NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. WILLIAM A. GARCIA Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 711 MDA 2012

Appeal from the Judgment of Sentence December 1, 2011
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0001243-2011

BEFORE: PANELLA, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J. Filed: March 18, 2013

William A. Garcia brings this appeal from the judgment of sentence imposed on December 1, 2011, in the Court of Common Pleas of Centre County. A jury convicted Garcia of criminal trespass, loitering and prowling at nighttime, and attempt (criminal trespass).[1,2] The trial judge found Garcia guilty of the summary offense of disorderly conduct.[3] Garcia was sentenced to serve a term of imprisonment from 5 days to 23½ months, with credit for 5 days and immediate parole, and a concurrent one year term

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 3503(a)(1)(ii), 5506, and 901(a), respectively.

[2] Following the jury's verdict, the trial court vacated the conviction of attempt (criminal trespass).

[3] 18 Pa.C.S. § 5503(a)(4).

of probation. Garcia challenges (1) the trial court's ruling that allowed the Commonwealth to amend the bill of information to include the charge of criminal attempt (criminal trespass), (2) the trial court's refusal to give requested points for charge, and to instruct the jury, at its request, of the definition of "entry," (3) the sufficiency of the evidence, and (4) the weight of the evidence.[4] For the following reasons, we affirm.

This case arose on June 18, 2011, at 1:55 A.M., when Garcia, a former resident of Stepping Stone Transitional Living Program, a residential program for youths and young adults experiencing homelessness, was spotted outside a female resident's bedroom window. Garcia was observed by Benjamin Blakeslee-Drain, a staff member of 13½ years, who had heard some noise. Upon seeing Blakeslee-Drain, Garcia ran away. Blakeslee-Drain then went to the resident's bedroom, and discovered that one storm window and screen had been raised, the window's blinds were pulled up with the cord hanging outside the window, and the window air conditioning unit was shunted to one side and sitting in the window well.[5] Earlier that night, Blakeslee-Drain had made sure that the bedroom's windows, screens and

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[4] ***See*** Garcia's Brief at 15. We have reordered the issues raised by Garcia for purposes of this discussion.

[5] There were two windows in the bedroom. The other window was locked, and a dresser stood in front of that window. ***See*** N.T., 11/8/2011 at 40.

blinds were pulled down. The resident who was in the room was found to be fast asleep. ***See*** N.T., 11/8/2011, at 26–49.

Blakeslee-Drain called police, and when they responded he told police the person he had seen was Garcia. He described Garcia to police, and stated Garcia was wearing a light-colored shirt, either a white or a light-gray in color. Blakeslee-Drain further informed police that Garcia may be staying temporarily with his aunt. Police went to Garcia's aunt's house a little after 2:30 A.M. and Garcia, who matched Blakeslee-Drain's description and was dressed in a light-gray T-shirt, answered the door. ***Id.*** at 60, 67, 69–71, 94.

At trial, Garcia testified on the evening of June 17, 2011, he had gone to Stepping Stone after he left work at a pizza shop, and was "hanging out"[6] there with other residents until he left to help look for a missing resident. Garcia stated that when the missing resident returned, he did not go back to Stepping Stone, but stayed across the street talking to another resident until it was time for her to go into the facility. He then walked back to his aunt's house. Garcia denied that he had been at Stepping Stone at 1:55 A.M. on the morning in question. ***Id.*** at 104–109, 111, 115–116.

The jury convicted Garcia of criminal trespass, loitering and prowling at night, and attempt (criminal trespass), and the trial court convicted

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[6] N.T., 11/8/2011, at 105.

Garcia of disorderly conduct, graded as a summary offense. The trial court subsequently vacated the attempt conviction, and sentenced Garcia as stated above. Garcia filed a timely post-sentence motion, which the trial court denied after a hearing. This appeal followed.[7]

Garcia first contends that the trial court erred in allowing the Commonwealth to amend the bill of information, after the defense had rested its case, to include the charge of criminal attempt (criminal trespass).

Pennsylvania Rule of Criminal Procedure 564, governing amendment of a criminal information, provides:

> **Rule 564. Amendment of Information**
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> The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or any property, or the date charged, provided the information as amended does not charge an additional or different offense. Upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice.

Pa.R.Crim.P. 564.

