J. S50014/12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: C.D., A MINOR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
APPEAL OF: C.D.,	:	
	:	No. 1974 EDA 2011
Appellant	:	

Appeal from the Order of Disposition, July 6, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-JV-0002340-2011

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND FITZGERALD,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: February 15, 2013

C.D. appeals from the order of disposition of July 6, 2011, following his adjudication of delinquency for aggravated assault. In a prior memorandum filed October 31, 2012, we held that the Commonwealth met its burden of disproving appellant's self-defense claim beyond a reasonable doubt; however, we remanded for a supplemental trial court opinion as to appellant's second issue, that the evidence was insufficient to sustain the conviction for aggravated assault as a felony of the second degree where there was no evidence that appellant used a deadly weapon in the commission of the offense. Although the issue was not preserved in appellant's Rule 1925(b) statement, we granted appellant's motion for remand for the trial court to address the issue. We retained panel

* Retired Justice specially assigned to the Superior Court.

jurisdiction. The factual and procedural history of this matter has been set forth at length in that memorandum and will not be repeated here.

On December 14, 2012, the trial court filed a supplemental opinion addressing the remaining sufficiency issue. Therein, the trial court, sitting as finder of fact in this juvenile matter, opines that although there was no testimony that appellant was ever in possession of a weapon, the evidence was sufficient to adjudicate appellant delinquent of second-degree aggravated assault where the complainant's injuries were such that the use of a deadly weapon could be fairly inferred. We are compelled to disagree, and therefore, reverse.

When considering a challenge to the sufficiency of the evidence, this court must view the evidence presented in a light most favorable to the Commonwealth, the verdict winner, and draw all reasonable inferences therefrom. ***Commonwealth v. Ketterer***, 725 A.2d 801, 803 (Pa.Super. 1999). We must then determine whether the evidence was sufficient to permit the fact-finder to conclude that all of the elements of the crimes charged were proven beyond a reasonable doubt. ***Id.*** Any question of doubt is for 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. ***Id.*** at 804.

> 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 trial 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, or none of the evidence.

Commonwealth v. George, 705 A.2d 916, 918 (Pa.Super. 1998), ***appeal denied***, 555 Pa. 740, 725 A.2d 1218 (1998), quoting ***Commonwealth v. Valette***, 531 Pa. 384, 388, 613 A.2d 548, 549 (1992) (citations and quotation marks omitted). "Although a conviction must be based on 'more than mere suspicion or conjecture, the Commonwealth need not establish guilt to a mathematical certainty.'" ***Commonwealth v. Gainer***, 7 A.3d 291, 292 (Pa.Super. 2010), ***appeal denied***, 611 Pa. 631, 23 A.3d 1055 (2011), quoting ***Commonwealth v. Badman***, 398 Pa.Super. 315, 580 A.2d 1367, 1372 (1990) (citation omitted).

Appellant was adjudicated delinquent of aggravated assault as a second-degree felony under subsection (a)(4), which provides:

> **(a) Offense defined.**--A person is guilty of aggravated assault if he: (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon[.]

18 Pa.C.S.A. § 2702(a)(4).

Simply stated, there was no testimony whatsoever that appellant was in possession of a deadly weapon. As noted in our prior memorandum, the complainant did not testify. The investigating officer, Sergeant Christopher Krause, testified that he saw appellant punching the victim multiple times in

the face. (Notes of testimony, 6/15/11 at 5, 12-13.) Sergeant Krause did not see anything in appellant's hands. (***Id.*** at 14.) There was no weapon recovered from the scene.

The trial court relies on photographs of the complainant's face and hands, finding that, "These photographs showed lacerations to the complainant's face as well as deep, bleeding lacerations to his hand. This Court reasonably inferred that the Appellant had used a weapon capable of slashing complainant." (Trial court opinion, 12/14/12 at 1.)

While it is not this court's function to re-weigh the evidence adduced at trial, we have also examined the color photographs in the certified record. (Supplemental record transmitted 6/26/12; Docket No. 3.) The blood and injuries to the complainant's face appear to be consistent with being punched multiple times in the face, as Sergeant Krause testified. There are no observable lacerations to the complainant's face. There do appear to be cuts on the victim's hand and wrist; however, the defense offered a logical explanation for this at trial. Appellant testified that the complainant was drunk and punched out a window. (Notes of testimony, 6/15/11 at 46-47.) Furthermore, there was a stipulation that, in fact, a store window in the area was broken that night and there was blood on the broken glass. (***Id.*** at 42-43.) Sergeant Krause admitted that he did not know when the complainant sustained the injuries to his hands. (***Id.*** at 10.)

The trial court's inference that the complainant's injuries must have resulted from the use of a deadly weapon by appellant is based on mere surmise and conjecture. Sergeant Krause never saw appellant with a weapon. There was no weapon recovered from the scene. The complainant did not appear for trial. Appellant gave uncontradicted testimony that the complainant punched out a nearby store window, cutting his hand, which was corroborated by the parties' stipulation to the office manager's testimony. For these reasons, we are constrained to reverse the order of disposition.

Order reversed.