IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 829 – 2016
	:	
vs.	:	CRIMINAL DIVISION
	:	
ANDREW TUBBS,	:	
Defendant	:	Post-Sentence Motion

OPINION AND ORDER

Before the Court is Defendant's Post-Sentence Motion, filed January 20, 2017. Argument was heard February 16, 2017, following which the court directed the preparation of a transcript of the trial and sentencing hearing. Those transcripts were completed on March 6, 2017.

Following a jury trial on October 27, 2016, Defendant was convicted of one count of theft by unlawful taking, one count of receiving stolen property and one count of theft by deception based on allegations that on April 21, 2016 he was provided with $4000 cash to buy marijuana for someone but kept the money instead. On January 12, 2017 he was sentenced to concurrent terms of one to four years' incarceration on the two theft charges; the receiving charge was determined to merge for sentencing purposes.

In the instant motion, Defendant contends the court erred in (1) granting the Commonwealth's pre-trial motion to amend the information, (2) admitting Defendant's statements to police, and (3) admitting certain text messages, that the evidence was insufficient to support the convictions, that the convictions were against the weight of the evidence, that the grading of the offenses was against the weight of the evidence, and finally, that the sentence was excessive. Each of these issues will be addressed in turn.

Motion to Amend Information

In the Information, Defendant was charged with theft by unlawful taking and receiving stolen property. Just before trial began, the Commonwealth moved to amend the Information to include a charge of theft by deception. Defendant objected on the basis that the charge contained an element not contained in the charge of theft by unlawful taking, i.e. the element of deception.

Theft by unlawful taking is defined as "unlawfully tak[ing], or exercise[ing] unlawful control over, moveable property of another with intent to deprive him thereof". 18 Pa.C.S. Section 3921. The Comment explains that "unlawfully" means that "the necessary *mens rea* must be present in order to constitute theft". Id. Theft by deception is defined as "intentionally obtain[ing] or withhold[ing] property of another by deception" and deception is defined as "create[ing] or reinforce[ing] a false impression, including false impressions as to law, value, intention or other state of mind". 18 Pa.C.S. Section 3922.

In the instant case, the victims alleged that they gave Defendant $4000 cash based on Defendant's statements that he would use the money to purchase for them a pound and a half of marijuana, in accordance with their previous request that he do so, but that he kept the money and did not provide them with the marijuana. To prove the "necessary *mens rea*" to show theft by unlawful taking in these circumstances, the Commonwealth would have to show that Defendant took the money "with intent to deprive [the victims] thereof", that is, with the intent to keep it and not return anything of value for it. To prove "deception" to show theft by deception, the Commonwealth would have to show that Defendant took the money by creating a false impression as to his intention, that is, that he took it intending not to buy marijuana but to keep it. These two elements are so

similar that the court saw no prejudice to Defendant; although defense counsel stated that he would need to prepare differently to meet the charge of "deception", the court cannot conceive of how the defense could have been any different, and counsel did not elaborate on that point, either at trial or at argument on the motion.[1]

Section 3902 of the Crimes Code allows for prosecution of one theft offense even though a different theft offense has been charged in the information, in the absence of prejudice to the defendant. Commonwealth v. Matty, 619 A.2d 1383 (Pa. Super. 1993)(an accusation of theft may be supported by evidence that it was committed in any manner that would be theft under the Crimes Code, notwithstanding the specification of a different manner in the complaint or indictment, … as long as defendant has an opportunity to respond, and is not prejudiced by lack of notice or surprise.) Having found no prejudice to Defendant, the court allowed the amendment.

Admission of Defendant's Statements to Police

At trial, the Commonwealth first introduced the testimony of one of the two alleged victims, Rachel Warburton. Ms. Warburton testified that on April 21, 2016 at about 2:30 p.m. she and a friend, Nick Aloisio, went to "meet Andy to buy weed",[2] that they met with Defendant and his friend, Jordan Probst, in Nick's car at a pizza place on Lycoming Creek Road,[3] that Nick handed Defendant

[1] Defendant's actual defense, introduced through statements he made to police following his arrest, was that he attempted to purchase the marijuana but the person from whom he attempted the purchase actually took the money from him and did not provide him with any marijuana. If believed, these facts would serve to negate findings of either of the mental states required to constitute either type of theft.
[2] N.T., October 27, 2016 at. Page 26.
[3] Id. at page 27.

