NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ERIC ROMONT HOGAN,	:	No. 552 MDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, December 14, 2011,
in the Court of Common Pleas of Luzerne County
Criminal Division at No. CP-40-CR-0003847-2010

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: February 4, 2013

Eric Romont Hogan appeals from the judgment of sentence entered on December 14, 2011 following his convictions of burglary, aggravated assault, simple assault, and recklessly endangering another person. We affirm.

The following facts were presented at the October 14, 2011 jury trial. On November 1, 2010, Ronald DeLuca ("DeLuca") heard someone pounding on the door of his home. By the time he opened the door, the person was gone. He looked over to his neighbor's, Donald Skiff ("Skiff"), porch and saw a black male wearing a dark hoodie banging on Skiff's door. (Notes of testimony, 10/12/11 at 45-46.)

Skiff testified that he was preparing to go out for the evening when he heard a rapid pounding on his front door. (***Id.*** at 59.) Upon opening the

door, he saw a man, later identified as appellant, standing on the porch. Appellant entered Skiff's home and explained that he was being chased. (***Id.*** at 59-60.) Skiff, however, did not observe anyone else outside or anything unusual on the street. Skiff explained that he had lived on this street, made up of only six houses, for 30 years and knew every car and anybody on the street. (***Id.*** at 67-68.)

Skiff believed appellant wanted help so he called 911 from his cell phone. Skiff handed appellant his cell phone so appellant could talk directly to the 911 operator.[1] (***Id.*** at 68.) While listening to the conversation, Skiff learned appellant's name. Appellant told the operator that four black males in a red truck or Jeep Cherokee were chasing him and had fired shots. (***Id.*** at 154-156.) Appellant claimed to have seen a nine millimeter handgun. (***Id.*** at 153.) Appellant also averred that his leg was grazed by a bullet.

Appellant ended the phone call, handed the phone back to Skiff, pushed Skiff out of the way and ran toward the kitchen. (***Id.*** at 70.) Skiff twice asked appellant to leave his home. (***Id.*** at 70-71.) Appellant ran through the kitchen and went out the back door. Skiff, who was frightened, followed and was going to lock the door but before he could, appellant came "bursting right back" into the house. (***Id.*** at 70.) The next thing Skiff remembered was being on the kitchen floor and repeatedly being hit in the

[1] The entire 911 conversation was played for the jury.

face. (***Id.*** at 71.) Skiff recalls nothing else until he awoke in the hospital one week later. (***Id.*** at 73.)

Following the 911 call, Officer Michael Derwin ("Officer Derwin") was dispatched to Skiff's residence. (***Id.*** at 170.) Upon arrival, he briefly spoke with DeLuca and quickly checked the area for four black males and a red truck or jeep. As he observed nothing suspicious, Officer Derwin proceeded to attempt to make contact with Skiff. While standing on Skiff's front porch, he heard the rear door slam, so he proceeded to the back of the house. (***Id.*** at 176.) Here he heard a cry for help and saw Skiff lying on the kitchen floor with severe head injuries. (***Id.*** at 177.) Skiff told the officer that the assailant was a bald, black male wearing a blue hoodie. Officer Derwin called for an ambulance and put a description out over the radio.

Officer Derwin later learned that another officer had taken appellant into custody as he matched the description of the perpetrator. Appellant was brought back to the scene and Officer Derwin noted that his left hand was swollen and there was blood on his clothing. (***Id.*** at 179.) Appellant explained that the blood came from a fall in the grass and that his hand was swollen from the fall. (***Id.*** at 179-180.) The officers searched the area for signs of weapons or other persons; nothing was found. (***Id.*** at 182-183.) The officers also did not find any red vehicles or observe other males fleeing in the area. (***Id.*** at 227.)

Skiff was transported to the hospital and Dr. Fredrick Toy treated his injuries. Dr. Toy testified that Skiff went into cardiac arrest twice. The doctor opined that Skiff's injuries were consistent with being held in a choke hold and repeatedly punched in the face. Skiff has continued to suffer from numbness, has trouble drinking hot beverages, has trouble balancing, and his memory is not what it used to be. Dr. Toy testified that the protracted losses are also consistent with the injuries Skiff suffered.

Once appellant was at the police station, his clothing was seized. It was also noted that appellant's left hand was swollen and had blood on it; appellant's injuries were photographed. No visible injuries were observed on appellant's leg. (***Id.*** at 217.) Appellant did not receive treatment for his hand and denied being injured. The Commonwealth presented the testimony of a forensic DNA scientist who testified to bloodstains on appellant's sweatshirt which matched the blood sample provided by Skiff. (***Id.*** at 291.)

