NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TIMOTHY BRIAN PRESSLEY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1082 MDA 2012

Appeal from the Judgment of Sentence December 28, 2011
In the Court of Common Pleas of Lebanon County
Criminal Division at No(s): CP-38-CR-0000509-2011

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.: Filed: March 5, 2013

Appellant, Timothy Brian Pressley, appeals from the December 28, 2011 judgment of sentence of 304 days to 23 months' imprisonment, imposed after he was found guilty of simple assault.[1] After careful review, we affirm.

The trial court summarized the relevant facts and procedural history of this case as follows.

> On February 26-27, 2011, [Appellant] and his girlfriend, Shirley Dipillo (hereafter "Dipillo") resided together in an apartment located at 10782 Allentown Boulevard, in Jonestown. During the evening of February 26, 2011, Dipillo returned to the apartment from the home of a neighbor in an extremely

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 2701(a)(1).

intoxicated condition. She and [Appellant] had planned to go out to eat and to the movies in order to celebrate [Appellant]'s birthday and the evening was ruined by Dipillo's intoxication. The two first became involved in a verbal argument, which escalated and turned physical when [Appellant] broke a glass table and their dog began to eat the glass. At trial, Dipillo testified that she ended up with a swollen, bloody, and painful lip, but claimed that she did not remember how her injury had been inflicted. She did indicate that her lip remained swollen and painful for several days.

During the argument, the residents of the apartment next door, Brandon and Megan Beaver, were awakened by loud noises coming from Dipillo's apartment. Dipillo appeared at their apartment a short time later. Both Mr. and Mrs. Beaver noticed that Dipillo was crying and shaken up and that her lip was swollen and bloody. She informed them that [Appellant] had inflicted these injuries by head-butting and/or hitting her. Dipillo had a hammer in her possession and informed Mrs. Beaver that [Appellant] had been using it to smash up things in the apartment. Mr. Beaver called the police at Dipillo's request.

Troopers Christopher Graf and George Shimko of the Pennsylvania State Police, Jonestown Barracks, responded to the call at approximately midnight. When the troopers arrived, they observed that Dipillo was crying, shaken up and hysterical and had a swollen lip with blood on her shirt, lips and mouth area. When Dipillo was interviewed, she indicated that [Appellant] had caused her injuries when he head-butted and punched her in the mouth. She further indicated that she had pushed [Appellant] back. While the troopers were in the Beaver's [sic] apartment, Dipillo prepared a written statement regarding the incident at around 12:30 a.m. on February 27, 2011.

When the troopers went next door to the couple's apartment, [Appellant] would not answer

the door. After they were let in by Dipillo, they noticed that the apartment was a mess with debris scattered throughout various rooms. They found [Appellant] in a bedroom closet. He admitted that he made physical contact with Dipillo and had pushed her in the mouth area. Although [Appellant] indicated that Dipillo had also pushed him, he made no claim that she had been the aggressor.

At trial, Dipillo testified that she did not actually remember speaking with the police when they responded. However, she verified her handwriting and signature on the statement and agreed that she had tried to be honest at the time it was given. In the statement given to the police, Dipillo had indicated that "[Appellant] head-butted me and choked me" and had "threatened to kill me." At the time of trial, Dipillo testified that she now thought that [Appellant] might have been smacking at the dog and hit her by accident, or that he had tried to push her away after she hit him first. She insisted that she was unsure how she had sustained the lip injury.

At trial, Dipillo also acknowledged that she and [Appellant] continued to be in a relationship and that the only reason she was not currently living with him was due to restrictions resulting from these charges. She admitted that she still visited him and had spoken to him about this incident at various times over the telephone. She further admitted that she was not testifying willingly and that she was desirous of having [Appellant] return to their home. She noted that she was having financial problems as she had several health issues for which she was on medication and unable to work. She acknowledged that she wanted [Appellant] to return to the home in order to pay the household expenses. Trooper Shimko also testified that Dipillo had contacted him in an attempt to have the charges dismissed. He explained that Dipillo did not contend that the incident did not occur, but had sought dismissal due to the fact that [Appellant] was the "breadwinner"

> and she was unable to pay the household bills without him.
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> At trial, the Commonwealth was permitted to play excerpts from three telephone conversations between Dipillo and [Appellant] which had been recorded while [Appellant] was in prison. The [trial c]ourt first examined transcripts of these calls and ascertained that they included no references to prison and that the conversations were relevant to this incident. The tapes were then played for the jury. During these discussions with [Appellant] regarding this incident, Dipillo asked "[w]hy do you gotta keep hitting me?" and referred to [Appellant] having threatened and choked her during their argument. The two also discussed Dipillo's written statement and her refusing to testify at the pending trial.

