NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ARTHUR JOHNSON,	:	
	:	
Appellant	:	No. 1372 EDA 2011

Appeal from the Judgment of Sentence May 6, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0009715-2010

BEFORE: GANTMAN, OLSON, and FITZGERALD,* JJ.

DISSENTING MEMORANDUM BY OLSON, J.: Filed: February 8, 2013

As I believe that the undisputed evidence is capable of only one rational inference – *i.e.,* that the Appellant intended to place the complainant in fear of serious bodily injury – I must respectfully dissent from the learned majority's decision.

As the majority notes, it is not error for a trial court to refuse to instruct the jury on a lesser-included offense "unless the evidence could support a conviction on the lesser offense." ***Commonwealth v. Hawkins***, 614 A.2d 1198, 1201 (Pa. Super. 1992) (*en banc*). Thus, the issue in this case is whether there was evidence that could support a conviction of robbery – felony of the second degree ("F-2 robbery"). More specifically, the

* Former Justice specially assigned to the Superior Court.

issue boils down to whether there was evidence that the Appellant intentionally placed the complainant in fear of immediate **bodily injury** (which would support an F-2 robbery conviction under 18 Pa.C.S. §3701(a)(1)(iv)), or whether the undisputed evidence is capable of only one rational inference that the Appellant intentionally placed the complainant in fear of immediate **serious bodily injury** (which is required to support conviction of robbery – felony of the first degree ("F-1 robbery") under 18 Pa.C.S. §3701(a)(i)(ii)).

Appellant takes exception with the trial court's statement that "the complainant testified at length about his fear that he was going to die throughout his struggle with [Appellant]." Appellant's Brief at 10, *quoting* Trial Court Opinion, 5/31/12, at 6. Appellant argues "[i]n the case *sub judice*, where there was no weapon, the evidence presented at trial could have led the jury to conclude that Appellant's intention was to threaten the complainant with bodily injury or to put him in fear of bodily injury. This accords with the complainant's failure to report to police the alleged death threats supposedly issued by Appellant ... ." Appellant's Brief at 10-11.

In agreeing with Appellant's argument, the majority cites to Appellant's challenge of the veracity of the complainant's trial testimony that Appellant said "Old head, I'm about to kill you." Majority Memorandum at 7-8. The majority concludes that the cross examination of the complainant raised some question as to whether Appellant verbally threatened to kill

complainant and, since there was some disputed evidence concerning an element of the greater charge, the trial court erred in not charging the jury as to F-2 robbery. ***Id.*** at 8.

I agree with the learned majority that the cross examination of the complainant challenged his credibility as to whether Appellant verbally threatened to kill him. However, a verbal utterance or threat is not required under subsection 3701(a)(1)(ii). ***Commonwealth v. Alford***, 880 A.2d 666, 676 (Pa. Super. 2005)(internal citation and quotation omitted). "For the purposes of subsection 3701(a)(1)(ii), the proper focus is on the nature of the threat posed by an assailant and whether he reasonably placed a victim in fear of immediate serious bodily injury." ***Id.*** Aggressive actions threatening the victim's safety are enough. ***Id.***

Neither Appellant's brief nor the majority decision addresses the undisputed evidence that Appellant choked the complainant and "power-drove" him into the concrete. Thus, even in the absence of a verbal threat, the physical assault that occurred placed complainant in immediate fear of **serious** bodily injury. ***See Commonwealth v. Davis***, 454 A.2d 595 (Pa. Super. 1982) (evidence of serious bodily injury or threat to sustain F-1 robbery conviction where defendant grabbed victim's pocketbook, slapped her in the face five to six times, and she testified that she feared additional harm); ***Commonwealth v. Leatherbury***, 473 A.2d 1040 (Pa. Super. 1984) (Although elderly robbery victim sustained no actual injuries, the

circumstances under which he was accosted, wherein the appellant and a co-defendant grabbed the victim's arms from behind, were sufficient to permit an inference that the appellant intended by his conduct to put the victim in fear of imminent serious bodily injury); ***Commonwealth v. Rodriquez***, 673 A.2d 962 (Pa. Super. 1996) (Evidence that robbery defendant and two other men kicked and punched older man and ransacked his pockets while he lay prostrate in intersection, was sufficient to permit inference that defendant, in course of committing theft, intended to put his victim in fear of serious bodily injury).

Further, this Court has determined previously that choking a victim constitutes serious bodily injury in other criminal contexts, as well. ***See Commonwealth v. Brunson***, 938 A.2d 1057 (Pa. Super. 2007) (Evidence supported finding that defendant recklessly engaged in conduct which placed the victim in danger of death or serious bodily injury, as required to support conviction for recklessly endangering another person, when defendant punched the victim, who was elderly, in the head and choked him, and that while fending off the attack, victim blocked his head with his arm and suffered torn ligaments to his right shoulder); ***Commonwealth v. Russell***, 460 A.2d 316 (Pa. Super. 1983) (Evidence that defendant forced open door of victim's residence at night, that the female victim was alone, and that he choked her and put her in fear of impending rape established that defendant

intended to inflict serious bodily injury for conviction for aggravated assault); ***Commonwealth v. Kibe***, 392 A.2d 831 (Pa. Super. 1978) (same).

In my view, the only rational inference that can be drawn from the testimony that Appellant choked the complainant and picked him up and slammed him into the concrete is that Appellant intended to place complainant in fear of serious bodily injury. Accordingly, I do not believe that the trial court erred in refusing to charge the jury with the lesser-included offense of robbery as a second-degree felony.

Moreover, I must disagree with the learned majority's conclusion that the jury's acquittal of Appellant on the charge of aggravated assault lends support to the conclusion that the trial court erred in denying Appellant's request of an F-2 robbery charge. As is well established in his Commonwealth, and recently reiterated by our Supreme Court, "acquittal [of one of the charged offenses] cannot be interpreted as a specific finding in relation to some of the evidence, and [] even where two verdicts are logically inconsistent, such inconsistency alone cannot be grounds for a new trial or for reversal." ***Commonwealth v. Miller,*** 35 A.3d 1206, 1213 (Pa. 2012) (jury verdict that defendant was not guilty of robbery but was guilty of second-degree murder predicated on robbery could stand). Thus, the fact that the jury acquitted Appellant of aggravated assault is of no moment in determining whether the trial court erred in failing to instruct the jury of robbery as a felony of the second degree.

Hence, I would affirm the trial court's decision.