

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

STEPHEN DAVIS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1812 EDA 2012

Appeal from the Judgment of Sentence April 9, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0004809-2011

BEFORE: BENDER, BOWES, and LAZARUS, JJ.

MEMORANDUM BY BOWES, J.:

FILED MAY 08, 2013

Stephen Davis appeals from the April 9, 2012 judgment of sentence of five to ten years imprisonment and restitution to the victim in the amount of \$25,453, imposed after a jury found him guilty of aggravated assault, simple assault, and recklessly endangering another person ("REAP"). We affirm.

The trial court recited the facts as follows:

Early in the morning of Sunday, December 5, 2010, Gina Mannino ("Mannino"), her boyfriend, Mike Bidwell ("Bidwell"), [Appellant] and his wife, Sheila Dearing ("Mrs. Dearing") were together at Hurricane Jack's bar, located on New Falls Road in Bristol, Bucks County. At approximately 2 A.M. a small fight broke out inside Hurricane Jack's. The altercation began as Ricky Becker ("Becker") cleaned drinks off the bar in an attempt to begin closing the business for the night. Becker was a bouncer at Hurricane Jack's on the evening of the incident. Davis ("Appellant") verbally threatened Becker for throwing out [Amber] Jordan's ("Jordan") drink. [Appellant] was then restrained by Becker and Bidwell inside the bar. As a result of

the altercation, [Appellant], Jordan and a group of others were told to leave the bar.

Mannino, Bidwell, Dearing and Mrs. Dearing remained behind inside the bar for a period of time. Thereafter, all four exited to the parking lot where they said goodbye and parted ways for their vehicles. A white truck was parked on the far side of the parking lot, near Mannino's car. As Mannino approached her vehicle, [Appellant] exited the white truck and confronted her. [Appellant] made threats to Mannino regarding Bidwell. Mannino told [Appellant] to leave.

Dearing crossed the parking lot when he saw Mannino and [Appellant] exchanging heated words. Dearing positioned himself about three or four feet away from the area where Mannino and [Appellant] were standing. [Appellant] raised his hand up toward Mannino. It appeared that [Appellant] was reaching for Mannino's neck or shoulder. At that time, an unknown individual exited [Appellant's] truck and approached Dearing. [Appellant] then moved away from Mannino and got within six inches of Dearing's face. Dearing turned his head to look toward Mannino, who was on his left side. [Appellant] then punched Dearing in the face.

[Appellant] and the unknown individual knocked Dearing to the ground. [Appellant] was on top of Dearing, holding him on the ground and punching him, while the other man kicked him repeatedly. [Appellant] then rose and kicked Dearing numerous times in the head and upper body. Dearing eventually became partially wedged underneath [Appellant's] truck. [Appellant] and the unidentified man continued to kick Dearing until Ricky Becker emerged from the bar and broke up the fight. Thereafter, Dearing was transported to the hospital by ambulance.

Dearing was treated for multiple injuries after being transported to the hospital, including multiple facial contusions, hematoma, abrasions, cuts, fractures to the left side orbital bone and cheekbone, and a clinical rib fracture. Several of these injuries required medical intervention to avoid permanent physical damage. Dearing underwent a surgical procedure to elevate his cheekbone fracture because bone fragments had been beaten into the maxillary sinus. Without timely treatment, Dearing risked permanent cosmetic deformity, nerve damage, and sinus problems.

Trial Court Opinion, 10/16/12, at 2-3 (citations to record and footnotes omitted).

Following a three-day trial, the jury found Appellant guilty of aggravated assault, simple assault, and REAP.¹ His aggravated assault conviction was based on a specific jury finding that Appellant both attempted to cause and actually caused serious bodily injury to Mr. Dearing. Appellant was sentenced on April 9, 2012 to five to ten years imprisonment and restitution on the aggravated assault charge; no further penalty was imposed on the remaining convictions.