A few hours after his arrest, appellant provided a statement to the police. In his statement he claimed that four white males, not black males, with weapons were chasing him and trying to kill him. (***Id.*** at 299-305.) Appellant claimed one of the white males followed him to Skiff's home and a "tussle" ensued between appellant and the white male. (***Id.*** at 307.) Appellant stated that Skiff called 911 during the fight. (***Id.*** at 307-308.) Appellant explained that when "the old man" told him to get out of his

house, appellant ran out the back door and jumped over the fence and ran until he got to a roadway where he approached a police vehicle. (***Id.*** at 309.) At this point, Skiff had not been beaten. (***Id.*** at 310.) Appellant averred that his hand was swollen as a result of a fall. In his statement, he did not mention a red truck or jeep.

At trial, the defense theorized that one of the men chasing appellant attacked Skiff. Appellant argued that the time frame of events made it impossible for him to commit the assault. In support thereof, the defense relied upon appellant's statements to the 911 operator and his statements to the police that he had been chased by unknown assailants. The defense also relied on the timing of the 911 call as appellant's theory was that the entire assault occurred between the end of the 911 call at 10:06:56 p.m. and the time Officer Derwin found Skiff. Officer Derwin arrived at the residence at 10:11 p.m. and, at 10:13 p.m., the officer radioed in response that he had appellant in the police vehicle. Appellant's theory was that it was impossible for him to commit the assault in this timeframe and one of his pursuers assaulted Skiff.

Appellant was convicted of burglary, aggravated assault, simple assault and recklessly endangering another person. Thereafter, the court imposed a sentence of 48 to 96 months for burglary and a consecutive 84 to 168 months' for aggravated assault, for an aggregate sentence of 11 to 22 years. Appellant filed a post sentence motion seeking to modify his

sentence and challenging the weight of the evidence. The motion was denied on January 31, 2012. Appellant filed a timely notice of appeal and the court ordered appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. (Docket #14.) Appellant filed a motion for enlargement of time to file a Rule 1925(b) statement which the trial court granted. (Docket #15.)

In his brief on appeal, appellant presents the following issues:

> 1. Did the Lower Court abuse its discretion in denying Appellant's Motion for Arrest of Judgment and a new trial based upon the weight and sufficiency of [the] evidence?
>
> 2. Did the Lower Court abuse its discretion in rejecting Appellant's Request to make the sentence for Count II, Burglary[,] concurrent with Count III, Aggravated Assault[,] which, under the Commonwealth's theory of the case, occurred at the same time of the burglary, and in fact, the crime which the Appellant intended to commit as part of the burglary was the aggravated assault on the victim?
>
> 3. Did the Lower Court abuse its discretion in imposing a consecutive sentence of a minimum of eighty-four (84) months to a maximum of one-hundred sixty-eight (168) months for Count III, Aggravated Assault[,] consecutive to the sentence imposed for burglary in Count II, when the standard range of the sentencing guidelines for Aggravated Assault recommended a minimum sentence of between seventy-two (72) months to ninety (90) months?

Appellant's brief at 2.

The first issue presented challenges to the weight and the sufficiency of the evidence regarding appellant's conviction for burglary. At the outset, we find the challenge to the weight of the evidence waived as appellant did not present this theory of relief in his Rule 1925(b) statement. (***See*** docket #17.) Therefore, this issue is deemed waived. ***Commonwealth v. Kitchen***, 814 A.2d 209, 214 (Pa.Super. 2002), ***affirmed***, 576 Pa. 229, 839 A.2d 184 (2003) (appellant's challenge to the discretionary aspect of his sentence was waived where the issue was not raised in his Rule 1925(b) statement); ***Commonwealth v. Castillo***, 585 Pa. 395, 888 A.2d 775 (2005) (re-affirming the bright-line rule for waiver first set forth in ***Commonwealth v. Lord***, 553 Pa. 415, 719 A.2d 306 (1998)).

We now turn to address the sufficiency of the evidence of appellant's burglary conviction. We begin with our standard of review:

> [O]ur standard of review of sufficiency claims requires that we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa.Super.2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." ***Id.***; ***see also Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa.Super.2000) ("[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence."). Any doubt about the

> defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. ***See Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super.2001).

