

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1499-06
vs. :
: CRIMINAL DIVISION
:
:
:
:
: 1925(a) Opinion
RICKEY R. McClAM,
Appellant

**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 judgment of sentence imposed on March 5, 2007 and its denial of Appellant's post sentence motions on May 14, 2007.

On January 19, 2007, the Court held a jury trial in this case. Toward the end of the jury trial, Appellant tendered a plea of guilty to Count 9, false reports to law enforcement agencies, a misdemeanor of the second degree. N.T., pp. 146-152. The trial immediately resumed on all the other counts in the information.

The jury found Appellant guilty of the following offenses: Count 4, robbery by force however slight; Count 5, unlawful restraint; Count 6, false imprisonment; and Count 7, theft. Appellant was found not guilty of Count 1, conspiracy to commit kidnapping and Count 3, kidnapping to inflict bodily injury or terrorize the victim. The jury was not able to reach a verdict on Count 2, kidnapping for ransom. The Commonwealth has decided not retry the Appellant on Count 2 and the Court, by separate Order, will dismiss this Count.

On March 5, 2007, the Court held a sentencing hearing. On Count 4, robbery

by force however slight, a felony of the third degree, the Court imposed a sentence of incarceration in a State Correction Institution for a minimum of one (1) year to a maximum of four (4) years. The Court applied the deadly weapon enhancement for possession of a knife. The guideline range with this enhancement is a standard range of 6-15 months. The range without the deadly weapon possessed enhancement was RS-9. Appellant had a prior record score of 0.¹ The Court also imposed a consecutive 2-12 months incarceration for unlawful restraint and a consecutive one year probation for false reports. The Court found false imprisonment merged with unlawful restraint and theft merged with robbery. The aggregate incarceration sentence imposed by the Court was 14 months to 5 years, with 1 year of consecutive probation.

Appellant filed a post sentence motion on or about March 14, 2007. The Court heard argument on the motion on May 1, 2007 and denied the motion on May 14, 2007.

Appellant filed notice of appeal on June 13, 2007. In his matters complaint of on appeal, Appellant challenges: (1) the sufficiency of the evidence to sustain the convictions for unlawful restraint and false imprisonment; (2) the weight of the evidence for the robbery, unlawful restraint and theft convictions; and (3) the propriety of applying the deadly weapon possessed enhancement to the sentencing guidelines for his robbery conviction.

In responding, the Court will initially report the facts of the case.

Statement of Facts

¹ Appellant was age 17 at the time of the offense. The case was transferred from juvenile court to the adult criminal system.

The key Commonwealth witness was Donnie Rockeymore. In July 2006, Mr. Rockeymore was staying at the residence of Megan Welch in Williamsport. On July 28, 2006, Ms. Welch left the home with her two children to attend a graduation ceremony with her mother in the Allentown, Pennsylvania area.

Mr. Rockeymore was alone in the residence on July 28, 2006. At about 11:30 p.m. two men he knew by the nicknames Owe and Low appeared at the residence. Appellant was the man he knew as Low. N.T., p. 18. Owe is Omar Rose. N.T., 42.

The door to the home was not closed and the two men walked in. The two men then asked the victim to go half on a bag of marijuana. N.T. p.19. The victim has \$260 in cash. The victim reached into his pocket for money and both men punched him in the face and back of the head. N.T., p. 20. The victim's eye swelled. The two men then had the victim take his cloths off, and they took his money and cell phones from him. N.T., p. 20. The victim was left only with a white t-shirt and boxer shorts. N.T., p. 21.

The perpetrators told the victim they did not come there for \$260. They threatened the victim and asked him to produce more money. N.T., p. 21. The victim told them the money was not there and that Megan had \$1,350 with her. The perpetrators then searched the home looking for more money. N.T., p. 22.

Appellant went upstairs to look for more money while Owe stayed with the victim. Owe had a pocket knife and told the victim not to move or he would stab him. N.T., p. 22. Appellant was unable to find more money upstairs and the victim told him that Megan had the money.

The perpetrators then had the victim call Megan by cell phone. Appellant and his partner wrote out a note of what they wanted the victim to say to Megan. This note was

marked as Commonwealth Exhibit 1. The note said, "Can you please bring my money. I have to go back to the city and deal with some family issues." Megan responded that she did not know what was going on.

