IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-212-2003**
vs.	**:**	**CRIMINAL**
	:	
BENJAMIN BROWN,	**:**	**Order re Defendant's**
Defendant	**:**	**Post-Sentence Motion**

O R D E R

AND NOW, this ____ day of June 2009, the Court DENIES Defendant's Post-Sentence Motion without hearing or argument. The motion raises two issues: (1) the evidence was insufficient to support the verdict; and (2) the verdict was against the weight to the evidence. The relevant facts follow.

In mid-August 2002, Kevin Skelly, John Damico, and Justin Wicke-Coamey moved into a row house located at 1068 Vine Avenue in the City of Williamsport. All three individuals were students in the auto body/collision repair major at the Pennsylvania College of Technology (Penn College).

On September 5, 2002, Skelly, Damico and Wicke-Coamey went to bed around midnight, because they had an early class the next morning. Skelly routinely locked the doors when everyone was in for the night, as his bedroom was on the first floor. Since it was still fairly warm out, however, they left the living room window open approximately four inches. When they awoke the next morning, the living room window and all the doors were wide open and their stereo, backpacks, numerous CDs, a Play Station II game system and games were missing, so they called the police. None of the doors showed any signs of forced entry; however, one of the back doors locked only from the inside with a padlock that routinely had the key in it. This lock was missing.

The police lifted latent fingerprints from the living room window and an

empty bottle that had been sitting on the stereo speakers on the window sill. The fingerprints from the window matched Defendant's right middle and ring fingers. Although Defendant was in the apartment about a week or so before September 5, 2002, Mr. Wicke-Coamey testified that Defendant was only in the residence for a few minutes and he wasn't near the window at all. N.T., at pp. 97, 99-100, 107, 117 and 125.

As part of their investigation, the police spoke to neighbors, including Athan Spanos, who resided at 1062 Vine Avenue. Mr. Spanos testified that about 12:30 a.m. on the night in question he observed Defendant, another male and two females arrive in a dark purplish car. Everyone exited the vehicle. Defendant approached Mr. Spanos as asked if there was any partying. Mr. Spanos said no, not tonight. During this time, the other male walked down the sidewalk and around toward the back alley, and the ladies were leaning against the car. After speaking with Mr. Spanos, Defendant walked down past the other row houses and stopped at 1068 Vine Avenue. He did not knock on the door; he just walked in. In his preliminary hearing testimony, Mr. Spanos said he did not see Defendant leave 1068 Vine Avenue. In his trial testimony, however, he indicated that he saw Defendant walk out of 1068 Vine Avenue about five or ten minutes after he entered and get into the driver's seat of the vehicle. The females were already in the car, and Defendant drove away. Mr. Spanos did not see Defendant take anything from the residence, and he did not see the other male again after he walked around back toward the alley.

Mr. Spanos gave a description of Defendant to the police. The tenants of 1068 Vine Avenue said the description sounded like an acquaintance known as "Benny." The police prepared a photo array, which contained Defendant's photograph without glasses and photos of several other people. The photo arrays were shown to Skelly, Damico and

Spanos. Neither Spanos nor Damico could pick Defendant out of the photo array. Spanos noted that he had only seen Defendant one time and he was wearing glasses and a hat. Skelly pointed to Defendant's photo and indicated that the eyes looked right, but he couldn't say for sure it was Benny. At trial, the witnesses were shown a photograph of Defendant wearing glasses (Commonwealth's Exhibit 13) and indicated they could identify him from that picture.

Defendant contends the evidence was insufficient to support Defendant's conviction for criminal trespass. In reviewing the sufficiency of 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***, 582 Pa. 52, 60, 868 A.2d 431, 435 (Pa. 2005); ***Commonwealth v. Murphy***, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004).

The jury only convicted Defendant of criminal trespass; it acquitted him of burglary, theft and receiving stolen property. To establish criminal trespass in this case, the Commonwealth had to prove the following three elements: (1) the defendant entered the apartment at 1068 Vine Avenue; (2) the defendant knew he did not have permission or lawful authority to enter that apartment; and (3) 1068 Vine Avenue was a building or occupied structure. Pa.SSJI (Crim) §15.3503A; see also ***Commonwealth v. Pellechia***, 2007 PA Super. 150, 925 A.2d 848, 851-52 (Pa.Super. 2007)(two primary elements of criminal trespass include (1) knowledge of lack of privilege (2) to enter a building).

The Court finds the Commonwealth presented sufficient evidence to prove each of these elements. There was no issue that the apartment met the definition of an

occupied structure, which is defined as "[a]ny structure, vehicle, or place adapted for overnight accommodation of persons or for carrying on business therein, whether or not a person is actually present." 18 Pa.C.S.A. §3501. Mr. Spanos testified he saw Defendant enter 1068 Vine Avenue. In addition, Defendant's fingerprints were found on the living room window inside the apartment. Although Defendant had been in the apartment approximately a week earlier, Mr. Wicke-Coamey testified Defendant was not anywhere near that window. All of the occupants of 1068 Vine Avenue testified they did not give Defendant permission to enter their apartment. In addition to this direct testimony that Defendant did not have permission to enter the apartment, the circumstances also support the inference that Defendant knew he did not have permission to enter. Defendant entered the apartment in the middle of the night when the lights were off and the occupants were in bed asleep. The Court believes this evidence is sufficient for the Commonwealth to meet each element of the offense of criminal trespass.

Defendant also asserts the verdict was against the weight of the evidence. Again, 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. ***Ibid***. at 806. The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. ***Ibid***. The issue is not whether there was sufficient 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. ***Ibid***.

The jury's verdict did not shock the court's sense of justice. The Court found the jury did a superb job in this case. The jury, unlike Defendant in his current motion, was able to look at the elements of each offense separately. For the offenses where Defendant either had to have taken the missing items of property from the apartment or entered the apartment with the intent to do so, the jury acquitted Defendant. For the criminal trespass charge, however, the fact the stolen items were never discovered and no one saw Defendant in possession of the items was irrelevant. Instead, the issue was whether Defendant entered the apartment knowing his was not licensed or privileged to do so. The Commonwealth presented ample evidence to show Defendant entered the victims' apartment at approximately 12:30 a.m. on September 6, 2002, without permission or privilege.

Defendant seems to argue that because he was permitted to be in the apartment earlier, the jury could not find Defendant knew he was not licensed or privileged to enter the apartment on September 6. This argument is ludicrous. No one ever gave Defendant permission to be in the apartment at 1068 Vine Avenue. About a week earlier the door was open and Defendant just walked in, stayed for a few minutes and walked back out. N.T., at pp. 97-98, 116. Moreover, the circumstances were entirely different. The prior occasion when Defendant was in the apartment, the door was open, the occupants were awake, and they were hanging out with friends playing video games. On September 6, 2002, it was the middle of the night, the doors were closed, the lights were off and the occupants were asleep in bed. Simply because the occupants did not throw Defendant out of the apartment on the prior occasion does not give Defendant permission, privilege, or authority to enter their apartment anytime day or night.

By The Court,

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Kenneth D. Brown, P.J.

cc: Christian Lovecchio, Esquire
Kenneth Osokow, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)