Here, the trial court, in its opinion accompanying the denial of Garcia's post-sentence motion, analyzed Garcia's argument, stating:

> The Court finds that [Garcia's] argument regarding the amendment of the Bill of Information to be moot as the Court vacated [Garcia's] conviction for Amended Count Four [Criminal Attempt] and no separate sentence was imposed. Moreover, Criminal Attempt, in this context, was a lesser included offense

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[7] Garcia timely complied with the order of the trial court to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

> of Criminal Trespass; as such the amendment in this case was not the sort of amendment that is recognized as tainting a verdict. ***See Commonwealth v. Sims***, 591 Pa. 506, 919 A.2d 931 (2007).

Trial Court Opinion, 4/10/2012, at 2. We agree with the trial court. Even if the issue were not moot, no relief would be due.

An attempt crime is necessarily a lesser-included offense of the substantive offense. ***Commonwealth v. Sims***, 919 A.2d 931, 933 (Pa. 2007). Instantly, the added charge of criminal attempt (criminal trespass) did not arise from different facts nor did the amendment affect Garcia's alibi defense. Therefore, no prejudice to Garcia occurred here. ***See Commonwealth v. Page***, 965 A.2d 1212 (Pa. Super. 2009) (allowing amendment after close of evidence but prior to closing arguments where there was no prejudice to defendant because the amended charge evolved out of the same factual scenario; no new facts were added to the amended information; the amended charge consisted of the same basic elements as the original charge; and the amendment did not hinder or necessitate any change in defense strategy). Accordingly, this claim fails.

Garcia next claims that the trial court erred (1) in refusing his requested point for charge No. 15,[8] and (2) in refusing to provide the jury with further instruction on the definition of "entry."

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[8] Garcia also contends that the trial court erred in refusing his requested point for charge No. 6, Pennsylvania Suggested Standard Jury Instruction 4.07B, "Identification Testimony/Accuracy in Doubt." This issue was not raised in Garcia's concise statement and, therefore, it is waived. ***See***
(Footnote Continued Next Page)

> "[I]n reviewing a challenge to the trial court's refusal to give a specific jury instruction, it is the function of this [C]ourt to determine whether the record supports the trial court's decision." In examining the propriety of the instructions a trial court presents to a jury, our scope of review is to determine whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case. A jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently, the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the appellant was prejudiced by that refusal.

Commonwealth v. Brown, 911 A.2d 576, 582–583 (Pa. Super. 2006), *appeal denied*, 920 A.2d 830 (Pa. 2007) (citation omitted).

Garcia contends that the trial court erred in refusing to give his requested point for charge No. 15[9] with respect to the crime of loitering and

(Footnote Continued)

Pa.R.A.P. 1925(b)(4)(vii). In any event, Garcia's claim is meritless since Blakeslee-Drain knew Garcia personally because Garcia was a former Stepping Stone resident, and he did not waver in his identification of Garcia as the perpetrator. Therefore, the court properly concluded that the requested instruction was not warranted.

[9] Specifically, Garcia requested the following instruction:

> The crime of Loitering and Prowling is intended to punish not only those persons who at night are bent on peeping into the private affairs of citizens in their dwellings, but also those individuals who are found at or near dwellings without lawful purpose or reason and whose presence can only be explained in some preparation for or attempt at illegality or crime. The

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prowling at nighttime. ***See*** Garcia's Brief at 24. However, we do not tarry with this claim since the trial court in this case utilized the relevant Pennsylvania standard jury instruction, and Garcia has failed to demonstrate that he suffered prejudice as a result of the trial judge's refusal to give the requested charge. ***See*** Pennsylvania Suggested Standard Jury Instruction (Pa.SSJI) (Crim) 15.5506; N.T., 11/8/2011, at 189–191. Accordingly, no relief is due on this claim.

Garcia also complains that the trial court did not give the jury additional instruction regarding the definition of "entry" by instructing the jury that "Enter includes gaining entry by deception or secretly remaining in a place." Garcia's Brief at 25, *citing* Pa.SSJI(Crim) 15.3503A.

(Footnote Continued)

> mischief prohibited is that intentional act, without legal justification or excuse, which has as its purpose injury to the privacy, person or property of another. It is that act which has for its purpose improper motive, evil design, depravity or perversion that is prohibited. Of necessity, therefore, each act must be considered under the peculiar facts and circumstances which give rise to the accusation. ***Commonwealth of Pennsylvania v. DeWan***, 124 A.2d 139, 140 (Pa. Super. 1956).

Garcia's Brief at 24.

In this case, the jury, after deliberating for some time, submitted a written question to the court, which read as follows:

> Difference between criminal attempt and criminal trespass. Using a football analogy, is attempt breaking the plane with the football to score a touchdown? Is trespass being inside?