After a period of time, Megan called the victim back, but he could hardly say anything because of the presence of the perpetrators. N.T., p. 25.

Around 3:00 a.m., the victim sent a text message to Megan which said, "Call the police." N.T., p. 25.

Megan called him around 8:30 – 9.00 in the morning and she asked him if he was okay. He said, "No, call the cops." N.T., p. 25. Megan then contacted the neighbor to go to the house to check on the victim. N.T., p. 26.

The victim testified that Appellant and the second perpetrator kept him in the house all night. They would not let him leave. Owe would be in front of him and the other would be behind him. They brandished weapons to threaten him, such as a kitchen knife, a pocket knife and a staple gun. N.T., p. 25. They threatened to kill him. N.T., p. 26. Because of these threats, the victim did not try to leave the house. N.T., pp. 26-27.

When a neighbor came to the door they would not answer the door. N.T., p. 27.

At one point during the evening, one of the men, Owe, left the apartment to obtain drugs. Appellant stayed with the victim. The victim did not try to leave because he was not wearing clothes and he was scared. N.T., pp. 27-28.

Around 8:30 a.m., the two men took the victim outside in back of the apartment to smoke marijuana. The victim testified he did not try to run away because he

believed Megan had called the police. N.T., p. 28.²

Around 10.00 a.m., the police came to the apartment. The victim was lying on a recliner chair. Owe was on the couch. Low was sitting on the steps when the police arrived Owe went down to the basement. The police came in with guns ordering everyone to freeze. N.T., p. 29. The perpetrators were then taken into custody.

The victim identified Commonwealth Exhibit 2 as the kitchen knife which was obtained from a kitchen drawer. This knife was brandished by both Owe and Appellant. N.T., p. 30. Appellant also threatened him with the other objects they had, with the exception of the pocket knife. N.T., p. 31. Both men threatened him with a kitchen knife and a steak knife. N.T., p. 32.

During the incident, the two men had a piece of paper which appeared to be a checklist of things to do during the robbery. N.T., p. 33. The victim identified Commonwealth Exhibit 6, as the checklist used during the robbery.

The victim described how he managed to send text messages to Megan asking her to call the police. N.T., p. 37. He testified he acted like the phone was in voice mail and kept trying to call her back. N.T., p. 57. He did not try to run from the perpetrators when they went outside in the morning because he had already text messaged Megan to call the police. He also was afraid he would be harmed if he ran. N.T., p. 37. The victim was in fear throughout the entire ordeal. N.T., p. 38.

The victim also testified that when he told Appellant and co-defendant that Megan could bring additional money for them, they wrote a note recording how they would

² The victim's testimony on cross-examination was contradictory in this area. On cross-examination, the victim admitted while he was outside with the perpetrators smoking he talked to the neighbor Alisha, and he told her he did not want her to call the police. N.T., p. 56. Omar Rose stood next to him when he talked to Alisha. N.T., p.

split this additional money. N.T., p. 57.

The Commonwealth provided corroboration of Donnie Rockeymore's testimony with other witness.

Donna Welch, the mother of Megan Welch, testified for the Commonwealth. She accompanied Megan on the trip to Allentown to attend a graduation ceremony for her oldest daughter on July 28. Megan had left her cell phone in Williamsport. Megan started to get telephone calls from the victim in Williamsport on her mother's cell phone N.T., p. 73. The calls began around midnight and Donnie was asking Megan to bring the money. N.T. p. 74. Megan indicated she didn't have any money. Finally, not understanding what was going on, Megan turned off the cell phone. N.T., p. 74.

Donna Welch woke up at 3:00 a.m. and Donnie called her cell phone. He again asked Megan to bring the money. At that time, she shut the phone off again.

Mrs. Welch got up at 6:00 a.m. Her oldest daughter told her Donnie called her cell phone. Mrs. Welch then began to wonder if someone was holding Mr. Rockeymore hostage, so they contacted the police. N.T., p. 75.

The Commonwealth attorney then had Mrs. Welch check her phone for any text messages, which might have been on the phone during that time. There was a text message on July 29, 2006 at 3:42 a.m. from phone number 1-570 500 0712, which said, "call the cops." N.T., p. 79. The phone number the call came from was Megan's phone, which was left in Williamsport.