Commonwealth v. Stays, 40 A.3d 160, 167 (Pa.Super. 2012).

Unfortunately, appellant's instant Rule 1925(b) statement language fails to identify which element of burglary was insufficiently supported by the evidence at trial. The failure to identify the element serves to waive this issue. ***Commonwealth v. Manley***, 985 A.2d 256, 262 (Pa.Super. 2009), ***appeal denied***, 606 Pa. 671, 996 A.2d 491 (2010).

Furthermore, even if not waived, the evidence at trial was sufficient. The Crimes Code defines burglary as follows:

> **§ 3502. Burglary**
>
> **(a) Offense defined.--**A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

18 Pa.C.S.A. § 3502(a). "Intent may be proved by direct evidence or inferred from circumstantial evidence." ***Commonwealth v. Burton***, 770 A.2d 771, 784 (Pa.Super. 2001), ***appeal denied***, 582 Pa. 669, 868 A.2d 1197 (2005). Thus, the Commonwealth must present evidence from which the jury could determine beyond a reasonable doubt that appellant intended

to enter the victim's home, intended to commit a crime therein, and took a substantial step towards entering the victim's home. ***Id.***

It is undisputed that appellant's initial entry into Skiff's residence was not the burglary, but rather appellant's return and second entry almost immediately following the termination of the 911 telephone call. Appellant claims that he was fleeing from the people whom he believed were chasing him when he re-entered Skiff's residence and asserts he was followed by one of the unknown pursuers who was the actual attacker of Skiff. (Appellant's brief at 14.)

Appellant's argument ignores our standard of review by examining the evidence in the light most favorable to him.[2] Again, the evidence is to be interpreted in the light most favorable to the Commonwealth. Herein, the Commonwealth presented sufficient evidence to establish burglary. Testimony was presented that after initially permitting appellant to enter his residence, Skiff twice ordered appellant to leave and appellant complied. As Skiff was in fear for his safety, he attempted to lock the door immediately after appellant left. Appellant, however, forced his way back into Skiff's home without license or privilege to assault Skiff, leaving him seriously injured. Specific intent as to the crime of burglary may be inferred from the circumstances surrounding entry of the accused. ***See Commonwealth v.***

[2] In the alternative, it could be said that appellant's analysis is to the weight of the evidence, not the sufficiency. Again, appellant has not preserved a weight of the evidence claim.

Hardick, 475 Pa. 475, 479, 380 A.2d 1235, 1237 (1977); ***see also, Commonwealth v. Kennedy***, 499 Pa. 389, 453 A.2d 927 (1982) (specific intent as to the crime of burglary may be inferred from the circumstances surrounding entry of the accused). Accordingly, the evidence was sufficient to support appellant's burglary conviction.

The next two issues concern the discretionary aspects of appellant's sentence. An appellant's right to challenge the discretionary aspects of his sentence is not absolute. ***Commonwealth v. Barzyk***, 692 A.2d 211, 216 (Pa.Super. 1997). Rather, a party who desires to raise such matters must petition this court for permission to appeal and demonstrate that there is a substantial question that the sentence is inappropriate. 42 Pa.C.S.A. § 9781(b); ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 511, 522 A.2d 17, 18 (1987). To fulfill this requirement, the party seeking to appeal must include in his or her brief a concise statement of reasons relied upon in support of allowance of appeal. Pa.R.A.P., Rule 2119(f), 42 Pa.C.S.A.,[3]

[3] Rule 2119(f) states:

> **(f) Discretionary aspects of sentence.** An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Commonwealth v. Saranchak, 544 Pa. 158, 176, 675 A.2d 268, 277 (1996), ***cert. denied***, 519 U.S. 1061 (1997). By the terms of Rule 2119(f), this statement should be placed immediately preceding the argument on the merits relating to the discretionary aspects of sentencing.

Appellant has not included a proper statement of reasons for allowance of appeal in his brief. The Commonwealth has specifically objected to this omission. (Commonwealth's brief at 10.) Although the failure to include a Rule 2119(f) statement may be overlooked when the opposing party fails to object, where the opposing party objects, the defect is fatal and this court is precluded from addressing the merits of appellant's challenge. ***Commonwealth v. Bruce***, 916 A.2d 657, 666 (Pa.Super. 2007).

Judgment of sentence affirmed.

Appellant's "summary of the argument" section does attempt to assert a substantial question, with respect to sentencing review; however, this is improper as a Rule 2119(f) statement.