

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
OLIVER NEAL,	:	No. 2991 EDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, May 11, 2012,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0007956-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 02, 2014**

Appellant appeals the judgment of sentence imposed following his conviction for aggravated assault. Finding no merit in the issues raised on appeal, we affirm.

The trial court accurately summarized the underlying facts:

On February 10, 2011, at approximately 2am, police responded to a 911 call at or near the vicinity of 1850 S. 54th Street in the City and County of Philadelphia. After police knocked on the front door of that address, the complainant, Sandy Spicer, answered and the police entered the home. Spicer was visibly upset and her clothes were covered in blood. Her face appeared swollen and she was bleeding from her mouth. Spicer told police she was asleep in bed when Oliver Neal (Appellant) began banging on the front door. She and Appellant engaged in a physical altercation. Spicer said that she was angry at Appellant and attempted to take his keys to the house because he refused to work or support his family. Appellant told Spicer he was

going to kill her and repeatedly punched her in the face and mouth. Appellant chased Spicer upstairs into the bathroom where she fell into the bathtub. Appellant continued to beat and choke Spicer until she was able to free herself and run downstairs. Appellant ransacked the house looking for his "motorcycle vest." Spicer brought the vest to him outside and Appellant opened the passenger door to his truck, retrieved a firearm, and shot twice at Spicer before fleeing in his vehicle. One fired 9mm cartridge casing was found at the scene.

Later that night, police located Appellant's vehicle and he was pulled over. As the officer approached the vehicle, Appellant backed up his truck, struck the officer's cruiser then sped from the scene. Appellant was later apprehended and arrested.

Spicer later provided a full detailed statement to police and identified Appellant from a police photo array. N.T. 2/9/12, pgs. 39-49; 121-122; 129; 156-159.

Trial court opinion, 7/11/13 at 1-2.

On February 10, 2012, a jury convicted appellant of aggravated assault.¹ Appellant was acquitted of carrying firearms in public in Philadelphia and possessing an instrument of crime.² On May 11, 2012, appellant was sentenced to 4 to 8 years' imprisonment. On May 21, 2012, appellant filed a post-sentence motion. That motion was denied by operation of law on September 20, 2012. Appellant timely filed his notice of appeal on October 17, 2012.

¹ 18 Pa.C.S.A. § 2702(a)(1).

² 18 Pa.C.S.A. §§ 6108 and 907(a), respectively.

Appellant raises the following issues on appeal:

- I. Is the [appellant] entitled to an arrest of judgment on the charge of Aggravated Assault as a Felony of the First Degree where there is insufficient evidence to sustain the verdict as the evidence was insufficient to prove that the Defendant attempted to cause a serious bodily injury to the victim?
- II. Is the [appellant] entitled to a new trial on the charge of Aggravated Assault as a Felony of the First Degree where the verdict is not supported by the greater weight of the evidence, as the greater weight of the evidence does not support any finding that the [appellant] acted so as to attempt to cause a serious bodily injury to the victim?

Appellant's brief at 3.

Appellant first challenges the sufficiency of the evidence. We note our standard of review:

The standard we apply in reviewing the sufficiency of the 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 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 finder 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. Antidormi, 84 A.3d 736, 756 (Pa.Super. 2014), quoting **Commonwealth v. Estep**, 17 A.3d 939, 943-944 (Pa.Super. 2011), **appeal dismissed as improvidently granted**, 54 A.3d 22 (Pa. 2012).

Initially, we find that appellant has waived this issue. Appellant failed to plead in his Statement of Matters Complained of on Appeal Pursuant to Rule of Appellate Procedure 1925(b) which element of aggravated assault was not supported by sufficient evidence. This court has previously ruled that such failure to plead the unsupported element in the concise statement of errors complained of on appeal serves to waive the sufficiency issue. **Commonwealth v. Williams**, 959 A.2d 1252, 1256-1257 (Pa.Super. 2008). Moreover, even if not waived, the issue is meritless.

Appellant was convicted of felony one aggravated assault:

(a) Offense defined.--A person is guilty of aggravated assault if he:

- (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

18 Pa.C.S.A. § 2702(a)(1).

Appellant's argument focuses on the extent and nature of the victim's injuries, contending that they did not represent serious bodily injury, nor did they manifest an intent to cause serious bodily injury. Appellant completely ignores the fact that appellant threatened the victim that he was going to kill her and later twice fired a gun at the victim. Appellant is of the mistaken belief that the jury's acquittal on the firearm offense and possessing an instrument of crime means that the jury found that there was no weapon involved and did not find that appellant fired a gun at the victim.