Trial Court Opinion, 5/7/12, at 2-6. On November 8, 2011, the jury found Appellant guilty of simple assault as a second-degree misdemeanor, but acquitted him of simple assault as a third-degree misdemeanor.[2] The trial court also found Appellant not guilty of harassment as a summary offense.[3] On December 28, 2011, the trial court imposed a sentence of 304 days to 23 months' imprisonment and Appellant was granted immediate parole. On January 9, 2012, Appellant filed a timely post-sentence motion, arguing among other things, that the jury's verdict was against the weight of the

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[2] 18 Pa.C.S.A. § 2701(b)(1).

[3] 18 Pa.C.S.A. § 2709(a)(1).

evidence.[4] On May 7, 2012, the trial court denied Appellant's post-sentence motion. On June 5, 2012, Appellant filed a timely notice of appeal.[5]

On appeal, Appellant raises three issues for our review.

> 1. Did the Commonwealth fail to present sufficient evidence at trial to prove beyond a reasonable doubt that [] Appellant committed the crime of Simple Assault (M2), and specifically, that the assault was not a Simple Assault – Mutual Affray (M3)?
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> 2. Was the [j]ury's verdict against the weight of the evidence because the [j]ury failed to give sufficient weight to the testimony of the victim, Shirley Dipillo, that this was a Simple Assault – Mutual Affray (M3)?
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> 3. Did the [t]rial [c]ourt commit an abuse of discretion by allowing the Commonwealth to play prison recorded phone conversation[s] between [] Appellant and [the v]ictim?

Appellant's Brief at 4.

Appellant first challenges the sufficiency of the Commonwealth's evidence. When reviewing a sufficiency of the evidence claim, our standard of review is well settled. We must "review the evidence admitted during the trial along with any reasonable inferences that may be drawn from that

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[4] We note that the 10th day for Appellant to file his post-sentence motion fell on Saturday, January 7, 2012. When computing the 10-day filing period "[if] the last day of any such period shall fall on Saturday or Sunday … such day shall be omitted from the computation." 1 Pa.C.S.A. § 1908. Therefore, the 10th day fell on Monday, January 9, 2012, and Appellant's post-sentence motion was timely.

[5] Appellant and the trial court have complied with Pa.R.A.P. 1925.

evidence in the light most favorable to the Commonwealth." ***Commonwealth v. Crawford***, 24 A.3d 396, 404 (Pa. Super. 2011) (citation omitted). "Any doubts concerning an appellant's guilt [are] to be resolved by the trier of fact unless the evidence was so weak and inconclusive that no probability of fact could be drawn therefrom." ***Commonwealth v. West***, 937 A.2d 516, 523 (Pa. Super. 2007), *appeal denied,* 947 A.2d 737 (Pa. 2008). Moreover, "[t]he Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." ***Commonwealth v. Perez***, 931 A.2d 703, 707 (Pa. Super. 2007) (citations omitted). "[T]he trier of fact, in passing upon the credibility of the witnesses, is free to believe all, part, or none of the evidence." ***Commonwealth v. Rivera***, 983 A.2d 1211, 1220 (Pa. 2009) (citation and internal quotation marks omitted), *cert. denied*, ***Rivera v. Pennsylvania***, 131 S. Ct. 3282 (2010).

In this case, Appellant was convicted of simple assault. The relevant statute provides, in pertinent part, as follows.

> **§ 2701. Simple assault**
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> **(a) Offense defined.--**A person is guilty of assault if he:
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> > (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
> >
> > ...

> **(b) Grading.--**Simple assault is a misdemeanor of the second degree unless committed:
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> > (1) in a fight or scuffle entered into by mutual consent, in which case it is a misdemeanor of the third degree[.]
> >
> > ...

18 Pa.C.S.A. § 2701.

> Furthermore, it is axiomatic that simple assault does not require a victim to suffer actual bodily injury. The attempt to inflict bodily injury may be sufficient. This intent may be inferred from the circumstances surrounding the incident if a specific intent to cause bodily injury may reasonably be inferred therefrom.