$4,000 (four "wads" of $1,000 each),[4] that Nick told Defendant he wanted him to go get a pound and a half of weed for it and that Defendant said "I can get you it", [5] that Defendant and Jordan got out of the car and walked off to behind the pizza place, saying they would be right back but that they did not come back[6], that they tried to find Defendant but couldn't,[7] and that Nick later received a text message from Defendant which stated "sorry, bro, you might as well just go home. I'm going to Florida."[8] Ms. Warburton also testified that about half of the money was hers.[9]

Next, Jordan Probst testified that on April 21, 2016 he and his girlfriend went to pick up Defendant at his request, that upon picking him up he stated that he wanted to go to Lycoming Creek Road to meet Nick Aloisio, that they did so and that he and Defendant got into Nick's car and talked about getting marijuana for Nick, that Nick handed Defendant money and then they got out of the car and went back to his (Jordan's) girlfriend's car and then left and went back to his (Jordan's) house.[10] Jordan Probst also testified that Defendant stated that he was going to go to Florida,[11] that they went to a gas station where Defendant's "baby's mom" worked and Defendant gave her "a nice little chunk of money", and then they went to the mall where they "purchased a whole bunch of stuff, shoes and outfits and hats."[12]

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[4] Id.
[5] Id. at page 35.
[6] Id. at page 28.
[7] Id.
[8] Id. at page 30.
[9] Id. at page 34.
[10] Id. at page 39-40.
[11] It appears this statement was made in a phone call to Mr. Aloisio, made from Mr. Probst's phone. Id. at page 50.
[12] Id. at page 41.

The Commonwealth then called the investigating officer as a witness and, anticipating that the officer would testify to statements made by Defendant, defense counsel objected that admission of such statements would violate the *corpus delecti* rule.

The *corpus delecti* rule requires that before an accused's statements in the nature of a confession may be admitted, two elements must be shown; "the occurrence of a specific kind of injury or loss; …. in larceny, property missing" and "somebody's criminality." Commonwealth v. Amato, 24 A.2d 681, 682 (Pa. 1942).

In the instant case, Defendant argues that because Nick Aloisio, the person who handed the money to Defendant, was not at trial to testify that he did not receive any marijuana from Defendant in exchange for the money, the theft itself could not be established. This argument is without merit. Although Aloisio did not testify at trial, Ms. Warburton's testimony that Defendant never returned to their vehicle but instead sent Nick a text message saying he was going to Florida, which testimony was confirmed by Jordan Probst, as well as Jordan Probst's testimony that he went with Defendant after Defendant received the money, that Defendant gave some of the money to his "baby's mom" and spent some of it at the mall, is sufficient to support a finding of both "property missing" and "someone's criminality".

Admission of Text Messages

The Commonwealth presented the testimony of Police Officer Christopher Kriner, who interviewed Defendant in connection with his investigation of the theft which is the subject of this case. Officer Kriner testified that Defendant told

him that Nick Aloisio had requested he get him a pound and a half of marijuana, that he met with Aloisio behind the pizza place on Lycoming Creek Road where Aloisio gave him $4,000 in cash ("four stacks, $1,000 in each stack"), that he then walked over to an apartment complex behind the pizza place and made contact with a male there, that he gave the male the money "in the hopes of getting marijuana" but that the male took the money and didn't give him any marijuana. N.T., October 27, 2016 at page 69-70. When Officer Kriner asked Defendant for the name of the male, Defendant wasn't willing to provide any identifying information. Id.

In response to Officer Kriner's question of Defendant whether he had any communications with Aloisio after taking his money, Defendant told Officer Kriner that "he had text messaged him or had communication with Mr. Aloisio telling him that he burned him." Id. at page 71. When told that the officer would like to corroborate his story, Defendant "stated that there would be communication on his Facebook and in his cell phone, which he described as a black Logic Brand cell phone that would corroborate what he was saying about getting marijuana for Aloisio." Id. He then told the officer where to find the phone and provided a pass code and written consent to search the phone. Id. at page 71-72.

When the Commonwealth then attempted to introduce the content of various text messages found in Defendant's phone, defense counsel objected on the bases of failure to authenticate and hearsay. Counsel argued that unless Aloisio testified that he had sent the messages, they could not be authenticated.