On April 18, 2012, Appellant filed a motion to reconsider sentence. After a hearing on the motion on June 13, 2012, the trial court denied it. Appellant filed a timely appeal to this Court and, on July 20, 2012, he filed his concise statement of errors complained of on appeal in accordance with Pa.R.A.P. 1925(b). On October 16, 2012, the trial court authored its Pa.R.A.P. 1925(a) opinion, and this matter is now ready for our review. Appellant presents six issues for our consideration:

I. Was the verdict not supported by sufficient evidence because the Appellee failed to establish beyond a reasonable doubt that the Appellant had a specific intent to cause serious bodily injury to Kevin Dearing?

II. Was the verdict not supported by sufficient evidence because the Appellee failed to establish beyond a reasonable

¹ Appellant was tried jointly with Amber Jordan, who was charged with simple assault upon Gina Mannino.

doubt that the Appellant acted with malice in causing serious bodily injury to Kevin Dearing?

III. Was the verdict not supported by sufficient evidence because the Appellee failed to establish beyond a reasonable doubt that the Appellant participated as an accomplice in an assault upon Kevin Dearing?

IV. Was the verdict not supported by sufficient evidence because the Appellee failed to establish beyond a reasonable doubt that the Appellant intended to or recklessly caused bodily injury to Kevin Dearing supporting a conviction for the charges of simple assault and recklessly endangering another person?

V. Did the trial court abuse its discretion in submitting its verdict form to the jury?

VI. Did the trial court abuse its discretion in ruling as inadmissible Officer Sanocki's testimony as to what original charges he filed against the Appellant?

Appellant's brief at 4-5.

Appellant's first four issues are sufficiency of the evidence claims. Our Court has stated,

[t]he standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact[-]finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and

the weight of the evidence produced, is free to believe all, part of none of the evidence.

Commonwealth v. Helsel, 53 A.3d 906, 917-18 (Pa.Super. 2012) (quoting ***Commonwealth v. Bricker***, 41 A.3d 872, 877 (Pa.Super. 2012)).

Appellant argues first that the Commonwealth failed to establish beyond a reasonable doubt that he had the specific intent to cause serious bodily injury to Mr. Dearing to support his aggravated assault conviction based on an attempt to cause serious bodily injury. Second, Appellant alleges that, to the extent that the jury found him guilty based upon a finding that he caused serious bodily injury to Mr. Dearing, the conviction is infirm as there was no proof that he acted with malice. In order to obtain a reversal of his aggravated assault conviction, Appellant would need to prevail on both positions.

A person commits aggravated assault if he attempts to cause bodily injury to another, or if he intentionally, knowingly or recklessly causes serious bodily injury to another. 18 Pa.C.S. § 2702(a)(1). Serious bodily injury is defined as an “injury that creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.” 18 Pa.C.S. § 2301.

Where no serious bodily injury is actually inflicted, the charge of aggravated assault can be supported only if the evidence supports a finding of a specific intent to attempt to cause such injury. “A person commits an

attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.” 18 Pa.C.S. § 901(a). An attempt under Subsection 2702(a)(1) requires some act, albeit not one causing serious bodily injury, accompanied by an intent to inflict serious bodily injury. **Commonwealth v. Matthew**, 909 A.2d 1254 (Pa. 2006); **Commonwealth v. Martuscelli**, 54 A.3d 940, 948 (Pa.Super. 2012).

“A person acts intentionally with respect to a material element of an offense when ... it is his conscious object to engage in conduct of that nature or to cause such a result.” 18 Pa.C.S. § 302(b)(1)(i). The intent to commit serious bodily injury for a charge of aggravated assault can be proven by direct or circumstantial evidence. **Commonwealth v. Hall**, 830 A.2d 537, 541-42 (Pa. 2003). The defendant’s actions themselves may evidence his intent to commit serious bodily harm. **Id.** at 542. We held in **Commonwealth v. Shank**, 883 A.2d 658 (Pa.Super. 2005), that one can reasonably infer an intent to seriously injure from multiple blows to the head. Verbalized threats can also provide evidence of the defendant’s intent. **Commonwealth v. Matthew, supra**. Whether or not a defendant stops his assault on his own or due to the intervention of others is also an important factor in determining intent. **Commonwealth v. Dailey**, 828 A.2d 356, 360-361 (Pa.Super. 2003).

