IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	CR-1792-2012
	:	OTN: T 238428-1
v.	:	
	:	1660 MDA 2014
AARON J. MORRISON,	:	
Defendant	:	CRIMINAL APPEAL

O P I N I O N A N D O R D E R

Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This Court issues the following Opinion and Order pursuant to Pennsylvania Rule of Appellate Procedure 1925(a). This appeal follows a jury verdict entered on February 26, 2014 and the imposition of sentence upon Aaron J. Morrison on May 21, 2014.[1] On February 26, 2014, a jury found Mr. Morrison guilty of kidnapping, false imprisonment, terroristic threats – threat of violent crime, and simple assault that occurred on September 26, 2012.[2] In his concise statement of matters complained of on appeal, Defendant raises six errors of the Trial Court as follows.

1. The Honorable Court erred when it denied the motion to suppress the incriminating statements as fruit of an unlawful arrest when the defendant was placed in handcuffs at gunpoint and was not given proper Miranda warnings.
2. The Honorable Court erred when it denied the motion to suppress the incriminating statements made at the police station after officers failed to renew the Miranda warnings.
3. The Honorable Court erred when it denied the motion for a new trial due to the failure of the Commonwealth to present sufficient evidence regarding the charge of kidnapping, namely that Appellant did not unlawfully remove complainant for a substantial distance and did not intend to inflict bodily injury or terrorize the

[1] The Order imposing sentence was filed May 28, 2014. A post-sentence motion was filed. On June 27, 2014, the Court granted Defendant's motion to rule upon the briefs alone and to set the deadline for filing briefs after the lodging of transcripts. No briefs were filed and the post-sentence motion was denied by operation of law and Order of Court dated September 19, 2014.

[2] 18 Pa. C.S. § 2901(a)(3) (felony 1); 18 Pa. C.S. § 2903 (misdemeanor 2), 18 Pa. C.S. § 2706(A) (misdemeanor 1); 18 Pa. C.S. § 2701 (a)(3) (misdemeanor 2). Immediately following the jury verdict, the Court found Mr. Morrison guilty of the summary offense of harassment – strike, shove, kick (physical contact), under 18 Pa..C.S. §2709(A)(1).

victim when he made no threats or aggressive physical movements toward the complainant.

4. The Honorable Court erred in denying the motion for mistrial for a violation of Pa. R. Evid. § 404(b), when complainant testified on direct concerning prior bad acts by Appellant, namely that she testified that had threated to "slit her throat" on prior occasions.[sic]
5. The Honorable Court erred in allowing the Commonwealth to cross-examine Appellant concerning irrelevant and prejudicial cellular text messages in violation of Pa. R. Evid. § 403.
6. The Honorable Court erred in granting the Commonwealth's motion in limine that prevented Appellant from introducing relevant evidence concerning the credibility of the complainant, that evidence concerns criminal proceedings against an individual where complainant was allegedly a victim.

This Court respectfully requests that its rulings be affirmed and the jury verdict be upheld. In support of affirmance, this Court relies upon its reasoning placed upon the record and provided in pertinent Orders. In addition, this Court respectfully submits the following background and discussion in further support of affirmance of its pre-trial and trial rulings and in support of upholding the jury verdict.

1. & 2. Incriminating Statements Made at the Scene and at the Police Station.

After argument held on May 17, 2013, this Court denied Defendant's motion to suppress incriminating statements the Defendant made at the scene and at the police station. This Court respectfully relies upon the reasons for this Court's denial of the suppression motions which can be found in its Opinion and Order entered June 7, 2013.

3. Sufficient Evidence of Kidnapping

This Court believes that there was sufficient evidence in support of the jury's verdict finding the Defendant guilty of kidnapping. The scope of review on appeal for sufficiency of the

evidence "is limited to considering the evidence of record, and all reasonable inferences arising therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner." Commonwealth v. Rushing, 99 A.3d 416, 420-421 (Pa. 2014), *citing*, Commonwealth v. Diamond, 83 A.3d 119, 126 (Pa. 2013); Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 478 (Pa. 2004); Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006); Commonwealth v. Chapney, 832 A.2d 403, 408 (Pa. 2003). The standard of review for sufficiency is well settled and provided in case-law as follows.

> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. Commonwealth v. Velez, 51 A.3d 260, 263 (Pa. Super. 2012), *quoting*, Commonwealth v. Mobley, 14 A.3d 887, 889-890 (Pa. Super. 2011).

With this standard in mind, this Court must review the sufficiency of the evidence with respect to the statutory requirement for kidnapping. The statute provides the following.

> "[A] person 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 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. § 2901

Instantly, the Defendant contends that there was insufficient evidence that the Defendant unlawfully removed the victim a *substantial distance* and/or that the Defendant *intended* to inflict bodily injury or terrorize the victim. This Court disagrees. The following discusses the sufficiency with respect to removing the victim a substantial distance followed by a discussion of the Defendant's intent.

a. Substantial Distance

Our Pennsylvania Supreme Court specifically analyzed the meaning of "substantial distance" under the kidnapping statute in Commonwealth v. Malloy, 856 A.2d 767, 780 (Pa. 2004) and determined the following.

> For purposes of the kidnapping statute, a substantial distance is not limited to a defined linear distance or a certain time period. *See* Commonwealth v. Hughes, 264 Pa. Super. 118, 399 A.2d 694, 696 (Pa. Super. 1979). The determination of whether the victim was moved a substantial distance is evaluated "under the circumstances" of the incident. *See* Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367, 1382 (Pa. 1991), *cert. denied*, 502 U.S 959, 112 S. Ct. 422, 116 L. Ed. 2d 442 (1991). Further, "the guilt of an abductor cannot depend upon the fortuity of the distance he has transported his victim nor the length of time elapsed. . . ." Hughes, 399 A.2d at 696. Commonwealth v. Malloy, 856 A.2d 767, 780 (Pa. 2004).

In Malloy, supra, the victim was forced into a car and "transported approximately 10-15 minutes away to a secluded lot." The Court concluded that "[t]he distance that the victim was transported during that 10-15 minute drive to the empty lot was a substantial distance for purposes of the kidnapping statute." Malloy, 856 A.2d at 780, *citing*, Hughes, 399 A.2d at 698. In Huges, supra, the Court concluded that the victim was transported a substantial distance where she was moved approximately 2 miles to an isolated wooded area and the movement was not incidental to another crime. Hughes, 399 A.2d at 698. The Superior Court noted that "two miles is a substantial enough distance to place the victim in a completely different environmental setting removed from the security of familiar surroundings."

The present case is remarkably similar to Malloy, supra, with respect to the removal and transportation of the victim. In the present case, the Defendant physically forced the victim into the back seat of his car against her will and physical resistance. N.T., 2/25/14, at 25:11-19. Defendant transported the victim about 15 minutes to a remote dead end road in a secluded wooded area. Id. at 28:19, 22; 35: 20-23. In addition, the Defendant transported the victim a

greater distance in the present case (5.2 miles) than the 2 miles that the Court concluded was a substantial distance in Huges. Id. at 54:10. Moreover, the victim in the present case was removed from the security of familiar surroundings and from the aid of friends and police. The Defendant maintained control over the victim's cell phone and directed her calls. Id. at 28:3-5; 29:3, 20; 30:9-11. The child safety lock was activated on the passenger side rear door. Id. at 27: 12-19; 62:25; 63:1-4; 20-23. In sum, the Court believes this evidence was more than sufficient for a jury to find that defendant removed the victim a substantial distance under the statute or unlawfully confined the victim "for a substantial period in a place of isolation" as required under the kidnapping statute.[3]

b. Intent

Defendant contends that there was insufficient evidence of Defendant's intent to inflict bodily injury or terrorize the victim. Defendant further asserts that he made no threats or aggressive physical movements toward the victim. This Court does not agree. When viewing the direct and circumstantial evidence of record, and all reasonable inferences in the light most favorable to the Commonwealth as the verdict winner, the evidence was sufficient for a jury to find that the Defendant intended to terrorize or inflict bodily injury upon the victim and did in fact threaten and terrorize the victim.