He also argued that the messages themselves were hearsay since Aloisio was not in court to testify.[13]

Pennsylvania Rule of Evidence 901, "Authenticating or Identifying Evidence," provides in relevant part:

> (a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
>
> (b) Examples. The following are examples only--not a complete list-- of evidence that satisfies the requirement:
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> * * * *
>
> (4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

Pa.R.E. 901(a) & (b). Thus, evidence that cannot be authenticated directly (by testimony of a witness with knowledge) may be authenticated by circumstantial evidence under subsection (4). In the context of a communication such as a text message, "subsection (4)'s 'distinctive characteristics' may include information tending to specify an author-sender, reference to or correspondence with relevant events that precede or follow the communication in question, or any other facts or aspects of the communication that signify it to be what its proponent claims." Commonwealth v. Koch, 106 A.3d 705, 712-13 (Pa. 2014), citing Commonwealth v. Collins, 957 A.2d 237 (Pa. 2008).

[13] Based on this argument, the court believes Defendant has objected to only those messages which are purported to have been sent by Aloisio.

Here, Officer Kriner testified that Defendant had told him that he had been communicating with Aloisio on his phone and that messages on his phone would corroborate his story. The messages show they were sent by "Nick"[14] and the officer, who had been qualified as an expert in the field of narcotics investigations with a specific emphasis on cellular phone communication, testified that the name of the sender "would be a name that was put into the contacts of that cell phone". Id. at page 77. It may reasonably be assumed the name "Nick" had been entered by Defendant.

Further, the content of the messages "correspond[s] with relevant events that precede or follow the communication in question":

4/21/16	1:58 p.m. from "Blade" –	"he wants 24 onions for four G's"
4/21/16	2:32 p.m. from "Nick" –	"almost to creek"
4/21/16	3:00 p.m. from "Nick" –	"you know how much longer?"
4/21/16	3:05 p.m. from "Nick" –	"I'll give you 1000 if you give it back, man"
4/21/16	3:11 p.m. from "Nick" –	"come I'll even give you 1500. Please bro, I thought we were better than this, dude"
4/21/16	4:03 p.m. from "JoJo" –	"how did you do it – he just let you walk off with his money?"
4/21/16	4:16 p.m. from "Nick" –	"well, it's shitty, you took $4000 from me but karma will get you"[15]

[14] There were two messages sent by other people, but Defendant objected to only "anything sent from Mr. Aloisio's phone". N.T. October 27, 2016 at page 73.
[15] Commonwealth's Exhibits 7-A through 7-G

Officer Kriner testified that Defendant had told him that on that date he was staying with a male by the name of Blade Noltee and that Melissa Pratt and Jordan Probst had picked him up from Mr. Noltee's place and taken him to the pizza place on Lycoming Creek Road to meet with Nick Aloisio. Id. at page 70. This testimony, combined with the testimony from Rachel Warburton that Nick Aloisio had asked Defendant to get him a pound and a half of marijuana for $4000 and that she and Nick went to a pizza place on Lycoming Creek Road to meet Defendant for that purpose, supports a finding that the text from "Blade" is a text message from Blade Noltee relaying the request from Aloisio to Defendant that Defendant get him the marijuana, and also a finding that the text from "Nick" at 2:32 p.m. is a text message from Nick Aloisio telling Defendant he was on his way to the meeting. The remaining text messages from "Nick" are authenticated by Jordan Probst's testimony that he heard Defendant say to Aloisio that "he was heading to Florida" and "in the same conversation Nick was telling him to bring the money back and that he would give him a thousand dollars if he brought the money back." Id. at page 50.[16]

The hearsay objection is also without merit; most of the statements were not offered for the truth of the matter asserted. Although one statement arguably *was* offered for the truth of the matter ("well, it's shitty, you took $4000 from me but karma will get you"), its admission is deemed harmless error in light of the other evidence establishing the matter.

[16] The message from "JoJo" was not explained, but Defendant did not raise an objection to this message.

Sufficiency of the Evidence

In addressing a challenge to the sufficiency of the evidence, the court is to view all of the evidence admitted at trial in the light most favorable to the Commonwealth as verdict winner, and the verdict will be upheld if there is sufficient evidence to enable the fact-finder to find every element of the crimes charged beyond a reasonable doubt. Commonwealth v. Adams, 882 A.2d 496 (Pa Super. 2005).