Commonwealth v. Polston, 616 A.2d 669, 679 (Pa. Super. 1992) (internal citations omitted), *appeal denied*, 626 A.2d 1157 (Pa. 1993).

Appellant argues that at best the Commonwealth presented sufficient evidence of simple assault as a third-degree, not a second-degree, misdemeanor because Dipillo's trial testimony established that she initiated the altercation, rendering the incident "a fight … entered into by mutual consent[.]" Appellant's Brief at 9-10, *citing* 18 Pa.C.S.A. § 2701(b)(1);. For the following reasons, we disagree.

First, the Commonwealth presented sufficient evidence that Dipillo sustained bodily injury because of this incident. Bodily injury for the purposes of simple assault is defined as an "[i]mpairment of physical condition or substantial pain." 18 Pa.C.S.A. § 2703. Dipillo testified that she sustained a swollen and bloody lip during the altercation. N.T., 11/8/11,

at 8. As a result of this swollen and bloody lip, Dipillo was in pain for days afterwards. ***Id.*** at 8, 23. In addition, Dipillo read her written statement given to the troopers the night of the incident into the record for the jury, in which Dipillo stated that "[Appellant] head-butted [her] and choked [her] … at home and threatened to kill [her.]" ***Id.*** at 12. Furthermore, Mr. and Mrs. Beaver and Troopers Graf and Shimko all testified that Dipillo had a swollen and bloody lip and that she stated Appellant caused it. ***Id.*** at 27, 33-34, 42, 56. Trooper Graf also testified that Appellant admitted that he had punched Dipillo in the mouth. ***Id.*** at 52. Appellant also testified that he had "pushed" Dipillo in the mouth during the altercation. ***Id.*** at 76. The jury was free to infer Appellant's intent based on the circumstances surrounding the events of that night. ***See Polston***, ***supra***. Viewing the evidence in the light most favorable to the Commonwealth, we conclude the Commonwealth did present sufficient evidence to sustain Appellant's simple assault conviction as a second-degree misdemeanor. ***See Crawford***, ***supra***.

Appellant next argues that the jury's verdict was against the weight of the evidence. We review claims that the verdict was against the weight of the evidence for an abuse of discretion. ***Commonwealth v. Kane***, 10 A.3d 327, 332 (Pa. Super. 2010), *appeal denied*, 29 A.3d 796 (Pa. 2011). When applying this standard, we are mindful that "the initial determination regarding the weight of the evidence was for the factfinder." ***Id.*** (citation omitted). "The weight of the evidence is exclusively for the finder of fact

who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." ***Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003) (citations omitted), *cert. denied*, ***Champney v. Pennsylvania***, 542 U.S. 939 (2004). Further, we must not reverse a verdict based on a weight claim unless the "verdict was so contrary to the evidence as to shock one's sense of justice." ***Kane***, ***supra*** at 333 (citation omitted).

Appellant avers that the verdict was against the weight of the evidence because "[a]t trial, both Dipillo and [Appellant] testified that Dipillo initiated the physical aspect of the fight when Dipillo hit and smacked [Appellant]." Appellant's Brief at 10-11. Because "[Appellant] and Dipillo were the only two witnesses to the altercation[]" Appellant believes the jury did not give sufficient weight to their testimony. ***Id.*** at 11.

On direct examination, Dipillo stated that after Appellant broke the glass table she "got up and cracked [Appellant] up-side his head." N.T., 11/8/11, at 7. This statement is consistent with Appellant's testimony that Dipillo started the fight. ***Id.*** at 75, 76. However, as the trial court noted, Appellant's argument ignores the other evidence put before the jury. ***See*** Trial Court Opinion, 5/7/12, at 12. As stated above, in her written statement, Dipillo wrote that "[Appellant] head-butted [her] and choked [her] … at home and threatened to kill [her.]" ***Id.*** at 12. Furthermore, Mr. and Mrs. Beaver and Troopers Graf and Shimko all testified that Dipillo told

them Appellant caused her injury. ***Id.*** at 27, 33-34, 42, 56. Trooper Graf also testified that Appellant admitted to punching Dipillo in the mouth. ***Id.*** at 52. Finally, Appellant testified that he had "pushed" Dipillo in the mouth. ***Id.*** at 76.

