IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 02-11,322**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
MARK D. TANNER,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Opinion and Order issued June 7, 2005, in which the Court granted Appellant's Post Conviction Relief Act (PCRA) petition with respect to reinstating his appeal rights but in all other respects denied his PCRA petition. The relevant facts follow.

On December 4, 2001, A.B., J.B. and A.S. were outside at A.B.'s house on Poplar Street when a white man called out to them from across the street.[1] The man offered the children $10 if they helped him find his dog. The children went over to the man. The man directed J.B. and A.S. to go down Poplar Street and around the corner to look for his dog and told them not to come back until he and A.B. came for them. The man took A.B. down an alley to a secluded backyard of a vacant house. When they got there, the man pulled a ski mask over his face and tackled A.B. to the ground. He covered her mouth with his one hand while he choked her with the other. A.B. began kicking and trying to yell for

1 A.B. was a nine year old, white female, J.B. was a nine year old, white male, and A.S. was a nine year old, black male. They were friends from the neighborhood who often played together.

help, kicking off one of her shoes in the process. The man pulled out a stun gun and shoved it into A.B.'s side several times. A.B. testified that it felt like she got electrocuted and she did not remember anything after that until she saw J.B.

After J.B. and A.S. looked for the dog for a while, they began to look for A.B. J.B. saw A.B. staggering and stumbling out from the yard area behind 820 or 824 Poplar Street. A.B.'s pants were torn and she was bruised and bleeding. J.B. ran and called for his mother. J.B.'s mom came and carried A.B. home. J.B.'s mom called 911.

The children gave the following description of the man to the police: white male in his early 30s, medium/average build, 5'5"-5"9", wearing a knit hat/ski mask, and dark pants. A.B. also indicated the man was wearing glasses. J.B. showed the police the area where he first saw A.B. stumbling and bleeding. The police found one of A.B.'s shoes in the backyard of 824 Poplar Street and her other shoe in front of 820 Poplar Street. A.B. was examined at the hospital. Although she did not need to be hospitalized overnight, she missed several days of school as a result of the injuries she suffered from this incident. Despite the police's investigative efforts, they could not find the perpetrator.

On July 30, 2002, R.R. and K.S., who were both 8 years old, were playing in K.S.'s backyard.[2] A white male approached them and asked them to help him find his little girl or if they saw his little girl wearing a green shirt over in Newberry Park. The children told the man no. R.R.'s older brother T.R. saw a strange man talking to R.R. and K.S. and told his mother, M.R. M.R. approached the man and asked him if he had a problem. The man said no and walked away. M.R. called the police because the man was looking and

acting suspicious and his response to her question was inconsistent with the questions he was asking the children. M.R. told the police the man was wearing a black Harley Davidson shirt with lightening bolts, black or blue shorts and glasses. About two hours later, the police picked up an individual matching that description in or around Newberry Park; the individual was Appellant Mark Tanner.

At City Hall, the police took Appellant to the captain's office to interview him. They took off his handcuffs and read Appellant his Miranda warnings. Appellant waived his Miranda rights and agreed to talk to the police. The police asked Appellant if he talked to any kids tonight. First Appellant said not tonight I didn't or I did but not tonight. The police asked him if he had a daughter and indicated he did not. The police then asked him if he talked to some kids and asked them if they saw a little girl. Appellant said I probably did but I don't remember. Later on Appellant said he talked to some kids over by the park. When the police told him that people saw him talking to kids at or near the rear of a house, Appellant then stated he did ask some kids to go over and help him find his daughter. When asked why he would do that, Appellant said he just wanted to watch them play on the swings and playground equipment. When the police were finished questioning Appellant, they asked him if he would be willing to write a statement out or have the police write the statement for him or give a taped statement. Appellant chose to have the police write the statement for him and he would sign it. The police then asked Appellant to slowly tell them what happened that night, so they could write down everything he said. Appellant's statement was introduced as Commonwealth's Exhibit 42.

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2 R.R. resides at 804 Poplar Street. K.S. lives behind his house.