Megan Welch was also called as a witness. She confirmed she left for

Allentown on July 28 and left Donnie Rockeymore at her apartment. Mr. Rockeymore is her son's father's cousin. N.T., p. 84. Beginning at about 11:30 p.m., her cell phone, which was left in the apartment started to make calls to her mother's cell phone and her sister's cell phone. N.T., p. 85. When she talked to the Mr. Rockeymore he said she had his \$1,300, and he needed it back because he wanted to go home. She did not know anything about this money. She got several calls from him about this money.

About 2:30 – 3:00 a.m., she turned off her mother's cell phone. She got up around 6:00 a.m. when her sister came in and her sister told her Donnie was making the same calls to her. She turned her mother's cell phone on at that time and called Donnie back. N.T., p. 87. Donnie kept switching stories, but he kept asking for money. He said his brother was in jail. N.T., p. 87. She then called Donnie's cell phone and Donnie whispered into the phone to call the police. N.T., p. 87. She then asked him if everything was okay and he said yeah. She then called the Allentown police. The Allentown police connected her to the Williamsport police. N.T., p. 87.

Megan gave the Williamsport police permission to go to her apartment. N.T., p. 88. Before she called the police she called one of her neighbors and asked her to go to her apartment. Her neighbor told her she went to the apartment and knocked on the door but no one answered. Megan told her to call Donnie and tell him she's having a problem with her car and needed it to go to work. The neighbor told Megan she talked to Donnie on the phone and he said he could not come out. Omar, Appellant, and Donnie then came out of the house; Donnie was standing at the door. N.T., p. 88.

Megan listened in on the phone conversation with her neighbor and Megan talked to Omar on the phone. N.T., p. 90. Omar told her everything was all right. N.T., p.

90.

Megan described Mr. Rockeymore in her phone conversation with her as acting “scared.” N.T., p. 95. He would pause after a word and say do you have my money. She thought he was in trouble. N.T., p. 96.

Chief Gary Whiteman, a patrol corporal in July 2006, responded to Ms. Welch’s home on July 29, 2006. At around 9:00 a.m., dispatch told them they had a caller from Allentown who thought there was a hostage situation. N.T., p. 102. He talked to the female caller who explained the situation to him. He obtained a key to the apartment from the housing authority.

Four officers made the entry into the house. As they entered, Chief Whiteman and Officer Peacock encountered unknown subjects to the left and right. N.T., p. 105. They commanded the subjects to the floor. One of the men was Donnie Rockeymore; the other individual identified himself as Calvin Williams. N.T., p. 108. They then found a third man, Omar Rose, in the basement hiding behind the furnace. N.T., p. 118. The subject in the basement had a kitchen knife or serrated steak knife. N.T., pp. 106, 118.

After Officer Peacock took control of Appellant and Mr. Rockeymore, Mr. Rockeymore in a whisper asked to talk with the officer. N.T., p. 125. Officer Peacock took Mr. Rockeymore into the kitchen where he told the officer he had been a hostage. N.T., p. 125. Officer Peacock took Mr. Rockeymore to City Hall where he gave a detailed statement. Mr. Rockeymore described the weapons used by the perpetrators. As a result, the police located the weapons other than the pocket knife in the apartment. N.T., p. 127. The pocket knife, allegedly held by Omar Rose, was found about five (5) days later by Megan Welch. N.T., p. 128. A search of Appellant’s person revealed several denominations of currency

consistent with the money taken from Mr. Rockeymore. N.T., pp. 129-130.

The officer also found three (3) sheets of paper on the person of Omar Rose. Commonwealth Exhibit 1 was the script of what Mr. Rockeymore was to read to Megan Welch when he talked to her on the telephone. N.T., pp. 132-133. Commonwealth Exhibit 6, appeared to be a checklist of thing to do in the crime. The list contained times and instructions such as take his money, phones, sneakers, etc. The items on the list had check marks beside them. N.T., p. 133. Commonwealth Exhibit 10 contained a breakdown of the \$260 taken from Mr. Rockeymore and the \$1,350 the perpetrators hoped to obtain and it divided the proceeds equally between the perpetrators. N.T., p. 135.