The background leading up to the kidnapping provides evidence of the Defendant's intent. The victim attempted to end an intimate relationship between the Defendant and the victim. N.T., 2/25/14, at 19:23. On the morning of the kidnapping, September 26, 2012, the Defendant called the victim and became angry when the victim ended the call to get ready for work. Id. at

[3] The Defendant does not appear to challenge the sufficiency of evidence with respect to the Defendant having confined the victim for a substantial period of time in a place of isolation. The jury was properly instructed as to this means of satisfying the first element of kidnapping and the Court believes there was sufficient evidence of this element. *See*, jury instruction N.T., 2/26/14, at 17.

20:7-23. After the victim hung up with the Defendant, the Defendant continuously called the victim, sent her text messages, and left her voice messages. Id. at 21:3-4. The victim observed that her phone showed approximately 100 missed calls from Defendant followed by numerous messages. Id. at 21:13-15. In fact, the Commonwealth's expert established that 189 phone calls were made from the Defendant's phone to the victim's phone from 8:15 a.m. until 10:35 a.m. Id. at 105-106.

During the period when the 189 phone calls were made, the Defendant also sent threatening text messages to the victim. Defendant threatened to show up at the victim's work if the victim did not pick up the phone. Id. at 23: 1-3. After calling her "evil, crazy and extremely selfish" (Id. at 23:7), the Defendant threatened to report the victim to children and youth, alleging that she was unfit, using drugs, and had unregistered handguns, which were all denied by the victim. Defendant also threatened to kick in the victim's apartment door. Defendant further threatened to put the victim in the back of her car against her will and threatened that she would not show up for work. Defendant threatened that no one would hear from her. Specifically, Defendant text messaged the following to the victim.

> Getting off the exit now. Make sure your door is unlocked or would you rather me **kick** it in? Your choice. I'm right outside your apartment. Answer the phone if you don't want it **kicked in**. You may as well answer because I'm sitting outside your apartment and as soon **as you walk out I'm putting you in the back of my car and there's nothing you can say or do to change that.** You will not show up to work. **You will not show up to work.** You will not show up to pick up Jaden —or pick Jaden up from school. **No one will hear from you.** Answer the phone. Id. at 23:8-17. (emphasis added.)

Defendant further text messaged the following.

> Every missed call you get you owe me a dollar because I don't have unlimited minutes. Scratch that, **I'll take it from you once I put you in my car. You will give me your pin number and I'm going to clean out your bank account.** You have exactly five minutes until 10:00 a.m. to return my call. I promise you, you will lose your job and you

> will not like what will happen. I can not go into details but you will lose your job today, sorry, your son also and your apartment because I know the manager won't like what will happen either. Id. at 23:22-25; 24:1-5.

Defendant further threatened the victim by text: "[y]our life is now ruined because you didn't call me back." Id. at 24: 8-9. And, he threatened: "You will have a big surprise in about five minutes. Don't be late for work." Id. at 24: 17-18.

Soon after the text that warned the victim that she would have a big surprise in five minutes, the victim arrived at work and saw the Defendant's vehicle in the parking lot. Id. at 25. Next, the Defendant aggressively, physically and forcibly grabbed the victim and threw her in the back of his car against her will and her physical resistance. Id. at 25: 13-19. The Defendant yelled at the victim and told her it was her fault for not answering the phone. Id. at 2-5. Defendant told the victim that "there were knives and duct tape in his car" and that he would use them if the victim did not do what he said. Id. at 27: 3-7; 5-11. The victim called off from work, with a shaking, quivering voice. Id. at 15:20. Defendant drove away with the victim inside the vehicle. Id at 27. Defendant was headed to the victim's bank but became lost. Id. at 61; 129-130.