Appellant's argument that there was no evidence of specific intent to cause serious bodily injury ignores our standard of review and is premised on his version of the events, not the evidence in the light most favorable to the Commonwealth. Appellant contends that he only delivered one punch to Mr. Dearing's jaw, which caused no injury. Appellant's brief at 17. Furthermore, he claims that he never spoke to, verbally threatened, or physically assaulted Mr. Dearing, nor attempted to do any of the same. **Id.** Appellant maintains that a third, unidentified male caused Mr. Dearing's injuries. **Id.** The one punch Appellant directed to the victim's head, he contends, was insufficient under **Commonwealth v. Alexander**, 383 A.2d 887 (Pa. 1978), to support a finding of intent to cause serious bodily injury. Absent circumstances establishing a desire to inflict serious bodily injury, a single punch will not sustain an aggravated assault conviction.

The Commonwealth counters that the evidence, taken in the light most favorable to it as the verdict winner, reveals that Appellant confronted Ms. Mannino and threatened to kill her boyfriend, Bidwell, in retaliation for the incident that occurred minutes before in the bar. Ms. Mannino also testified that Appellant made verbal threats to her, saying "Where is your pussy f*****g boyfriend, I'm going to kill him." N.T. Jury Trial, 11/7/11, at 106. Such evidence, according to the Commonwealth, demonstrated that Appellant wished to rekindle a violent altercation with someone in Ms. Mannino's group. Commonwealth's brief at 11 (citing N.T. Jury Trial,

11/9/11, at 107). In addition, Mrs. Dearing testified that Appellant held her husband down on the ground while an unidentified male kicked him repeatedly in the head. N.T. Jury Trial, 11/9/11, at 109. Mrs. Dearing continued that, after Appellant released Mr. Dearing, both Appellant and the unidentified male continued to kick her husband in the head and upper body. N.T. Jury Trial, 11/9/11, at 110. Mrs. Dearing testified that Appellant and the unidentified male kicked her husband so many times that she “couldn’t begin to count” the number of individual blows and described the force of Appellant’s kicks as “full-on blows, completely back and – it was like kicking a soccer ball.” N.T. Jury Trial, 11/9/11, at 110-112. These kicks to the head and upper body continued even after Mr. Dearing was laying on the ground, defenseless and wedged underneath Appellant’s truck. ***Id.*** at 111, 152. As a result of this brutal attack, Mr. Dearing’s cheekbone was pushed into his maxillary sinus, and, without surgery, he would have suffered permanent facial deformity and impairment in performing everyday activities such as blowing his nose and eating. ***Id.*** at 171-173. The Commonwealth maintains that the jury was justified in inferring that Appellant intended to cause serious bodily injury when first he punched and then repeatedly kicked Mr. Dearing in the head, a vital part of the body. ***See Commonwealth v. Shank, supra*** (multiple kicks to the head of defenseless victim evidenced intent to cause serious bodily injury).

The testimony also established that Appellant did not stop attacking Mr. Dearing until Mr. Becker exited the bar and broke up the fight. N.T., Jury Trial, 11/9/11, at 112. Given Appellant's violent threats, his restraint of Mr. Dearing, his punching and kicking Mr. Dearing in the head, the fact that intervention was necessary to halt the assault, the Commonwealth contends that the evidence was sufficient to permit the jury to find beyond a reasonable doubt that Appellant possessed the requisite specific intent to cause serious bodily injury to support his aggravated assault conviction.

We agree with the Commonwealth that there was sufficient evidence that Appellant intended to cause serious bodily injury to support the aggravated assault conviction based on an attempt to cause serious bodily injury theory. Hence, this claim fails. Our finding obviates the need to address Appellant's argument that the evidence was insufficient to establish beyond a reasonable doubt that he acted with malice, or with extreme indifference to the value of human life in causing serious bodily injury to Mr. Dearing.

The judge instructed the jury that the Commonwealth's charges against Appellant were based both on his own conduct and on accomplice liability, and it explained the difference between the two. N.T. Jury Trial, 11/10/11, at 207. It then defined accomplice liability and explained what proof was required to find Appellant culpable under such a theory. Appellant

contends that the Commonwealth failed to prove beyond a reasonable doubt that he participated as an accomplice in the assault of Mr. Dearing.