On July 31, 2002, the police transported Appellant from the Lycoming County jail to the holding cell in City Hall. The police put Appellant's photograph in an array with 7 other photographs and went out and showed the array to A.B., J.B., and A.S. A.B. and J.B. picked out Appellant's photograph and indicated he was the individual who asked them to help him find his dog and who assaulted A.B. When the police returned to City Hall, they brought Appellant some fast food for lunch. They moved him from the holding cell to an interview room, unhandcuffed him and allowed him to eat. Then they read him his Miranda rights again. Appellant waived his Miranda rights and the police interviewed him about the incident on December 4, 2001. The police asked Appellant if he had run into some kids and hurt somebody back in December. Appellant said he never hurt a kid. Appellant said he talked to two boys, one white and one black, and asked them to help him find his dog. Appellant later said they encountered a girl in an alley. He described her as a white girl with dark hair. Appellant stated the boys split up and he walked with the girl for a while. They walked behind a house into a yard. The girl wanted to leave and she left. Appellant said she was fine when she left him. The police wrote out the statement and Appellant initialed and signed it.[3]

The police then spoke to Appellant about stun guns. Appellant described a stun gun and used the word zapper. The police asked whether he had ever seen one and Appellant indicated he believed an individual named Rob had one. The police went and spoke to Rob, then spoke to Appellant again. Appellant then admitted he had a stun gun, but he claimed he did not use it on the girl; rather, he showed it to her just to scare her. The

3 Appellant's statement regarding the December 4, 2001 incident was admitted into evidence as Commonwealth's Exhibit 44.

police asked Appellant if he would be willing to show them where this incident occurred and Appellant agreed. Appellant directed the police to the backyard where A.B. was assaulted.

Appellant was charged with kidnapping, unlawful restraint, interference with custody of a child, aggravated assault, simple assault, recklessly endangering another person and possessing an instrument of crime as a result of the incident involving A.B. on December 4, 2001. Appellant was charged with multiple counts of attempted kidnapping and two counts of interference with the custody of a child as a result of the incident with K.S. and R.R. on July 30, 2002.

Defense counsel John Piazza filed an omnibus pretrial motion, which included a motion to suppress Appellant's statements to the police on the basis that Appellant has a low IQ and is easily led. In an Opinion issued April 15, 2003, the Honorable Dudley N. Anderson denied Appellant's omnibus pretrial motion. Attorney Piazza filed a motion for reconsideration, which was denied on or about July 2, 2003.

A jury trial was held August 18, 19, 21 and 22, 2003. The jury found Appellant guilty of kidnapping, unlawful restraint, aggravated assault, simple assault, recklessly endangering another person and possessing an incident of crime arising from the December 4, 2001 incident involving A.B. The jury acquitted Appellant of the charges relating to R.R. and K.S.

On or about October 16, 2003, the Court sentenced Appellant to an aggregate term of imprisonment in a state correctional institution for 8 ½ years to 18 years for

aggravated assault, kidnapping and possessing an instrument of crime.[4]

On October 24, 2003, in contravention of Rule 120(c) of the Rules of Criminal Procedure which requires court approval to withdraw from a criminal case, Mr. Piazza filed a praecipe to withdraw his appearance as counsel. Nicole Spring, an assistant public defender, filed a petition to extend the filing time for post sentence motions. On October 27, 2003, Chief Public Defender William Miele formally filed an entry of appearance of counsel in this case. Mr. Miele filed a post sentence motion on November 6, 2003. On November 21, 2003, the Court granted the petition to extend filing time for post sentence motions, ordered trial transcripts and directed counsel to file an amended post sentence motion by February 6, 2004. Although Mr. Miele filed amended post sentence motions on February 6, 2004 and March 10, 2004 and the Court took testimony on the motions, the Court was constrained to deny all the post sentence motions as untimely and find that the time for filing an appeal also had already elapsed under controlling Pennsylvania Superior Court precedents because the Court .32did not grant the motion to extend within 30 days of sentencing. [5]

On May 13, 2004, Appellant filed a Post Conviction Relief Act (PCRA) petition, seeking reinstatement of his post sentence motions and his right to appeal nunc pro tunc. The Court incorporated the evidence from the hearings on the untimely post sentence motions and held an additional hearing on Appellant's claims. In an Opinion and Order docketed June 7, 2005, the Court reinstated Appellant's appeal rights nunc pro tunc, but did

4 The Court found unlawful restraint merged with kidnapping and simple assault and recklessly endangering another person merged with aggravated assault for sentencing purposes.