N.T., ***supra*** at 196. The trial court, in response to the jury's question, reread its initial instructions regarding criminal trespass and criminal attempt to commit criminal trespass. ***Id.*** at 196–200. Thereafter, a juror requested the court to define "entry," and the court declined to do so. ***Id.*** at 201.

Here, the court, in twice charging the jury regarding criminal trespass, had utilized the Pennsylvania standard jury instruction, which provides, in relevant part:

> 1. The defendant has been charged with criminal trespass. To find the defendant guilty of this offense, you must find that all of the following elements have been proven beyond a reasonable doubt:
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> *First*, that the defendant [entered *[location]*] [broke into *[location]*]. [Enter includes gaining entry by deception or secretly remaining in a place.] ["Broke into" includes entrance by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access.]
>
> ...

Pa.SSJI(Crim) 15.3503A. When reading the instruction, the court proceeded under the "broke into" portion of the charge and instructed the jury that "'Broke into' includes entrance by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access." N.T., ***supra*** at 185, 197. As such, the court's instruction was consistent

with Section 3503(a)(1)(ii), the subsection under which Garcia was prosecuted by the Commonwealth.[10]

Subsequently, when the juror asked for the definition of "entry," trial counsel requested the court to instruct "that enter includes gaining entr[y] by deception or secretly remaining in a place."[11] However, the definition proposed by trial counsel relates to 18 Pa.C.S. § 3503(a)(1)(i), and therefore was inapplicable to the criminal trespass charge against Garcia

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[10] The Crimes Code defines the offense of criminal trespass, in relevant part, as follows:

> (a) *Buildings and occupied structures.*
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> (1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he:
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> (i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; or
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> **(ii) breaks into any building or occupied structure or separately secured or occupied portion thereof**.
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> ...
>
> (3) As used in this subsection:
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> ***"Breaks into."*** **--To gain entry by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access.**

18 Pa.C.S. § 3503(a)(1), (3) (emphasis supplied).

[11] N.T., ***supra*** at 202.

under Section 3503(a)(1)(ii). Accordingly, the court properly declined to define "entry" as requested by trial counsel. Therefore, Garcia's claim fails.

Next, Garcia challenges the sufficiency of the evidence. Garcia argues the Commonwealth failed (1) to prove a completed trespass, (2) to prove the element of maliciousness for the crime of loitering and prowling, and (3) failed to prove any action on the part of Garcia that amounted to the summary offense of disorderly conduct.[12]

Our standard of review is well established:

> A claim challenging the sufficiency of the evidence is a question of law. 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. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

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[12] ***See*** Garcia's Brief at 17–19. As Garcia's Rule 1925(b) statement did not identify the elements of the offenses upon which Garcia alleges that the evidence was insufficient, the sufficiency challenge may be deemed subject to waiver. ***See Commonwealth v. Garland***, ___ A.3d ___, ___ [2013 PA Super 41] (Pa. Super. 2013) ("In order to preserve a challenge to the sufficiency of the evidence on appeal, an appellant's Rule 1925(b) statement must state with specificity the element or elements upon which the appellant alleges that the evidence was insufficient."). In any event, as will be discussed, we find no merit in Garcia's sufficiency challenge.

Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (citations omitted).

As already stated, a person is guilty of criminal trespass if he "breaks into any building or occupied structure or separately secured or occupied portion thereof." 18 Pa.C.S. § 3503(a)(1)(ii). The offense of loitering and prowling at nighttime is defined by the Crimes Code as follows:

> Whoever at night time maliciously loiters or maliciously prowls around a dwelling house or any other place used wholly or in part for living or dwelling purposes, belonging to or occupied by another, is guilty of a misdemeanor of the third degree.

18 Pa.C.S. 5506. Finally, with regard to the offense of disorderly conduct, the Crimes Code provides, in relevant part:

> (a) *Offense defined.* --A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
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> ...
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> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
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> (b) *Grading.* --An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.

18 Pa.C.S. § 5503(a)(4), (b).

Here, the Commonwealth presented evidence that Blakeslee-Drain, upon investigating the Stepping Stone resident's bedroom located where Garcia had been seen standing outside, discovered that the storm window,

screen, and blinds had been raised, the cord for the blinds was hanging outside the window, and the air conditioner had been moved within the window well. Blakeslee-Drain further testified that the resident was in the room sound asleep at that time. The trial court concluded: "[T]he jury's verdict was consistent with the Pennsylvania law on [the definition of entry], which recognizes any crossing of the threshold without authorization as entry, including a burglar's screwdriver going through a hole." Trial Court Opinion, ***supra*** at 2, citing ***Commonwealth v. Giddings***, 686 A.2d 6 (Pa. Super. 1996), *overruled on other grounds by* ***Commonwealth v. Clark***, 746 A.2d 1128 (Pa. Super. 2000), *appeal denied*, 764 A.2d 1064 (Pa. 2000).[13] We agree with the trial court.