In disposing of Appellant's weight claim, the trial court noted the following.

> After reviewing the evidence in its entirety, we must disagree [with Appellant's weight claim]. [Appellant]'s argument disregards the fact that there existed an abundance of other evidence, including the testimony of Mr. and Mrs. Beaver and two other troopers, as well as Dipillo's written statement, the contents of the telephone [calls between Appellant and Dipillo while Appellant was incarcerated], and [Appellant]'s own admissions, which pointed to [Appellant] having initiated the physical contact in this argument and indicated that Dipillo did not consent to or willingly participate in a physical altercation with [Appellant]. The jury obviously found that evidence to be credible and [it was] entitled to do so and the [trial court's] sense of justice is not disturbed in the least by its finding.

Trial Court Opinion, 5/7/12, at 12.

After careful review of the certified record, we agree with the trial court's conclusion. The jury was free to find the statements of Mr. and Mrs. Beaver and Troopers Graf and Shimko credible. The jury was also permitted to give Dipillo's written statement and statements to Mr. and Mrs. Beaver and to the troopers more weight as they occurred on the night in question. Finally, the jury was also allowed, as the factfinder, to disbelieve any testimony suggesting that Dipillo either began the physical altercation or

agreed to fight Appellant. Therefore, we conclude that the trial court did not abuse its discretion in finding that the verdict did not shock its sense of justice. ***See Kane, supra*** at 333.

Finally, Appellant argues that the trial court erred in admitting recorded telephone conversations between Appellant and Dipillo into evidence. Our standard of review regarding evidentiary issues is well settled. "The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error." ***Commonwealth v. Sanchez***, 36 A.3d 24, 48 (Pa. 2011) (citations omitted). "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." ***Commonwealth v. Hanford***, 937 A.2d 1094, 1098 (Pa. Super. 2007) (citation omitted), *appeal denied*, 956 A.2d 432 (Pa. 2008). Furthermore, "if in reaching a conclusion the trial court over-rides [sic] or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error." ***Commonwealth v. Weakley***, 972 A.2d 1182, 1188 (Pa. Super. 2009) (citation omitted), *appeal denied*, 986 A.2d 150 (Pa. 2009).

In this case, Appellant avers that the "calls should not have been admitted because the probative value was outweighed by their prejudicial effect, in that, the information contained therein was merely cumulative

evidence previously provided to the [j]ury through Dipillo's written statement and trial testimony." Appellant's Brief at 12. Pennsylvania Rule of Evidence 403 provides that "evidence may be excluded if its probative value is outweighed by the danger of … needless presentation of cumulative evidence." Pa.R.E. 403.

> We define cumulative evidence as additional evidence of the same character as existing evidence and that supports a fact established by the existing evidence. Evidence that strengthens or bolsters existing evidence is corroborative evidence; we have previously explained that corroborative evidence is not cumulative evidence.

Commonwealth v. Flamer, 53 A.3d 82, 88 n.6 (Pa. Super. 2012) (internal quotation marks and citations omitted).

Based on the record before us, we agree with the trial court and the Commonwealth that the recorded telephone conversations did not amount to "needless presentation of cumulative evidence." The telephone conversations revealed at a minimum that Dipillo explained to Appellant that he choked her and repeatedly threatened to kill her. Appellant confirmed the contents of this call when he was cross-examined by the Commonwealth.

> Q: You would agree with me, [Appellant], that in that April 1st phone call [Dipillo] also explained to you, "You're not getting it. You had me by the Adam's apple. You said, I will kill you bitch. You kept screaming it, that's when -- why I sent over to [the Beavers' apartment]"?
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> A: Yes.

> Q: Your response was, "if you never testified this statement wouldn't have come in and this never would have happened", right?
>
> A: Right.

N.T., 11/8/11, at 83. We conclude that these tapes served to strengthen and bolster the contents of Dipillo's written statement to the troopers, as well as the testimony of Mr. and Mrs. Beaver and Troopers Graf and Shimko. As a result, the tapes constitute corroborative evidence, not cumulative evidence. ***See Flamer***, ***supra***. Therefore, we conclude the trial court did not abuse its discretion in admitting them into evidence.

Based on the foregoing, we conclude that all of Appellant's issues are devoid of merit. Accordingly, the December 28, 2011 judgment of sentence is affirmed.

Judgment of sentence affirmed.