*** Pa.R.A.P. 1925(b)(vii); ***Commonwealth v. Dowling***, 778 A.2d 683, 686 (Pa. Super. 2001) (holding that issues not raised in a Rule 1925(b) statement are waived).

S67044-13

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

Commonwealth of Pennsylvania	:	No.: CP-67-CR-0007615-2010
vs.	:	
Josue Eduardo Rivera	:	474 MDA 2013

Appearances:

Duane Ramseur, Esquire
For the Commonwealth

James B. Rader, Esquire
Counsel for Defendant

Rule 1925(a) STATEMENT IN SUPPORT OF DECISION

AND NOW, this 15th day of May, 2013, this matter is before the Court pursuant to a Notice of Appeal to the Superior Court of Pennsylvania filed by the Defendant on March 13, 2013.

Defendant raises the following issues on appeal:

1. Did this Court abuse its discretion in sentencing Defendant to an aggravated range sentence?
2. Was the evidence presented at trial sufficient to convict Defendant of simple

assault, mutual consent fight?

3. Was the verdict against the weight of the evidence?

Factual and Procedural History:

A criminal complaint was filed in this case on December 1, 2010 charging Defendant with one count of Simple Assault, 18 Pa.C.S.A. 2701(a)(1) and one count of Harassment, 18 Pa.C.S.A. 2709(a)(1). The charges arose from a road rage incident that occurred on Route 30 in Hellam Township, York County on November 17, 2010. A witness to the incident said that a white male exited a black SUV and punched the victim Sean Riker. (Affidavit of Probable Cause). According to the Affidavit, Defendant told police that the victim was driving a Saturn in such a manner as to prevent other vehicles from being able to pass. Defendant said that he motioned for the Saturn to pull over and that the Saturn did pull over. Both Defendant and the victim exited their vehicles and approached one another. Defendant struck Rivera several times and then got back in his vehicle and left.

Defendant applied to the Accelerated Rehabilitative Disposition(ARD) program and was accepted on April 26, 2011. Defendant violated the conditions of

ARD and a hearing was scheduled and continued several times. Defendant was removed from the ARD program on January 26, 2011 and a pre-trial conference was scheduled for March 22, 2012 and continued several times at the request of Defendant. The pre-trial conference was held on October 18, 2012 and Defendant's Defendant's trial was listed for the December term.

Defendant's jury trial began on December 4, 2012 and the jury returned with a verdict on December 5, 2012 finding Defendant not guilty of Simple Assault but guilty of Simple Assault by Mutual Consent, a misdemeanor three.

Defendant filed a Motion for Post-Sentence Relief raising all of the issues raised on appeal. We held a hearing on February 20, 2013 and denied Defendant's Motion on that same date. Defendant timely filed his Notice of Appeal on March 13, 2013.

Discussion:

1. Defendant's Sentence

Defendant asserts that this court abused its discretion in sentencing Defendant to an aggravated range sentence where Defendant's mitigating factors substantially outweigh any aggravating factors. Defendant was found guilty of Simple Assault-

Assault-Mutual Consent Fight, which is a Misdemeanor of the third degree. 18 Pa.C.S.A. 2701(b)(1).

The maximum sentence for a misdemeanor of the third degree is one year of total confinement. 18 Pa.C.S.A. 1104(3). Defendant was sentenced on January 24, 2013 to a sentence of not less than ten (10) days or more than 11 months imprisonment and a $200 fine on the Simple Assault. Defendant was also directed to pay court costs and restitution to the victim.

A Pre-Sentence Investigation was obtained from the Probation Department and the recommended sentence was 12 months probation, the costs of prosecution, and completion of Anger Management classes. The Offense Gravity Score was 1 and Defendant's Prior Record Score was 0. The standard range sentence is Restorative Sanctions(RS). Restorative Sanctions do not include any period of confinement. When the standard range sentence is RS, then the aggravated range sentence is Restrictive Intermediate Punishment(RIP) to 3 months. 204 Pa.Code 303.13(5). Defendant's sentence does fall into the aggravated range.

We stated our reasons for the aggravated range sentence on the record during Defendant's sentencing and again at the Post-Sentence hearing. The beating was in in excess of what needed to occur to settle the dispute, the situation was entirely

avoidable by the Defendant, and Defendant did not call for help for the victim and just left the scene. (N.T. 1/24/13 pgs. 3-5).

Pursuant to 42 Pa.C.S.A. 9721(b), "the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant."

> The court shall impose a sentence of total confinement if, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that the total confinement of the defendant is necessary because: 1) there is undue risk that during a period of probation or partial confinement the defendant will commit another crime; 2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or 3) a lesser sentence will depreciate the seriousness of the crime of the defendant.