From the evidence presented by the Commonwealth, the jury could reasonably infer that Garcia's fingers, hands or arms crossed the threshold as he raised the storm window and screen, pulled the cord of the blinds, and tampered with the air conditioner. Therefore, there was sufficient evidence to sustain Garcia's conviction for the crime of criminal trespass. ***See Giddings, supra*** at 9 ("the entry requirement of criminal trespass is the

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[13] In ***Giddings***, as in this case, the appellant was convicted of "breaking into" a building under 18 Pa.C.S. § 3503(a)(1)(ii), rather than "entering" under section (a)(1)(i). The ***Giddings*** Court noted that "the legislature has defined 'breaks into' as 'to gain entry'. [18 Pa.C.S. § 3503(a)(1)(ii), (a)(3)]. Thus, regardless of the provision under which appellant was convicted, we must consider whether he entered [the complainant's] house." ***Giddings***, ***supra***, 686 A.2d at 9 n.5.

same as that of burglary"); ***see also Commonwealth v. Myers***, 297 A.2d 151, 152 (Pa. Super. 1972) (stating "entry" requirement of burglary is satisfied where any part of the body enters the structure).

Likewise, the evidence was sufficient to sustain the offense of loitering and prowling at nighttime, pursuant to 18 Pa.C.S. § 5506. This Court has stated that "malicious," as used in Section 5506, "means an intent to do a wrongful act or having as its purpose injury to the privacy, person, or property of another." ***Commonwealth v. Belz***, 441 A.2d 410, 411 (Pa. Super. 1982). Garcia argues (1) that Stepping Stone had been his own dwelling up to a few days before the incident, (2) that he was friends with the residents and had permission to be inside the house several hours earlier, and (3) that he was not wearing dark clothing to blend into the night, nor did he possess a flashlight, tools, mask or gloves.[14] These arguments, however, ignore our standard of review, and the fact that Garcia was seen standing outside a resident's bedroom right after Blakeslee-Drain heard a noise, and immediately before Blakeslee-Drain discovered an obviously-disturbed window and air conditioner in the sleeping resident's room. Therefore, we reject Garcia's claim that the evidence was insufficient to sustain his conviction for loitering and prowling at nighttime.

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[14] ***See*** Garcia's Brief at 19.

Likewise, we reject Garcia's challenge to the sufficiency of the evidence to sustain his conviction for disorderly conduct, 18 Pa.C.S. § 5503(a)(4), graded as a summary offense. Garcia argues that "Mr. Blakeslee-Drain testified that he observed Mr. Garcia standing at the window for several seconds. He was not disorderly creating any kind of hazardous or physically offensive condition." Garcia's Brief at 19. This argument is meritless since the evidence, viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient for the trial judge to conclude that Garcia intruded at the bedroom window of the transitional living facility, where a female resident slept inside. Specifically, the circumstantial evidence showed that Garcia opened the window, pulled up the blinds, and moved the air conditioner to the side. Accordingly, we reject Garcia's sufficiency challenge to his convictions for criminal trespass, loitering and prowling at night, and disorderly conduct.

Nor do we find merit in the argument of Garcia that the verdict was against the weight of the evidence. Garcia's challenge to the weight of the evidence focuses on the identification testimony of Blakeslee-Drain arguing, *inter alia*, that "Mr. Blakeslee-Drain could have confused the identity of the young male outside the window with that of Mr. Garcia. Just moments after the report was called in, Mr. Garcia was found to be at his aunt's residence." Garcia's Brief at 26.

The trial court, however, stated: "Though [Garcia] rigorously disputes the weight and credibility of the evidence presented against him, such

determinations are ultimately left to the finders of fact." Trial Court Opinion, ***supra*** at 2. The trial court further opined:

> The eyewitness [Blakeslee-Drain] in the case at hand never expressed any doubt as to his identification of [Garcia], and was in a position to identify [Garcia] if his story was found credible by the jury. The jury determined the Stepping Stone Transitional Living Program employee who testified to seeing and recognizing [Garcia] on the night of the incident was credible.

Id. at 3.

Applying our standard of review,[15] we discern no abuse of discretion in the trial court's analysis and, therefore, this final claim warrants no relief.

Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

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[15] We review a challenge to the weight of the evidence as follows:

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One 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 and that a new trial should be granted in the interest of justice.

Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (citations omitted).