Appellant was initially charged by the police under the name Calvin Williams, which was the name he provided. At arraignment he admitted to police his correct name was Ricky McClam. N.T. p. 132.

Finally, Officer Peacock testified that when he first found Mr. Rockeymore in Ms. Welch's apartment, he observed he had physical injuries to his face. His face was swollen and one of his eyes was visibly injured. N.T., p. 132.

At the end of the Commonwealth's case, Appellant decided not to testify. The Court did a colloquy with Appellant to insure he understood his rights in regard to whether or not he would testify as a witness in the case. N.T., pp. 176-180.

Issues Raised in Matters Complained of on Appeal

First, Appellant contends that the evidence was insufficient to support the jury verdict of guilty for the offense of unlawful restraint, 18 Pa.C.S.A. §2902. In reviewing 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). The Court is satisfied in viewing the evidence in a light most favorable to the Commonwealth as the verdict winner, that ample evidence supports this conviction.

A person commits the crime of unlawful restraint if he “restrains another person unlawfully in circumstances exposing him to risk of serious bodily injury.” 18 Pa.C.S.A. 2902(a)(1); see also Commonwealth v. Shaffer, 763 A.2d 411, 413 (Pa.Super. 2000). Mr. Rockeymore testified that he was beaten by Appellant and Omar Rose. They took his money. They took his pants off. They threatened him with various knives and a staple gun. They demanded he obtain more money to provide to them. They held him against his will all night and into the next morning trying to obtain additional monies. The display of the knives and the threats explicitly and impliedly conveyed by Appellant and his co-defendant exposed Mr. Rockeymore to a risk of severe bodily injury, as required for the crime of unlawful restraint.

Next, Appellant contends the convictions for robbery, unlawful restraint, and theft were against the weight of the evidence. 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. Unlike a sufficiency claim, the trial court is under no obligation to view the evidence in the light most favorable to the Commonwealth. Similarly, 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 ignore them or give them equal weight with all the facts is to deny justice. Id. The jury's verdict in this case did not shock the court's sense of justice. Although there may have been some minor inconsistencies or credibility issues in the Commonwealth's evidence, credibility is within the province of the jury. Furthermore, the evidence in this case was not tenuous, vague or uncertain. The victim's testimony was corroborated by: (1) the three pieces of paper found on the perpetrators regarding the checklist of how to commit the crime, how the money was going to be split, and what the victim was supposed to say to Megan when he called her; (2) the kitchen knife found on Owe when the police discovered him hiding in the basement; and (3) the denominations of currency found on the perpetrators.

The final issue raised by Appellant is whether the Court erred in imposing the deadly weapon possessed enhancement when the Court sentenced Appellant for the offense of robbery. 18 Pa.C.S.A. §3701.

The Court is at a disadvantage in speaking to this issue because it does not have a transcript of the sentencing proceeding. The Court believes this is the most tenable issue raised by Appellant.

Unquestionably, the evidence presented by the victim established that Appellant and his co-defendant, Mr. Rose, throughout much of the evening possessed knives. Although the evidence shows that the weapons were possessed by Appellant after the initial

forcible robbery of the \$260 from the victim, the evidence also shows that Appellant was not satisfied with this amount of money and that the weapons were used in an effort to persuade the victim to obtain additional monies. Appellant and his co-defendant even drew up a paper, Commonwealth Exhibit 10, with the amount of monies, which they believed the victim would produce and how they would have split up the anticipated additional \$1,350, which they wanted the victim to obtain.

Thus, it is clear that the robbery did not end with the taking of the initial \$260, but that it was continuing with the goal of increasing the money obtained by Appellant and his accomplice. Since a knife was possessed by Appellant during this process, the Court found the deadly weapon possessed sentencing enhancement applicable to this case. This escalation of the sentencing guidelines was certainly consistent with the continuation of the robbery process and the heightened seriousness of the crime through the use of the deadly weapon.

Accordingly, the Court believes that no error was made at trial or sentencing.

DATE: _____

By The Court,

Kenneth D. Brown, P. J.

cc: Robert Ferrell, Esquire (ADA)
William Miele, Esquire (PD)
Work File
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)