

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JAMES W. NELSON,	:	
	:	
Appellant	:	No. 687 EDA 2010

Appeal from the Judgment of Sentence February 12, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s): CP-51-CR-0001169-2008
MC-51-CR-0059422-2007

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

MEMORANDUM BY FITZGERALD, J.:

Filed: February 19, 2013

Appellant, James W. Nelson, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas. Appellant argues that: (1) the complainant was not a credible witness and therefore the evidence was insufficient to support a conviction; (2) the court erred in admitting evidence of a prior alleged rape which was *nolle prossed*; (3) the prosecutor made an unfair and inflammatory statement in closing argument; (4) and the trial court rendered an inconsistent verdict. We affirm.

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

* Former Justice specially assigned to the Superior Court.

On December 18, 2007, the complainant, 15 year old [A.O.] was living with her godmom On the evening of December 18, 2007 she received a phone call from Tyree Nelson, [Appellant's] brother, who was going out with her godsister at the time. After a brief conversation [A.O.] received a phone call from [Appellant] telling her that she should come over to his house to see him. [A.O.] told him that she couldn't and hung up the phone. [Appellant] called back and convinced her to come over after which [A.O.] went outside to her front porch. She then saw [Appellant] in a car being driven by an unknown heavy set black male. [Appellant] told [her] to get into the car and she refused after which he grabbed her and pulled her into the car. She was driven to [Appellant's] house, which she entered willingly, and went down to the basement. While sitting on a couch in the basement [Appellant] unzipped his pants and began rubbing his penis. [Appellant] then placed his hands on [A.O.'s] breasts and began rubbing up and down. [A.O.] moved away and told him to stop. He then tried to pull her pants down but was initially unsuccessful as she kept pulling them up. At some point [Appellant's] friend Chris came down stairs and held [A.O.'s] arms down allowing [Appellant] to pull down her pants. [Appellant] then stuck his penis in [A.O.'s] vagina while Chris continued to restrain her by holding her arms. Despite [A.O.] repeatedly saying to get off of her, [Appellant] continued to insert he penis in her vagina while his friend, Chris, began to rub her breasts.

Trial Ct. Op., 4/7/11, at 1-2.

Following a bench trial, Appellant was convicted of rape,¹ criminal conspiracy,² unlawful contact with a minor,³ statutory sexual assault,⁴ sexual

¹ 18 Pa.C.S. § 3121(a)(1).

² 18 Pa.C.S. § 903(a)(1).

³ 18 Pa.C.S. § 6318(a)(1).

assault,⁵ corruption of minors⁶ and indecent assault.⁷ Appellant was sentenced to ten to twenty years' imprisonment. This appeal followed. Appellant filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal and the trial court filed a responsive opinion.⁸

Appellant raises the following issues in his statement of questions involved for our review:

1. Was it error to have admitted the testimony of the Commonwealth's witnesses which was in conflict with each other and inconsistent with the weight of the evidence?
2. Did the Trial Court err in allowing into evidence testimony of complainant that was not credible, uncorroborated and insufficient to support a conviction?
3. Did the Trial Court err in allowing evidence of a prior alleged rape involving [Appellant] into evidence?
4. Did the Trial Court err in admitting evidence that a prior case against [Appellant] for rape was *nolle prossed* and that one Co-Defendant's case was also *nolle prossed* while the other Co-Defendant was found guilty which had the effect of being more prejudicial than probative?

⁴ 18 Pa.C.S. § 3122.1.

⁵ 18 Pa.C.S. § 3124.1.

⁶ 18 Pa.C.S. § 6301(a)(1).

⁷ 18 Pa.C.S. § 3126(a)(1).

⁸ We note that Appellant filed an untimely Pa.R.A.P. 1925(b) statement. "When counsel has filed an untimely Rule 1925(b) statement and the trial court has addressed those issues we . . . may address the merits of the issues presented." ***Commonwealth v. Thompson***, 39 A.3d 335, 340 (Pa. Super. 2012).

