NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
PAUL THOMAS BAIR III,	:	No. 1860 WDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, July 2, 2012,
in the Court of Common Pleas of Westmoreland County
Criminal Division at Nos. CP-65-CR-0003351-2011,
CP-65-CR-0003353-2011

BEFORE: FORD ELLIOTT, P.J.E., ALLEN AND COLVILLE,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED DECEMBER 06, 2013**

Appellant appeals the judgment of sentence entered following his convictions for criminal trespass and simple assault.[1] Finding no error in the issues on appeal, we affirm.

On April 12, 2012, a Westmoreland County jury convicted appellant of charges lodged at trial court docket numbers CP-65-CR-0003351-2011 ("No. 3351") and CP-65-CR-0003353-2011 ("No. 3353").[2] At No. 3351, appellant was convicted of simple assault. This conviction arose from an

* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 3503(a)(1)(i) and 2701(a)(1), respectively.

[2] We note that appellant was also charged at trial court docket number CP-65-CR-0003352-2011 for a separate incident in Westmoreland County, but was acquitted of all charges at that docket number.

incident on May 1, 2011 in which appellant went to the home of Clark Baird in Bolivar Borough, Westmoreland County and punched the victim, Tracey Singer, so violently in the head that she was knocked unconscious.

At No. 3353, appellant was convicted of criminal trespass. This incident occurred November 19, 2010, at the residence of Tracey Singer in West Wheatfield Township, Indiana County. Singer returned home that night to find appellant waiting inside. Singer ordered appellant out of her residence, and although he initially complied, he returned shortly thereafter, entering her home without invitation, and then physically assaulting her.

On July 2, 2012, appellant was sentenced at No. 3353 to a term of 18 to 84 months' imprisonment. At No. 3351, the court imposed a concurrent sentence of 12 to 24 months' imprisonment. Following the denial of post-trial motions on November 13, 2012, this appeal was timely filed on November 27, 2012.

Appellant raises the following issues on appeal:

1. DID THE TRIAL COURT ERR WHEN IT DENIED THE APPELLANT'S MOTION TO DISMISS THE ACTION AT 3353 C 2011 AS THE COMMONWEALTH FAILED TO DEMONSTRATE THAT THE ACTS ALLEGED THEREIN WERE PART OF AN ONGOING CRIMINAL EPISODE WITH THE COMPANION CASES IN WESTMORELAND COUNTY?

2. WERE THE VERDICTS RETURNED BY THE JURY AT EACH CASE SUPPORTED BY SUFFICIENT EVIDENCE?

> 3. WERE THE VERDICTS AGAINST THE WEIGHT OF THE EVIDENCE PRODUCED AT TRIAL?

Appellant's brief at 4. We will examine these issues in the order presented.

In his first issue, appellant claims that the trial court erred in resolving his pre-trial motions in failing to dismiss the charges at No. 3353. Appellant argued that the charges at No. 3353 arose from an incident in Indiana County and that venue was improper for trial in Westmoreland County because the Commonwealth could not demonstrate that the incidents in Indiana and Westmoreland Counties were part of an ongoing, single criminal episode:

> **Rule 130. Venue; Transfer of Proceedings**
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> **(A) Venue.** All criminal proceedings in summary and court cases shall be brought before the issuing authority for the magisterial district in which the offense is alleged to have occurred or before an issuing authority on temporary assignment to serve such magisterial district, subject, however, to the following exceptions:
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> (3) When charges arising from the same criminal episode occur in more than one judicial district, the criminal proceeding on all the charges may be brought before one issuing authority in a magisterial district within any of the judicial districts in which the charges arising from the same criminal episode occurred.

Pa.R.Crim.P., Rule 130(A)(3), 42 Pa.C.S.A. According to appellant, the exception at Rule 130(A)(3) does not operate to render venue in

Westmoreland County proper because the incident in Indiana County was not part of the same criminal episode.

Appellant has waived any challenge to venue. A challenge to venue must be raised prior to the preliminary hearing:

> **Rule 134. Objections to Venue**
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> (A) Objections to venue between magisterial districts shall be raised in the court of common pleas of the judicial district in which the proceeding has been brought, before completion of the preliminary hearing in a court case or before completion of the summary trial when a summary offense is charged, or such objections shall be deemed to have been waived.

Pa.R.Crim.P., Rule 134(A), 42 Pa.C.S.A.

The preliminary hearing in this case was conducted on September 8, 2011. Appellant did not raise the issue of venue until he filed his Omnibus Pretrial Motions on January 31, 2012. Consequently, appellant has waived any challenge to venue.

Appellant next asserts that the evidence was insufficient to support his convictions. We note our standard of review:

> As a general matter, our standard of review of sufficiency claims requires that we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (Pa.2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused,

> beyond a reasonable doubt." ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa.Super.2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." ***Id.***; ***see also Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa.Super.2000) ("[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence."). Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. ***See Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super.2001).
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> The Commonwealth may sustain its burden by means of wholly circumstantial evidence. ***See Brewer***, 876 A.2d at 1032. Accordingly, "[t]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence." ***Id.*** (quoting ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038-39 (Pa.Super.2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld. ***See Brewer***, 876 A.2d at 1032.

Commonwealth v. Lynch, 72 A.3d 706, 707-708 (Pa.Super. 2013), quoting ***Commonwealth v. Stays***, 70 A.3d 1256, 1266 (Pa.Super. 2013).