Appellant argues that the evidence did not show that he threatened Mr. Dearing or that he actively participated in the altercation that caused Mr. Dearing's injuries. Appellant's brief at 25. Furthermore, Appellant submits, while his actions and those of the unidentified male occurred simultaneously, they should be treated as independent from one another as Appellant never solicited, aided, or agreed to aid this unidentified male in his assault of Mr. Dearing. ***Id.*** Appellant contends the unidentified male, rather than Appellant, evidenced the intent to cause serious bodily harm to Mr. Dearing through his words and conduct, specifically, his tackling and kicking of Mr. Dearing during the altercation. Appellant's brief at 23-24.

A person is an accomplice of another person in the commission of an offense if, with the intent of promoting or facilitating the commission of the offense, he solicits such person to commit it, or aids or agrees to attempt or aid such person in planning or committing it. 18 Pa.C.S. § 306. In order to convict as an accomplice, the evidence must demonstrate that the "defendant intended to aid or promote the underlying offense" and "that the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principal." ***Commonwealth v. Murphy***, 844 A.2d 1228, 1234 (Pa. 2004). The amount of aid need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit

the crime. **Id.** As an accomplice, one is legally accountable for the conduct of another, and an accomplice may be convicted of the alleged crime even if the other actor has not been prosecuted or convicted. 18 Pa.C.S. § 309(g).

For the reasons outlined above, the Commonwealth's evidence established beyond a reasonable doubt that Appellant acted as an accomplice to the unidentified male. The trial court found, and this Court agrees, Appellant's conduct in holding down the victim while another individual kicked him in the head demonstrated sufficient intent to aid in committing an aggravated assault, simple assault, and REAP to support a conviction premised on accomplice liability. Trial Court Opinion, 10/16/12, at 12. Additionally, the trial court concluded, based on the evidence presented, the jury could have found Appellant guilty based on his own conduct. **Id.** Hence, this claim fails.

Next, Appellant challenges the Commonwealth's proof that he intended to cause or recklessly caused bodily injury to Mr. Dearing to sustain the convictions for simple assault and REAP. In support of his position, he incorporates the same arguments we previously rejected in sustaining his conviction for aggravated assault. Again, no relief is due.

A person is guilty of simple assault if he attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another. 18 Pa.C.S. § 2701(a)(1). A person is guilty of recklessly endangering another person if he recklessly engages in conduct that places or may place another

person in danger of death or serious bodily injury. 18 Pa.C.S. § 2705. Bodily injury is defined as an “impairment of physical condition or substantial pain.” 18 Pa.C.S. § 2301.

As Appellant acknowledges, simple assault and REAP are lesser-included offenses of the charge of aggravated assault. **See Commonwealth v. Thompson**, 739 A.2d 1023, 1029 n.13 (Pa. 1999). Hence, where the jury has found sufficient evidence to convict a defendant of aggravated assault, the evidence will be sufficient to sustain a charge of the lesser-included offenses. **Id.** For the reasons already set forth in upholding the aggravated assault conviction, we find that the evidence was clearly sufficient for a jury to convict Appellant of both simple assault and REAP, and this claim lacks merit.

Appellant claims that the trial court abused its discretion in submitting a verdict form to the jury that listed “attempting to cause,” “causing serious bodily injury,” and “both” in reference to the aggravated assault charge. Appellant argues that delineating attempt, cause, and both on the verdict slip was unnecessarily confusing to the jury and prejudicial, but cites no authority in support of his position. Appellant’s brief at 31.

The Commonwealth directs our attention to **Commonwealth v. Fisher**, 863 A.2d 574, 577 (Pa.Super. 2004), where this Court held that verdict slips distinguishing between different types of a criminal offense were permissible in a case involving aggravated assault. It maintains that the

verdict slip was not prejudicial to Appellant; rather, "it was designed to ensure that a clear determination was made[.]" Commonwealth's brief at 21.