5. Did the Trial Court err in overruling [Appellant's⁹] objections to the closing statement of the Assistant district Attorney (Prosecutor) who made unfair and inflammatory statement regarding [Appellant's] intention or proclivity to rape based on a prior arrest for rape that did not lead to a conviction?

6. Did the Trial Court err in rendering an inconsistent verdict?

Appellant's Brief at 1-2.

Despite raising six issues in his statement of questions involved, Appellant divides his argument section into three parts, thus violating Pa.R.A.P. 2119(a), which mandates that "[t]he argument shall be divided into as many parts as there are questions to be argued." **See** Pa.R.A.P. 2119(a). We remind counsel: "The briefing requirements scrupulously delineated in our appellate rules are not mere trifling matters of stylistic preference; rather, they represent a studied determination by our Court and its rules committee of the most efficacious manner by which appellate review may be conducted so that a litigant's right to judicial review as guaranteed by Article V, Section 9 of our Commonwealth's Constitution may be properly exercised." **Commonwealth v. Briggs**, 12 A.3d 291, 343 (Pa. 2011), *cert. denied*, 132 S. Ct. 267 (2011).

As a prefatory matter, we consider whether Appellant has waived issues 1. and 2., which he addresses together as the first issue in his

⁹ Appellant is inexplicably referred to as "Defendant Johnson" here.

argument section, and issue 6. which he presents as the third issue in the argument section. In the first two issues, Appellant claims the evidence from the Commonwealth's witnesses was conflicting, contradictory, and therefore "insufficient to establish all of the elements of Rape beyond a reasonable doubt, the judgment should be reversed." Appellant's Brief at 5-6. Although Appellant frames the third issue in his argument section as a claim that the court rendered an inconsistent verdict, he in support avers that the "[c]omplainant's testimony, standing alone or in conjunction with the incompetent and non-corroborating testimony of the Commonwealth's witnesses, was not sufficient to substantiate a verdict of guilty." *Id.* at 9.

Appellant's arguments are that the Commonwealth's evidence was not reliable and was contradictory, incompetent and non-corroborating. This goes to the weight of the evidence, not to its sufficiency. This Court has stated that variances and mere conflicts in testimony go the weight of the evidence because "it is within the province of the fact finder to determine the weight to be given to the testimony and to believe all, part, or none of the evidence." *Commonwealth v. Patterson*, 940 A.2d 493, 502 (Pa. Super. 2007) (citations omitted). Accordingly, we treat these issues as a challenge to the weight of the evidence.

A weight of the evidence claim is waived where the defendant "failed to raise it properly at the conclusion of trial or in a post-sentence motion." In *Commonwealth v. Walsh*, 36 A.3d 613, 622 (Pa. Super. 2012); *see*

also Pa.R.Crim.P. 607(A)(1)-(3) (requiring weight of evidence claim to be raised before trial court in motion for new trial before or after sentencing). Appellant did not raise this issue at the conclusion of trial or in a post-sentence motion. Accordingly, we find the challenge to the weight of the evidence waived. **See Walsh, supra.**

Appellant has combined issues 3. and 4. as presented in the statement of the questions, as the second issue in the argument section. He argues that “[t]he trial court erred in permitting the Assistant District Attorney’s prejudicial commentary during trial and closing statements.” Appellant’s Brief at 7. He avers that the prosecutor’s comment during closing argument, that “Appellant had ‘every intention that night and we know it from his prior bad act,’” should have resulted in a mistrial. **Id.** at 7-8.