Appellant notes that his simple assault conviction was under 18 Pa.C.S.A. § 2701(a)(1):

> **§ 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;

18 Pa.C.S.A. § 2701(a)(1).

Appellant further observes that for this statute, bodily injury is defined as "impairment of physical condition or substantial pain." ***See*** 18 Pa.C.S.A. § 2301. It is appellant's position that when he punched the victim in the face and knocked her unconscious, he did not cause impairment of physical condition or substantial pain. We disagree.

We find that knocking someone unconscious manifestly represents an impairment of physical condition. Moreover, our case law has held that while a blow to the head that <u>almost</u> knocks one unconscious is insufficient to support the serious bodily injury of aggravated assault, it is sufficient to satisfy the bodily injury element of simple assault:

> No less can be said of the simple assault conviction, which was a reduction by the court, on appellant's demurrer, from the initial charge of aggravated assault (i.e., the information alleged that the appellant "attempted to cause serious bodily injury to one Diana Rickabaugh by striking her on the head[.]"). The court did so upon its reading of ***Commonwealth v. Alexander***, 477 Pa. 190, 383 A.2d 887 (1978), which held that a punch to the nose, in and of itself, does not prove one's intent to inflict serious bodily injury. Suffice it say, albeit the evidence was not sufficient to prove that the injury was serious or that the surrounding circumstances

> established the intent to inflict serious bodily injury, there was that quantum of proof necessary to show that the assailant attempted to cause bodily injury to Ms. Rickabaugh by striking her upon the head with an object hard enough to almost knock her unconscious.

Commonwealth v. Adams, 482 A.2d 583, 587 (Pa.Super. 1984).

Appellant also challenges the sufficiency of the evidence as to his conviction for criminal trespass. Appellant was convicted under the following subsection:

> **§ 3503. Criminal trespass**
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> **(a) Buildings and occupied structures.**--
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> (1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he:
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> (i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof

18 Pa.C.S.A. § 3503(a)(1). The two elements of criminal trespass are (1) knowledge of a lack of privilege; (2) to enter a building. ***Commonwealth v. Pellecchia***, 925 A.2d 848, 851-852 (Pa.Super. 2007).

Testimony at trial showed that when the victim and her son returned home on November 19, 2010, and found appellant in the residence, the victim told appellant to leave. (Notes of testimony, 4/9-12/12 at 187.) Appellant yelled at the victim, punched her in the face, and then walked out

of the residence. (***Id.***) As the victim and appellant continued to yell at each other, appellant then re-entered the premises and again punched the victim. (***Id.*** at 188.) From this testimony, it is clear that appellant understood that any privilege he may have had to be in the residence had been revoked at the time he re-entered the premises. Thus, the elements of criminal trespass have been satisfied by the evidence.

The sum and substance of appellant's argument on appeal is that he should have been found guilty of some lesser degree of trespass such as defiant trespass or simple trespass because his conduct in immediately re-entering the residence "does not rise to the level of a felony grade trespass."

It is wholly irrelevant that appellant could have been convicted under some other subsection of section 3503. Appellant was charged with the felony-graded criminal trespass subsection of section 3503 and the facts adduced at trial support all the elements of that subsection. There is no merit to appellant's argument.

In his final argument, appellant contends that his convictions were also against the weight of the evidence.

> Our standard of review for a challenge to the weight of the evidence is well-settled: The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses. ***See Commonwealth v. Champney***, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003), ***cert. denied***, 542 U.S. 939, 124 S.Ct. 2906,

> 159 L.Ed.2d 816 (2004). As an appellate court, we cannot substitute our judgment for that of the finder of fact. ***See id.*** Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. ***See Commonwealth v. Passmore***, 857 A.2d 697, 708 (Pa.Super.2004), ***appeal denied***, 582 Pa. 673, 868 A.2d 1199 (2005). Our appellate courts have repeatedly emphasized that "[o]ne of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence." ***Commonwealth v. Forbes***, 867 A.2d 1268, 1273 (Pa.Super.2005) (internal quotes omitted).
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> Furthermore,
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> > where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.
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> ***Champney***, 574 Pa. at 444, 832 A.2d at 408 (citation omitted).

Commonwealth v. Rabold, 920 A.2d 857, 860-861 (Pa.Super. 2007), ***affirmed***, 597 Pa. 344, 951 A.2d 329 (2008).

In its opinion, the trial court reviewed the jury's weighing of the evidence as to appellant's conviction for simple assault. (Opinion and Order of Court, 11/14/12 at 8-9.) We find no abuse of discretion in the trial court's review. The court did not review the jury's weighing of the evidence as to

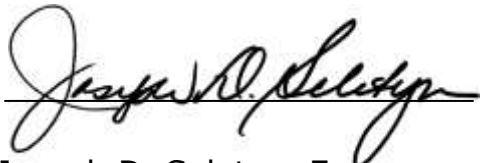
criminal trespass. Nonetheless, the jury's verdict, based upon the evidence presented, certainly does not shock our sense of justice.

Appellant admitted that the victim ordered him to leave her residence on November 19, 2010. (Notes of testimony, 4/9-12/12 at 394.) The only evidence that appellant did not re-enter the victim's residence after being ordered to leave was his own self-serving testimony. (***Id.***) On the other hand, both the victim and her son testified that appellant was told to leave, did leave, and then re-entered the residence. (***Id.*** at 96-99, 187-188.) It does not shock our sense of justice that the jury chose to believe the matching testimonies of the victim and her son over the testimony of appellant. The conviction was not against the weight of the evidence.

Accordingly, having found no merit in any issue on appeal, we will affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/6/2013