The law is well settled that an abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. **Commonwealth v. Hess**, 745 A.3d 29, 31 (Pa.Super 2000). The trial court concluded that Appellant was not entitled to relief on this ground based upon our Supreme Court's decision in **Commonwealth v. Kelly**, 399 A.2d 1061 (Pa. 1979), holding that "notations on the verdict slip, seeking to identify for the jury the separate counts charged" do not constitute an abuse of discretion. Trial Court Opinion, 10/16/12, at 17. The trial court also cited **Commonwealth v. Fisher, supra**, for the proposition that verdict forms that distinguish between different types of aggravated assault have been permitted. **Id.**

The verdict slip simply allowed the jury to indicate whether it found Appellant guilty of attempting to cause serious bodily injury, actually causing seriously bodily injury, or both. It did not provide any instruction to the jury or refer to any evidence. We find no basis for concluding that its use was prejudicial to Appellant. Instead, as the trial court opines, the verdict slip was designed to ensure that the jury's verdict properly reflected the offense

grading for sentencing purpose. **Id.** For those reasons, we find no abuse of discretion in the use of this verdict slip.

Appellant's final argument is that the trial court abused its discretion in sustaining the Commonwealth's objections to questions directed to Officer Stephen Sanocki regarding the nature of the charges originally filed. Appellant wanted the jury to know that the officer did not originally charge him with aggravated assault, and represents that the officer stated that he made that decision based upon eyewitness accounts of the altercation. At trial, Appellant elicited testimony from Officer Sanocki acknowledging there were inconsistencies and omissions between the witnesses' original statements and their subsequent trial testimony. Appellant now makes a convoluted argument suggesting that if the jury knew that the officer did not charge him with aggravated assault after speaking with the witnesses, it would have enhanced his impeachment of these witnesses. Appellant's brief at 32-34.² Appellant contends that the implication of allowing the jury to believe that the charges at trial were the same as those originally filed bolstered the credibility of the Commonwealth's witnesses. **Id.**

The Commonwealth maintains that the trial court was correct in excluding testimony about the original charges, as it "had not even the

² Appellant's argument that he should have been permitted to question the officer regarding the original charges to underscore inconsistencies in the stories of the Commonwealth's witnesses was not advanced at trial. **See** N.T. Jury Trial, 11/9/11, at 224-225.

slightest tendency to prove any fact at issue was more or less probable. **See** Pa.R.E. 401.” Commonwealth’s brief at 23. Furthermore, Appellant was impermissibly seeking to place the officer’s legal opinion before the jury, invading its province to determine whether all elements of the offenses charged were proven beyond a reasonable doubt. Finally, the Commonwealth offered a myriad of reasons why charges are routinely added after the filing of a criminal complaint, suggesting that the officer’s opinion was not probative.

Contrary to Appellant’s representation herein that the officer stated that the charges would depend on the witnesses’ statements, the officer actually testified “the extent of the injuries [to Mr. Dearing] was going to determine how the charges were going to be filed” and against whom. N.T. Jury Trial, 11/9/11, at 223. At trial, Appellant sought to elicit testimony from the police officer that he only charged Appellant with simple assault, harassment, and disorderly conduct based on the victim’s injuries, the implication being that, in his opinion, the injuries did not warrant aggravated assault and REAP charges. **Id.** at 224-225. The Commonwealth objected to this line of inquiry and the trial court sustained the objection.

The admission of evidence is committed to the sound discretion of the trial court and will only be reversed upon a showing that the trial court clearly abused its discretion. **Commonwealth v. Kennedy**, 959 A.2d 916, 923 (Pa. 2008). Relevant evidence is evidence having any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Pa.R.E. 401. Evidence that is not relevant is inadmissible. Pa.R.E. 402. Even if relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Pa.R.E. 403.

The trial court determined that the officer's legal opinion was irrelevant for the purposes of the trial. Trial Court Opinion, 10/16/12, at 18; **see also** N.T. Jury Trial, 11/9/11, at 225. The testimony Appellant attempted to solicit would not have assisted in establishing a material fact and did not bear on the likelihood of any facts at issue during the prosecution. Trial Court Opinion, 10/16/12, at 18-19. Upon review of the record, we agree, and find no abuse of discretion in precluding this line of inquiry.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Sambitt", written over a horizontal line.

Prothonotary

Date: 5/8/2013