The Defendant arrived at a secluded location, turned his car around, backed into a weeded, wooded area and turned off the car. Id. at 28:22-23; 47:20-21. Defendant threatened that the victim was going to make Defendant do something with a knife that the Defendant was going to regret the rest of his life. Id. at 27:5-11; 60:12-18. The victim was afraid that the Defendant was going to hurt her or kill her. Id. at 99:2-3; 27: 5-11. Defendant got out of the car with a knife and held it to his throat. Id. at 29:21-23. The victim was afraid of what Defendant would do with the knife, including being afraid for herself. Id. at 47:6, 17; 43:3; 4; 95. The victim called 911 but would only whisper out of fear Defendant might hear her. Id. at

30:11; 42:13. The victim ended the 911 call when Defendant turned around and could possibly see her. Id. at 31: 8-10.

After the victim ended the 911 call, the Defendant got back in the car. Defendant got into the back seat of the car where the victim was and started yelling at the victim, asking why she had her phone. Id. at 31: 12-16. When the victim told the Defendant that she just wanted to go home, Defendant threatened the victim by stating that if she does what he says, he *may* be able to take her home." Id. at 31:13-16 (emphasis added). The victim was afraid that the Defendant might not take her home. Id. at 44:3. The victim was also afraid that she may witness the Defendant harm himself with the knife. Id. at 47:6,17; 43:3; 4; 95. The victim was crying hysterically and Defendant grabbed her face and was very close to her when the police arrived. Id. at 32:2-8. Police approached with a gun pointed at them. Id.

The Court believes there was sufficient evidence for the jury to infer that the Defendant intended to terrorize the victim or inflict bodily injury upon her. Defendant's verbal threats during the kidnapping – that he had knives and duct tape in the car and would use them if she did not do what he said, that he may not take her home, that no one would hear from her, that her life was ruined, that he would do something that he would regret (such as harm himself or harm her) - were amplified by the context of earlier text messages. Defendant's threat that he "may" take the victim home was even more terrorizing because Defendant had already made good on his threat to pick her up and throw her in his car against her will. The Defendant had also made good on his threat that the victim would not show up for work that day if she failed to pick up the phone. In light of this evidence, the Court respectfully believes that there was more than sufficient evidence that the Defendant intended to terrorize and did in fact terrorize the victim.

4. Immediate Curative Instruction Was Sufficient to Avoid Mistrial.

Defendant contends that the Court erred in denying his motion for mistrial when the victim testified on direct examination that the Defendant "made threats previously about slitting my [her] throat" to explain why she was afraid that the Defendant might use the knife she saw to hurt her. N.T., 2/25/14, at 32:12-23. The exchange of direct examination of the victim conducted by the Commonwealth at trial occurred as follows.

> Q. Now you said that the defendant made it clear to you that he had knives and duct tape?
>
> A. Yes.
>
> Q. Did he tell you how many knives?
>
> A. Um, I can't remember if he gave me a number, he just said he had knives.
>
> Q. Were you scared that Mr. Morrison would use that knife on you, the one you saw?
>
> A. Yes.
>
> Q. Why were you scared?
>
> A. He has made threats previously about slitting my throat.

N.T., 2/25/14, at 32:12-23.

Immediately, Defense Counsel objected. At sidebar, Defense Counsel objected to the evidence of prior bad acts under 404(b), citing a lack of notice or a motion in limine by the Commonwealth. Counsel moved for a mistrial. Id. at. 33: 5-8. The Commonwealth represented to the Court that the victim's answer was unanticipated and that the Commonwealth had not intended to present such testimony on direct. Id. at 33:9-12. No pre-trial notice of the evidence was provided because the Commonwealth only intended to use the evidence for rebuttal. Id. at 34: 2; 34:8-12. Upon consideration of these arguments, the Court denied the motion for mistrial and opted to provide an immediate curative instruction to the jury to disregard the evidence. Id. at 34: 23; 35.