5 See Commonwealth v. Dreves, 839 A.2d 1122 (Pa.Super. 2003); Commonwealth v. Bilger, 803 A.2d 199

not find merit in his underlying claims.

Appellant filed a notice of appeal on July 5, 2005. Appellant raises five issues in his appeal.

Appellant first asserts the Court erred in denying his motion to suppress statements because: (1) Appellant was denied counsel during questioning; and (2) Appellant was unable to provide a knowing, intelligent and voluntary waiver of his right to remain silent and to proceed without counsel. The Court cannot agree. There is no evidence in the record that Appellant was denied counsel during questioning. To the contrary, Appellant waived his right to counsel and agreed to speak with the police on two separate occasions. Trial counsel argued that Appellant was incapable of providing a knowing, intelligent and voluntary waived of his Miranda rights due to his diminished mental capacity. Judge Anderson rejected trial counsel's contention. The rationale for this ruling can be found in the Opinion and Order docketed April 15, 2003.

Although Mr. Piazza did not present the testimony of Dr. Egli at the hearing on the omnibus pretrial motion to establish Appellant's mental capacity, even assuming Appellant has an IQ of 70, the fact that a defendant has a low IQ does not in and of itself render his confession involuntary. Commonwealth v. Glover, 488 Pa. 459, 412 A.2d 855 (Pa. 1980); Commonwealth v. Crosby, 464 Pa. 337, 346 A.2d 768 (Pa. 1975). An individual's mental condition is only one factor in analyzing the voluntariness of a confession under the totality of the circumstances. Commonwealth v. Nestor, 551 Pa. 157, 167, 709 A.2d 879, 884 (Pa. 1998); Commonwealth v. Chacko, 500 Pa. 571, 583, 459 A.2d

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(Pa.Super. 2002).

311, 317 (Pa. 1983).

The police read Appellant his Miranda rights before both interviews. N.T., April 2, 2003, at 30, 32, 51. On each occasion, Appellant indicated he understood his rights and he would talk to the police without an attorney. Id. When the police questioned Appellant, he appeared to understand the questions, his responses were appropriate, and the police did not have to repeat their questions. Id. at 33, 51. The police permitted Appellant to make a phone call, but no one answered. Id. at 40-41. Appellant never asked for an attorney, never asked to leave and never said he didn't want to talk to the police. Id. at 34, 63. Appellant was not handcuffed during either interview. Id. at 52. Agent Sorage asked Appellant if he wanted to use the restroom or if he wanted anything to eat or drink. Id. at 51. The police brought Appellant lunch from Burger King before interviewing him about the December 4, 2001 incident. Id. at 52.

Based on the totality of the circumstances, Appellant knowingly, intelligently, and voluntarily waived his rights and gave statements to the police.

Appellant next contends the Court erred in denying Appellant's motion for reconsideration of his omnibus pre-trial motion that requested a hearing be held and testimony be taken from the examining psychologist, and requested that a psychiatrist, not a psychologist, evaluate Appellant's competency. Judge Anderson denied Appellant's motion for reconsideration because, even assuming Dr. Egli would testify to the matters contained in his report, it would not change his determination that Appellant's statements were voluntary. See N.T., June 24, 2003, at 15-16. "The question of voluntariness is not whether the

defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess." Commonwealth v. Nestor, 551 Pa. 157, 163, 709 A.2d 879, 882 (1998). Mr. Piazza did not have any additional testimony to show the police conduct during the interview was manipulative or coercive.[6]

With respect to Appellant's competency, the Court notes a defendant is presumed to be competent to stand trial. Commonwealth v. Brown, 582 Pa. 461, 491, 872 A.2d 1139, 1156 (Pa. 2005); Commonwealth v. DuPont, 545 Pa. 564, 681 A.2d 1328, 1330-31 (Pa. 1996). The burden is on Appellant to prove, by a preponderance of the evidence, that he was incompetent to stand trial. To do so, Appellant must establish that he was either unable to understand the nature of the proceedings against him or to participate in his own defense. Brown, supra; Commonwealth v. Hughes, 521 Pa. 423, 555 A.2d 1264, 1270 (Pa. 1989); 50 P.S. §7402(a). "[T]he relevant question is whether the defendant has sufficient ability at the present time to consult with counsel 'with a reasonable degree of rational understanding' and have a 'rational as well as factual understanding of the proceedings.'" Commonwealth v. Appel, 547 Pa. 171, 187-88, 689 A.2d 891, 898-99 (Pa. 1997).

