NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
TERRY WAYNE BANE JR., Appellant	No. 1477 WDA 2012

Appeal from the Judgment of Sentence September 17, 2012
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0001872-2011

BEFORE: STEVENS, P.J., BOWES, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: FILED: May 17, 2013

Terry Wayne Bane Jr. appeals from the judgment of sentence of nine to twenty-four months imprisonment that was imposed after a jury convicted him of simple assault, reckless endangerment and harassment. We affirm.

Matthew Gindlesperger testified as follows. On September 9, 2011, he lived at 704 High Street, Adah, Pennsylvania with his girlfriend Trisha Werner, Appellant, and Appellant's girlfriend Lauren Tate. The location in question was a two-bedroom, one-story house. Mr. Gindlesperger and Ms. Werner were the lessees on the lease agreement and paid the rent. In April or May 2011, Appellant asked if he could stay at the house since he had nowhere else to reside. Mr. Gindlesperger granted

him permission, and Appellant agreed to help clean and buy food for the house. Ms. Tate then began to reside at the house with Appellant.

At approximately 9:45 p.m. on September 9, 2011, Mr. Gindlesperger arrived home from his job at Goodwill Industries. Since Mr. Gindlesperger's car was damaged, he had been asking friends and neighbors for transportation to and from work. When Mr. Gindlesperger was unable to secure a ride to work from his usual source, a neighbor, he asked Appellant, who was in his bedroom at the house with Ms. Tate, for a ride. Mr. Gindlesperger testified that "they told me no because her vehicles were broke down and weren't running right and that they wanted $40.00 for one day to run me back and forth [to work]." N.T. Trial, 9/4-5/12, at 16.

Mr. Gindlesperger unsuccessfully sought a ride from two other neighbors and returned home around 10:30 p.m. Appellant and Ms. Tate were in their bedroom. Mr. Gindlesperger asked Ms. Werner to make a pot of coffee and then went and told Appellant and Ms. Tate, "I want you out of my f'in house by the time I get home from work." ***Id***. at 17. He then returned to the kitchen to join Ms. Werner. Appellant arrived in the kitchen, and he said, "f me, no, f you." Appellant then "busted [Mr. Gindlesperger] upside the head with a glass." ***Id***. at 18. The glass was a drinking glass containing soda.

Appellant continued his assault by punching the victim six to eight more times. Mr. Gindlesperger "ended up between the stove and the deep freezer with my hands over my head trying to keep from bleeding." ***Id***. at

19. Ms. Tate then came to the kitchen and said to Appellant, "[N]ow you've done it. Now we have nowhere else to go." ***Id***. at 20. She gave the victim a towel, as Mr. Gindlesperger was bleeding profusely. The victim dialed 911 and was transported to the hospital, where he received stitches. Ms. Werner confirmed her boyfriend's version of the assault and indicated that Appellant arrived in the kitchen with the glass in his hand.

Appellant testified on his own behalf and also presented the testimony of his girlfriend Ms. Tate, who was seven months pregnant on September 9, 2011. Ms. Tate indicated the following. When the victim arrived at home on the night of the incident, he was extremely upset over the fact that he paid for transportation to work that was not going to be provided for him. Mr. Gindlesperger then ordered Ms. Tate, who was in the bedroom with Appellant, to transport him to work the next morning and told her that she had no choice.

Ms. Tate and Appellant decided to leave the apartment to allow Mr. Gindlesperger to calm himself. When they returned, they went to their bedroom but heard Mr. Gindlesperger banging pots and pans in the kitchen. Appellant went into the kitchen to retrieve a soda for Ms. Tate, and Ms. Tate followed him there after hearing a banging sound. When Ms. Tate came into the kitchen, Mr. Gindlesperger pushed her against the refrigerator, and she fell onto the ground. At that point, Ms. Tate heard Mr. Gindlesperger either punch, slap, or push Appellant, and then the sound of a glass breaking. Ms. Tate stated that the glass broke while Appellant was attempting to push

Mr. Gindlesperger's hand away. She denied that Appellant continued to punch the victim in the head after the incident with the glass.

Appellant confirmed that when Mr. Gindlesperger arrived home on the night in question, he was irate because someone "ripped him off for $30.00 and he didn't have a ride to work." ***Id***. at 76. Appellant related that Mr. Gindlesperger punched a hole in a door next to Appellant's bedroom, flipped over a table, and ripped down a couple of curtains.

As noted, Appellant and Ms. Tate left the residence for a while. When they returned, Ms. Tate wanted a glass of soda, and Appellant went to the kitchen, where Mr. Gindlesperger was banging pots and pans, to retrieve it for her. After Appellant poured the soda into a glass, Mr. Gindlesperger punched a cabinet next to Appellant's head. At that point, Ms. Tate arrived in the kitchen, Mr. Gindlesperger started to yell at her, and he pushed her into the refrigerator, which caused her to fall on the floor. Appellant was stunned.