Defendant argues that the evidence was insufficient to establish (1) a loss, to support the charge of theft by unlawful taking, (2) that the money received was stolen, to support the charge of receiving stolen property, and (3) deception, to support the charge of theft by deception. He bases all three arguments on the fact that Nick Aloisio did not testify and without his testimony, "there was no direct testimony that Mr. Aloisio did not subsequently receive any goods or services." Post-Sentence Motion at paragraphs 57, 67 and 77.

While there may have been no direct testimony from Nick Aloisio, that Mr. Aloisio did not subsequently receive any goods or services was made abundantly clear from other evidence which *was* presented. For example, Jordan Probst's testimony that he and Defendant immediately left with the money and did not purchase any marijuana, his testimony that Defendant told Aloisio that he was going to Florida with the money, his testimony that Defendant and his compatriots went shopping with the money,[17] his testimony that Defendant gave a "nice little chunk of money" to his "baby's mom", and the evidence that Defendant had $2000 in cash (held together with a rubber band) in his backpack

[17] Beside the testimony to that effect, the Commonwealth also introduced photos of a substantial amount of newly purchased merchandise in shopping bags found in the trunk of the vehicle in which Defendant and the others were

when stopped by the police.[18] This evidence was more than sufficient to enable the fact-finder to find beyond a reasonable doubt that Defendant took the money and did not provide the marijuana, with the requisite intent to deprive Aloisio and Warburton of the money.

Weight of the Evidence

A "weight of the evidence" claim contends the verdict is a product of speculation or conjecture, and requires a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice. Commonwealth v. Dougherty, 679 A.2d 779 (Pa. Super. 1996).

Defendant's argument in this regard is identical to his argument that the evidence was insufficient to support the verdict. Defendant contends that because Mr. Aloisio did not testify there was no "direct" evidence that he did not receive goods or services and thus, apparently, that Defendant acted with the requisite larcenous intent when he took the money. Again, even though the evidence did not come directly from Aloisio, the verdict was hardly a product of speculation or conjecture. All the evidence pointed to Defendant's guilt and the jury so found. The court's sense of justice was not at all shocked.

Grading of the Offenses

To the extent relevant here, the Crimes Code provides that theft constitutes a felony of the third degree if the amount involved exceeds $2,000. 18 Pa.C.S. Section 3903(a.1).

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riding when stopped, and receipts for those items showing they had been paid for in cash at about 4:30 p.m. on April 21, 2016.

[18] N.T., October 27, 2016 at page 100.

Defendant contends that grading the offenses here as felonies of the third degree is against the weight of the evidence, again focusing on the lack of testimony from Mr. Aloisio. Ms. Warburton testified that Aloisio gave Defendant $4000, but on cross-examination she said that "a good half of it" was her money.[19] Defendant argues that, if anything, only the amount stolen from Ms. Warburton has been sufficiently proven and therefore the Commonwealth has failed to show that more than $2000 was involved.

The court does not agree that only the amount stolen from Ms. Warburton has been sufficiently proven. For the reasons stated in discussing the sufficiency of the evidence, above, the court believes the weight of the evidence supports the jury's findings that the amount involved was more than $2000.

Excessiveness of Sentence

Defendant contends the sentence imposed, one to four years' incarceration, is excessive because one of the victims did not testify and the other victim stated in her testimony that she did not want to be involved. Defendant argues that the court should consider the "impact on the life of the victim" to be reduced as a result. Considering, however, that the victims were attempting to purchase marijuana, most likely for re-sale, the court cannot read too much into their reluctance. In any event, to adopt Defendant's position would be to send a message to the community that theft among drug dealers is somehow considered less offensive. This the court will not do.

Furthermore, the court considered other factors in fashioning the sentence, such as Defendant's lengthy prior record and his apparent inability to respond to

[19] Id. at page 34.

efforts at rehabilitation.[20] The pre-sentence investigation concluded that Defendant had "exhausted the efforts of the programs afforded him and continues to demonstrate lack of judgment, disregard for himself and the community."[21] Considering all of the factors, the court believes the sentence was not excessive.

ORDER

AND NOW, this day of March 2017, for the foregoing reasons, Defendant's Post-Sentence Motion is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
Robert Cronin, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

[20] Indeed, Defendant was on parole when he committed the instant offenses.
[21] N.T., January 12, 2017 at page 8.