Dr. Egli's report indicated Appellant was depressed and lacked self esteem, but he was not psychotic. The report did not indicate Appellant was incompetent. Appellant testified at the hearing on April 2, 2003. His answers to questions were responsive and

6 At the April 2, 2003 hearing, Appellant testified that Agents Dincher and Sorage yelled at him and called him a liar and Agent Dincher poked him in the chest. N.T., April 2, 2003, at 58-59. Agent Dincher, however, was about five feet away behind a desk. Id. at 63-64. Furthermore, when asked how loud the police yelled, Appellant indicated a little louder than they were talking, but not screaming. Id. at 65. Agent Dincher and Agent Sorage denied yelling at Appellant, touching him or doing anything threatening. Id. at 40, 52-53. From

appropriate. Although he attended special education classes, Appellant graduated from high school. Appellant appeared to be able to remember the police interviews of July 30 and July 31, 2002 and to assist in his defense, since he testified about the police yelling at him and poking him. Judge Anderson also noted that Dr. Egli mentioned in the background section of his report that Appellant indicated to Dr. Egli that he was being incarcerated on two separate incidents, one involving attempting to lure or kidnap children and the other involving the use of a stun gun. N.T., June 24, 2003, at 2-3. While Appellant may have a below average IQ, he appeared competent. Since there was no basis in the record to believe Appellant was incompetent, the Court did not err in failing to order a competency evaluation by a psychiatrist.

Appellant next contends that the verdict was against the weight of the evidence because the Commonwealth failed to present any physical forensic evidence, such as hair, saliva, semen, or fibers. The court cannot agree.

An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. Commonwealth v. Sullivan, 820 A.2d 795, 805-806 (Pa. Super. 2003). A new trial is awarded only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. Id. at 806. The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. Id. The issue is not whether there was evidence to support the verdict, but rather whether, notwithstanding all the facts, certain facts are so clearly of greater weight that to

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the transcript of the reconsideration hearing, it appears that Judge Anderson felt that, at most, the police may

ignore them or give them equal weight wit hall the facts is to deny justice. Id. "Unless there are facts and inferences of record that disclose a clear abuse of discretion, an appellate court must refrain from reversing the ruling of a trial court that a verdict was not against the weight of evidence." Commonwealth v. Fletcher, 580 Pa. 403, 421, 861 A.2d 898, 908 (Pa. 2004).

A.B. and J.B. picked Appellant's photograph out of an array containing eight photographs. The children also identified Appellant at trial. The children testified that Appellant asked them to help him find his dog. Appellant sent the boys in one direction while he led A.B. to an area behind a vacant house, where he choked her and utilized a stun gun on her. Appellant admitted to the police that he was walking with A.B. that night and he showed her a stun gun. Appellant even directed the police to the location where A.B. was attacked.

All the facts and inferences in this case showed that Appellant was the perpetrator of the crimes committed against A.B. Although no physical evidence, such as hair, saliva, semen or fibers, linked Appellant to the crime, such is not necessary to sustain the verdict. See Commonwealth v. Passmore, 857 A.2d 697, 708 (Pa. Super. 2004)(lack of physical evidence of struggle not dispositive of weight of evidence claim, where ample circumstantial evidence to establish Appellant unlawfully removed victim from her home either by threat or deception).

Appellant also contends the evidence was insufficient to support the verdicts for the charges of kidnapping, unlawful restraint, aggravated assault, simple assault, recklessly endangering another person, and possessing instruments of a crime. In reviewing

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have pointed at Appellant and told him in a stern voice not to lie to them. N.T., June 24, 2003, at 8-9.

the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. Commonwealth v. Davido, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. Murphy, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004); Commonwealth v. Ockenhouse, 562 Pa. 481, 490, 756 A.2d 1130, 1135 (Pa. 2000); Commonwealth v. May, 540 Pa. 237, 246-247, 656 A.2d 1335, 1340 (Pa. 1995).

An individual is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period of time in a place of isolation with any of the following intentions: . . . to inflict bodily injury on or to terrorize the victim or another. 18 Pa.C.S.A. §2901(a). When the victim is under the age of 14 years, removal or confinement is unlawful if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of the victim's welfare. 18 Pa.C.S.A. §2901(b).