It is well-settled that the decision to declare a mistrial rests within the discretion of the trial court, subject to review for an abuse of such discretion. Commonwealth v. Chamberlain, 30 A.3d 381, 422 (Pa. 2011); Commonwealth v. Wright, 961 A.2d 119, 142 (Pa. 2008); Commonwealth v. Simpson, 754 A.2d 1264, 1272 (Pa. 2000). In Wright, our Pennsylvania Supreme Court stated that "[a] trial court may grant a mistrial only "where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." Wright, 961 A.2d at 142, *quoting*, Simpson, 754 A.2d at 1272. Furthermore, the Court noted that "[a] mistrial is not necessary where cautionary instructions are adequate to overcome prejudice." Wright, 961 A.2d at 142, *citing*, Commonwealth v. Spotz, 552 Pa. 499, 716 A.2d 580, 593 (Pa. 1998); Commonwealth v. Lawson, 519 Pa. 175, 546 A.2d 589, 594 (Pa. 1988). In general, "the law presumes that the jury will follow the instructions of the court." Chamberlain, 30 A.3d at 422, *citing* Commonwealth v. Rega, 593 Pa. 659, 933 A.2d 997, 1016 (Pa. 2007); Commonwealth v. Brown, 567 Pa. 272, 786 A.2d 961, 971 (Pa. 2001).

When determining whether to grant a mistrial, the trial court must consider "whether the improper remark was intentionally elicited by the Commonwealth, whether the answer was responsive to the question posed, whether the Commonwealth exploited the reference, and whether the curative instruction was appropriate" Commonwealth v. Manley, 985 A.2d 256, 266-267 (Pa. Super. 2009); *see also*, Commonwealth v. Haag, 562 A.2d 289, 295 (Pa. 1989); Commonwealth v. Phillips, 580 A.2d 840, 846 (Pa. Super. 1990). In the present case, after considering the arguments made by Counsel, the Court provided the reason for its denial of a mistrial on the record.

> The Court believes it is an inadvertent comment by the victim and not planned to be brought out by the Commonwealth. The court will strike that testimony, however, and

give a cautionary instruction at this time. The Court would also be willing to give at the time of the final charge any additional instruction that might be suggested by the Defense. N.T., 2/25/14, at 34: 22-25; 35:1-4.

Furthermore, immediately following its ruling, the Court gave the following cautionary instruction.

> Folks, there was some testimony that you just heard from Miss Trimble about a prior threat. That is not proper evidence in the context of this case as presented so I'm striking that last question and answer from the record and I'm instructing that you should disregard that and give no weight or credibility to that particular statement. N.T., 2/25/14, at 35:7-14.

This Court believe the instruction to disregard the evidence was sufficient to avoid a mistrial where the Commonwealth represented that it did not intend to elicit the testimony and did not exploit the reference. The Court also does not believe the evidence is of such a nature as to prevent the jury from weighing and rendering a proper verdict as the evidence was solely the testimony of the victim.[4]

5. Allowance of Cross-Examination of the Criminal Defendant about Text Messages He Sent to the Victim was Within Discretion

The Defendant contends that the Court erred in allowing him to be cross-examined about cellular text messages which he sent to the victim about eleven days prior to the kidnapping, which he believes are irrelevant and prejudicial. The extent and subject matter of cross-examination are within the discretion of the trial court. Commonwealth v. Lane, 424 A.2d 1325 (Pa. 1981), *citing*, Commonwealth v. Greene, 366 A.2d 234, 236 (1976); *see also,* Commonwealth v. Robinsion, 249 A.2d 536 (Pa. 1969)(citations omitted) "Great latitude is

[4] The Court notes that once the Defendant testified on his own behalf about his intent and the nature of his relationship with the victim, the evidence would likely have been admissible to rebut his testimony. At the time the Court ruled on admissibility and gave the curative instruction it was unknown whether the Defendant would testify.

afforded the commonwealth on its cross-examination of a defendant in a criminal case who takes the stand in his own behalf." Commonwealth v. Albert, 182 A.2d 77 (Pa. Super. 1962); Commonwealth v. Farley, 77 A.2d 881, 886 (Pa. Super. 1951); Commonwealth v. Halleron, 63 A.2d 140, 143 (Pa. Super. 1949)