42 Pa.C.S.A. 9725.

At sentencing, we relied upon a pre-sentence investigation furnished to us. A sentence in the aggravated range is appropriate when we determine that an aggravating circumstance is present. *Commonwealth v. Bromley*, 862 A.2d 598 (Pa. Super. 2004).

Sean Riker, the victim in this case testified that he was taken to the hospital

after the incident and his ear and jaw were hurting, there was bleeding behind his ear, his ear turned black and blue, and the inside of his gums were cut and bleeding. (N.T. 12/4/12 p. 73). He further testified that when he left the hospital, he was still nauseous, had headaches, was sensitive to light, and was told not to go to work. (N.T. 12/4/12 p. 74).

Officer Justin Golder, who responded to the scene, testified that Mr. Riker was seated in his car when he arrived but was very dazed and that he could not form a sentence. (N.T. 12/4/12 p. 94). Officer Golder observed that Mr. Riker had a split lip, was bleeding from the mouth, had a swollen ear, and bruising to his right ear. (Id. at 95). He also testified that he was unable to take a statement from Mr. Riker at that time because he was very incoherent. (Id. at 96).

Defendant also testified at trial. When asked what he did after he struck Mr. Mr. Riker, Defendant responded, "Like I said, I hit him a couple times. I saw he started going down, so I just let him be and I went back into my vehicle and I left." (N.T. 12/4/12 p. 115). On cross-examination, Defendant confirmed that he struck the victim five or six times in the face, that he was not struck by the victim, and that he is the one that waved the victim over to the side of the road in order to fight with him. (N.T. 12/4/12 pp. 117-119). Defendant stated that "[the victim] got over to

the side of the road. He got out. He pulled over because he wanted to fight. I got out because I was going to fight him and he lost the fight and then he wants to go cry to the cops and pretend like he is a victim when he was part of the problem." (Id. at pp. 118-119). As we stated on the record at sentencing, Defendant had several opportunities to avoid this encounter and chose not to. He punched the victim until the victim was down on the ground and then left the victim on the side of a busy major highway. While we agree there are some mitigating factors, we are not necessarily required to weigh aggravating factors against mitigating factors. Additionally, while this case was pending, Defendant pled guilty to another simple assault (N.T. 1/24/13 p. 3), which we can consider as an aggravating factor. *Bromley, supra.* Having heard the testimony at trial and having viewed the evidence evidence of the injuries to Mr. Riker at trial, we believed a brief period of incarceration was appropriate in this case, to not depreciate the seriousness of this offense and because the circumstances of this offense, a road rage incident, make it likely to recur.

2. Sufficiency of the Evidence

Defendant avers that the evidence was not sufficient to convict him of simple

assault-mutual consent fight where the evidence failed to show that the victim suffered bodily injury. To prove simple assault, the Commonwealth must prove that that the defendant attempted to cause or intentionally, knowingly, or recklessly caused bodily injury to another. 18 Pa.C.S.A. 2701(a)(1). Bodily injury is defined as as "impairment of physical condition or substantial pain." 18 Pa.C.S.A. 2301. "[T]he existence of substantial pain may be inferred from the circumstances surrounding the use of physical force even in the absence of a significant injury." *Commonwealth v. Smith*, 848 A.2d 973, 976 (Pa.Super. 2004) (quoting *Commonwealth v. Ogin*, 540 A.2d 549, 552 (Pa. Super. 1988)).

In *Commonwealth v. Richardson*, 636 A.2d 1195 (Pa. Super. 1994), the Superior Superior Court found the evidence was sufficient to sustain a finding that the defendant caused bodily injury to the victim where the defendant's punch broke the victim's glasses, caused him to stumble backwards, and caused the victim pain for the next few days. In this case, we have evidence, as outlined in the previous section, that Defendant struck Mr. Riker five or six times in the face causing Mr. Riker to fall to the ground; causing swelling to Mr. Riker's ear; causing lacerations to Mr. Riker's lip; and, causing him to suffer pain for several days after the incident. Clearly the evidence, including Defendant's own testimony, was sufficient to find

that Defendant caused bodily injury to Mr. Riker.

3 Weight of the evidence

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Charlton, 902 A.2d 554, 563 (Pa. Super. 2006) (quoting *Commonwealth v. Champney*, 832 A.2d 403 (Pa. 2003)).

Here the jury heard testimony from the victim, the investigating officer, and the Defendant. Evidence of the victim's injuries was also provided by photographs taken by the police officer. As discussed at length above, the evidence and testimony was consistent as to what transpired. We cannot find that the verdict of guilty of simple assault-mutual consent fight was so contrary to the evidence as to shock one's sense of justice.

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