The evidence presented in this case shows that Appellant removed A.B. from her yard at 728 Poplar Street by telling her he would pay her $20 if she helped him find his dog. He led her down an alley to a secluded backyard of a vacant house at 820 or 824 Poplar Street. He grabbed her, put his hand over her mouth and choked her. She kicked and struggled with Appellant to try to get away, and she tried to yell for help. Appellant used on a stun gun on her. A.B. testified that it felt like she got electrocuted. A.B.'s parents did not consent to Appellant taking her anywhere. Appellant directed the police to the location where A.B. was attacked. The police also testified that Appellant admitted he had a stun

gun, but claimed he did not hurt A.B.; he merely showed her the gun to scare her. Photographs were introduced into evidence, which depicted the marks on A.B.'s body from Appellant utilizing the stun gun on her.

Based on this evidence, the jury found beyond a reasonable doubt that Appellant either removed A.B. a substantial distance or confined her in a place of isolation for a substantial period of time with the intent to inflict bodily injury on her and/or to terrorize her. The court notes that the term substantial is evaluated under the circumstances of the case. The term substantial is meant only to exclude the incidental movement of the victim during the commission of a crime which does not increase the risk of harm to the victim. Commonwealth v. Hughes, 264 Pa. Super. 118, 125, 399 A.2d 694, 698 (1979). Although A.B. may have been moved only a block or two and the ordeal did not last days or hours on end, Appellant's removal of her from her home and friends to a secluded backyard of a vacant house greatly increased the risk of harm to A.B., as it enabled Appellant to keep her there against her will and to use a stun gun multiple times until she lost consciousness without anyone seeing her struggle with Appellant or hearing her cries for help. See Commonwealth v. Malloy, 579 Pa. 425, 445-446, 856 A.2d 767, 779-780 (Pa. 2004)(moving adult victim 10-12 blocks was a substantial distance); Hughes, supra at 125-126, 399 A.2d at 698 (moving adult female rape victim 2 miles and 30 minutes satisfied substantial distance or substantial period). Therefore, the Court finds the evidence was sufficient to convict Appellant of kidnapping.

A person is guilty of aggravated assault if he "attempts to cause serious bodily injury to another or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa.C.S.A.

§2702(a)(1); Commonwealth v. McClendon, 874 A.2d 1223, 1229 (Pa. Super. 2005). The Crimes Code defines serious bodily injury as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. §2301.

Appellant utilized a stun gun numerous times on A.B.'s chest and side. At the time, A.B. was a nine year old child, who weighed approximately 80 pounds. The stun gun sent a 100,000 volt shock into A.B.'s body each time it was applied. A.B. testified that it felt like she got electrocuted. Photographs were introduced into evidence showing the marks the stun gun left on A.B.'s body. A.B. missed eight days of school as a result of this incident. The court believes this evidence was sufficient to show that Appellant intended to cause and attempted to cause serious bodily injury to A.B.

A person is guilty of possessing an instrument of crime "if he possesses any instrument of crime with intent to employ it criminally." 18 Pa.C.S.A. §907(a). An instrument of crime includes "anything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have." 18 Pa.C.S.A. §907(d).

A.B. testified that Appellant possessed a stun gun and he assaulted her with it by applying it to her chest and side numerous times. A.B. did nothing to justify Appellant utilizing the stun gun on her. A.B.'s testimony is sufficient to convict Appellant of possessing an instrument of crime.[7]

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7 Since the Court believes the evidence was sufficient to convict Appellant of kidnapping, aggravated assault and possessing an instrument of crime and unlawful restraint and simple assault are lesser included offenses of kidnapping and aggravated assault, respectively, the Court did not address the sufficiency of the evidence for unlawful restraint and simple assault. Similarly, since recklessly endangering another person merged with aggravated assault, the court did not address the sufficiency of the evidence for that charge either.

Appellant's final assertion is the trial court erred because it improperly denied Appellant's Post Conviction Relief Act (PCRA) petition claims regarding ineffective assistance of counsel for failure to call various alibi witnesses. The reasons for the Court's ruling can be found in the Opinion and Order docketed June 7, 2005.

DATE: _____ By The Court,

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Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)
Charles Brace, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)