The Court overruled Defense Counsel's objection, and permitted the Commonwealth to cross-examine the Defendant about text messages that the Defendant sent to the victim on September 15 and September 16, 2012, approximately ten and eleven days prior to the kidnapping. N.T., 2/25/14, at 142.[5] This Court does not believe that the probative value of such evidence was outweighed by a danger of unfair prejudice. The Commonwealth cross-examined the Defendant about those text messages for rebuttal and credibility. On direct examination, the Defendant testified that he was the one who ended the relationship with the victim and that the victim was suicidal as a result of his ending the relationship with her. The Defendant testified that all of the threatening text messages on September 26, 2012 were meant simply to get a response from the victim because he was worried about her harming herself. By contrast, in his text messages to the victim on September 15 and 16, 2012, the Defendant is seeking another chance from the victim and indicating that he is scheduling anger management and therapy for himself. Id. at 145-147. Defendant states that he is heartbroken and sad. Id. at 147. This Court believes that the text messages were a proper subject of cross-examination where the Defendant opened the door to his credibility after testifying on direct examination about his intent toward the victim and his relationship with the victim. Id. at 118:14-15; 123: 20-23. 124:16-17; 125:1-7; 126:6-8, 12, 24. In essence, the focus of the Defense in this case was that the victim was so

[5] Defendant does not specify the text messages at issue. However, since the Defendant testified on direct examination about what he meant by certain text messages sent to the victim, N.T., 2/25/14, at 123-127, the Court believes the Commonwealth was properly permitted to cross-examine the Defendant as to those text messages and any objection has been waived.

distraught about the Defendant ending the relationship that she was suicidal and thus the Defendant needed to send the text messages he did to get a response from her. As such, the Court believes that the text messages which suggest that in fact the victim ended the relationship and the Defendant was the one who was distraught were proper for cross-examination and not unfairly prejudicial.

6. The Court Properly Precluded Evidence that the Victim had Been Molested and Raped as a Child.

As to sixth error raised on appeal, this Court believes that trial counsel did not actually seek to admit evidence of the pending criminal proceedings which Defendant now claims was precluded in error.[6] Instead, Defense sought to offer evidence that the victim had a child at a young age, which he believed impacted on the victim's credibility. N.T., 8/23/13, at 10:3-9. Following argument on August 23, 2013, the Court issued the following evidentiary ruling.

> At trial the Defense shall make no reference to the age of the victim's child or the manner in which that child was conceived. The Court does not believe that any such information is relevant or material and is more prejudicial than relevant. See, *Trial Court Order*, dated August 23, 2013 and filed September 5, 2014.

The Court further noted its concern and intention to prevent the Defense from straying into evidence protected under the Pennsylvania's Rape Shield Law.

The Court believes that evidence of pending proceedings in which the victim in this case was a victim of child molestation and rape would be far more prejudicial than probative. Similarly, the Court believes that evidence highlighting the young age in which the victim became a mother would be far more prejudicial than probative. The Court placed a minimal limitation on the

[6] Defense counsel argued that he did not intend to offer evidence that there was a rape case pending. N.T., 8/23/13, at 8:9-10; see also at 6:8-17. To the extent that the Defendant now asserts that it was precluded from submitting evidence concerning criminal proceedings in another county in which the complainant was a victim, this Court believes that issue is waived.

admissibility of the evidence. While the specific age of the child and the manner of conception were inadmissible, the fact that the child was of school age and young enough to be picked up or taken to school was admitted. N.T. 2/26/14 at 23, 1. The Court does not believe that the exact age that the victim had a child was probative or raised issues of credibility.

For these reasons, and those provided on the record and in this Court's previous Orders referenced above, this Court respectfully requests that the verdict and sentence be affirmed.

BY THE COURT,

December 30, 2014
Date

____
Richard A. Gray, J.

cc: District Attorney's Office (NI)
Public Defender's Office (JB)
(Superior & 1)