Appellant continued that Mr. Gindlesperger next "stuck his hand out," and either pushed or slapped Appellant in the side of the face. Appellant testified that at that point, Appellant "pushed my hands out to push [Mr. Gindlesperger] away." ***Id***. at 80. The glass in Appellant's hand struck Mr. Gindlesperger in the head. Appellant explained that he did not intend to harm Mr. Gindlesperger and that he "just wanted to get him away from us and stop him." ***Id***. at 80. Appellant denied continuing to punch the victim in the head after the glass broke. On cross-examination, Appellant was

asked, "so your testimony is that this was all an accident," and he responded, "Yes, sir." ***Id***. at 81. Appellant then confirmed that he unintentionally struck Mr. Gindlesperger with the glass when Appellant was pushing Mr. Gindlesperger's hand away from Appellant's face.

At the close of the first day of evidence, which was September 4, 2012, Appellant asked that the jury be given a justification charge on the basis that Appellant was attempting to protect himself and/or Ms. Tate. The trial court indicated that it did not believe that the charge was supported by the evidence because Ms. Tate was on the floor and Appellant never said that he was trying to protect her, indicating, instead, that he pushed the victim's hand away from his own face and struck the victim accidentally with the glass. ***Id***. at 89. The court declined to give the charge because Appellant never testified that he shoved the victim's hand and struck him with the glass to protect somebody. The court ruled, "There's no self defense here. I'm not charging self defense because [Appellant] didn't, that's not the reason [Appellant] did it," *i.e.*, struck Mr. Gindlesperger in the face with the glass in his hand. ***Id***. at 90. Appellant made no objection after the court refused his verbal request for a justification/defense of others instructions.

The following morning, September 5, 2012, Appellant presented another witness, and closing remarks were offered. The jury was instructed, ***id***. at 96-107, and the trial court asked Appellant and the Commonwealth

whether there were "any additions or corrections to the charge[?]" ***Id***. at 107. Appellant responded, "No, Your Honor. Thank you." ***Id***. at 108.

Based on this evidence, Appellant was convicted of simple assault, reckless endangerment, and harassment but acquitted of aggravated assault. On September 17, 2012, Appellant was sentenced to nine to twenty-four months imprisonment. In this direct appeal, Appellant raises the single issue, "Whether the trial court erred in refusing to instruct the jury of a requested self defense instruction and/or the defense of others justification?" Appellant's brief at 7. As the trial court aptly observed, this contention has been waived. Pa.R.Crim.P. 647, which governs request for instructions, and the jury charge, provides:

> (A) Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests and which instructions shall be submitted to the jury in writing. The trial judge shall charge the jury after the arguments are completed.
>
> (B) No portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.

Our Supreme Court interpreted this rule in ***Commonwealth v. Pressley***, 887 A.2d 220 (Pa. 2005). In that case, near the close of the testimony, the defendant specifically submitted three written proposed points for charge. Before closing remarks, the trial court informed the

defendant that it would not instruct the jury on the three concepts and explained its reasoning. Appellant did not object after the ruling was rendered. "Following the jury charge, the court inquired of [defense] counsel whether he wanted any additional instructions or corrections; he responded in the negative." ***Id***. at 222.

Based upon that state of the record, our Supreme Court concluded that the defendant waived any objection to the trial court's failure to disseminate the three written proposed points for charge. The court held "that under Criminal Procedural Rules 603 and 647(B), the mere submission and subsequent denial of proposed points for charge that are inconsistent with or omitted from the instructions actually given will not suffice to preserve an issue, absent a specific objection or exception to the charge or the trial court's ruling respecting the points." ***Id***. at 225.[1] ***Accord Commonwealth v. Houser***, 610 Pa. 264, 278-279, 18 A.3d 1128, 1137 (Pa. 2011) (since defendant did not object after the court stated "it would not instruct the jury on the extreme mental or emotional disturbance

---

[1] Pa.R.Crim.P. 603, exceptions, provides:

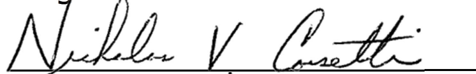
> (A) Any ruling of the judge on an objection or motion made during the trial of any action or proceeding shall have the effect of a sealed exception in favor of the party adversely affected without the necessity of a formal request or notation made on the record.
>
> (B) This rule shall not be applicable to the charge to the jury.

mitigator" and also failed to "object at the time the instructions were given to the jury," he waived his claim to the trial court's failure to disseminate the requested charge).

This case is procedurally indistinguishable from ***Pressley*** and ***Houser***. Appellant asked for justification/defense of others instructions. The court refused to delineate those concepts to the jury and offered its reasoning. Appellant did not level any objection following that ruling. Then, after the instructions were given, Appellant was asked specifically if he had any additions or objections to the instructions as given. He responded in the negative. Hence, the issue is waived for purposes of this direct appeal, and it must be raised under the guise of ineffective assistance of counsel pursuant to post-conviction proceedings.

Judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: May 17, 2013