“The absence of a contemporaneous objection below constitutes a waiver of [an] appellant’s current claim respecting the prosecutor’s closing argument. Pa.R.A.P. 302(a); **see also Commonwealth v. Butts**, 495 Pa. 528, 434 A.2d 1216, 1219 (1981) (failure to object during or after summation constitutes waiver of prosecutorial misconduct claim).” **Commonwealth v. Powell**, 956 A.2d 406, 423 (Pa. 2008). Appellant fails to cite to the place in the record where this issue was preserved. **See** Pa.R.A.P. 2117(c), 2119(e). Our review of the trial transcript reveals that Appellant’s counsel did not object to the comment during or after the closing argument. Therefore, this issue is waived. **See id.**

Appellant also contends that the evidence of his alleged prior bad act, *viz.*, the alleged rape of another victim, should not have been admitted because that case was *nolle prossed*.¹⁰ Appellant's Brief at 7. Appellant asserts that the evidence did not "come under any of the exceptions of Pa.R.Evid. 404." *Id.* We find no relief is due.

Our standard and scope of review for evaluating the admission of evidence is settled.

The admission of evidence is committed to the sound discretion of the trial court, and a trial court's ruling regarding the admission of evidence will not be disturbed on appeal unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous.

Where the evidentiary question involves a discretionary ruling, our scope of review is plenary.

Commonwealth v. Stokes, 38 A.3d 846, 867 (Pa. Super. 2011) (citation omitted).

¹⁰ "If an appellant has properly preserved an issue for appellate review, the appellant must include in his or her brief a 'statement of the case' including a 'statement of place of raising or preservation of issues.' Pa.R.A.P. 2117(c). This information must also be referenced in the argument portion of the appellate brief. Pa.R.A.P. 2119(e)." ***Commonwealth v. Baker***, 963 A.2d 495, 502 n. 5 (Pa. Super. 2008). Because the record is not voluminous, and the issue was preserved in Appellant's answer to the Commonwealth's notice of intent to introduce evidence of prior bad acts, we will address it. ***See*** Aplnt.'s Answer to Commw.'s Mot. for Admis. of Alleged Prior Bad Acts, 11/26/08. The trial court granted the motion. Order, 9/11/09. "Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues." *Id.* at 502 n.8 (citation and emphasis omitted).

It is well established that a prior case which ended in acquittal does not render evidence of that case inadmissible under Pa.R.Evid. 404. In

Commonwealth v. Young, 989 A.2d 920 (Pa. Super. 2010), the defendant

posits that because he was acquitted in [a prior case], his actions there no longer qualify as prior crimes or bad acts under Rule 404(b). However, [] Rule 404(b) is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court.

Id. at 925-26. Analogously, in the instant case, the fact that the case involving the prior bad act was *nolle prossed* did not render the evidence inadmissible. ***See id.***

Prior bad acts are admissible to prove a common scheme, plan or design. Pa.R.Evid. 404 provides in pertinent part:

(b) Other crimes, wrongs, or acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

Pa.R.Evid. 404(b)(1)-(3). "Under Pennsylvania law, evidence of prior bad acts is admissible to prove a common scheme, plan or design where the

crimes are so related that proof of one tends to prove the others.”

Commonwealth v. Ross, 57 A.3d 85, 103 (Pa. Super. 2012).

At the time of trial, there was a stipulation regarding the prior bad act:

[The Commonwealth] There’s a stipulation, Your Honor, by and between counsel that if [S.A.] were called to testify, she would testify that back on September 26th of 2004, when she was 16 years old, she was inside [the house]. She was laying down on her bed when [Appellant] and another boy . . . came into the room. [Appellant] grabbed her arms and legs while [the other boy] began to have sex with her.

She then screamed for her brother. [The other boy] got off and held the door and [Appellant] began to have sex with her against her will and then they stopped when her brother and another person came to the door.

N.T., 9/11/09, at 100-01. The trial court found the evidence of the prior bad act was admissible. Trial Ct. Op. at 2.¹¹ We discern no abuse of discretion.

See Stokes, supra.

Judgment of sentence affirmed.

¹¹ The trial court granted the pre-trial motion without an opinion. In the Pa.R.A.P. 1925(a) opinion, the trial court opined that the evidence was admissible to show intent. Trial Ct. Op. at 2. We can affirm the trial court for any reason. ***Commonwealth v. Lynch***, 820 A.2d 728, 730 n.3 (Pa. Super. 2003).