The jury's acquittal verdicts on the other charges do not result in an inference that appellant was unarmed at the time of the assault or did not fire a gun at the victim. These are simply inconsistent verdicts. An acquittal on one charge cannot be interpreted as a specific finding as to certain evidence on another charge, and an inconsistent verdict shall be allowed to stand so long as the inconsistent verdict is supported by sufficient evidence:

The question before us implicates the general issue of inconsistent verdicts, which, under longstanding federal and state law, are allowed to stand so long as the evidence is sufficient to support the conviction. **See *Dunn v. United States***, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932) (holding that "[c]onsistency in the verdict is not necessary" and refusing to allow inconsistent verdicts to be upset by "speculation or inquiry" into the possibility of compromise or mistake on the part of the jury); ***United States v. Powell***, 469 U.S. 57, 58, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) (applying ***Dunn***'s rule, which the Court explained as follows: "a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's verdict of acquittal on

another count"). In affirming a verdict of aggravated assault and battery, despite the jury's acquittal of the accused on a separate count of assault and battery, this Court reiterated that "[a]n acquittal cannot be interpreted as a specific finding in relation to some of the evidence." **Commonwealth v. Carter**, 444 Pa. 405, 282 A.2d 375, 376 (1971) (citation omitted). Rather, an acquittal of a charge for which there was sufficient evidence for conviction is an occasion of a "jury's assumption of a power which [it] had no right to exercise, but to which [it was] disposed through lenity." **Id.** (citation omitted).

Commonwealth v. Miller, 35 A.3d 1206, 1208-1209 (Pa. 2012).

Thus, the acquittals as to the firearms and possession of criminal instruments charges do not lead to an inference that appellant did not possess and fire a gun during the assault. Finally, this court has previously found that firing a gun twice at a person, even where the shots both miss, is sufficient to support the intent component of aggravated assault.

Commonwealth v. Wanamaker, 444 A.2d 1176, 1178 (Pa.Super. 1982).

We find that appellant's aggravated assault conviction was supported by sufficient evidence.

Appellant next asserts that his aggravated assault conviction was against the weight of the evidence. We note our standard of review:

A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. **Commonwealth v. Widmer**, 560 Pa. 308, 319, 744 A.2d 745, 751-52 (2000); **Commonwealth v. Brown**, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the

judge on the same facts would have arrived at a different conclusion. **Widmer**, 560 Pa. at 319-20, 744 A.2d at 752. Rather, "the role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'" **Id.** at 320, 744 A.2d at 752 (citation omitted). It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." **Brown**, 538 Pa. at 435, 648 A.2d at 1189.

An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:

Appellate review of a weight claim **is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence.** **Brown**, 648 A.2d at 1189. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. **Commonwealth v. Farquharson**, 467 Pa. 50, 354 A.2d 545 (Pa.1976). One 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 and that a new trial should be granted in the interest of justice.

Widmer, 560 Pa. at 321-22, 744 A.2d at 753 (emphasis added).

Commonwealth v. Clay, 64 A.3d 1049, 1054-1055 (Pa. 2013).

The trial court provided the following analysis in considering the weighing of the evidence by the jury:

Here, the jury, acting as the finder of fact, afforded the proper weight to the testimony and evidence presented. Following the criminal assault, Spicer gave a detailed statement to police at her home. Thereafter, at the police district, she again provided a detailed account of what transpired that evening and provided a signed and dated statement. Further, the police took numerous photographs of Spicer and her injuries, which were shown to the jury, demonstrating her numerous physical injuries. Lastly, Spicer identified Appellant from a police photo array and even identified Appellant with a unique "broken heart" symbol over his photograph. N.T. 2/9/12, pgs. 70-75; 77; 80-85; 89-91; 111-117; 125.

In court, Spicer recanted her testimony stating that the blood that soaked her body was that of Appellant and that he did not fire a gun at her. ***Id.*** at 59-65. Thus, her credibility was at issue during trial. However, the prosecution admitted into the record both of Spicer's signed statements to police, the photos of her after the assault, and the photo identification of Appellant, all of which were admitted into evidence to explain the inconsistency in the witnesses statement, which is permissible. ***See, Commonwealth v. Starks***, 444 A.2d 736 (Pa. Super. 1982); ***Commonwealth v. Buchanan***, 689 A.2d 930 (Pa. Super. 1997).

It is not unusual for witnesses in criminal cases to provide detailed statements to police only to provide inconsistent testimony, or claim faulty memory due to fear, intimidation, or retaliation. However, it is for the fact finder alone to review the evidence and determine the credibility of any witness. The Commonwealth questioned Spicer on

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direct, as well as admitted her evidence of the assault through the police who observed Spicer that night and who took her statements.

The weight of the evidence, supported, rather than contradicted the verdict, and does not "shock one's sense of justice." ***Commonwealth v. Cousar***, 928 A.2d 1026 (Pa. 2007). No error is found.

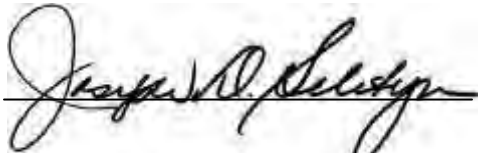
Trial court opinion, 7/11/13 at 6-8.

We discern no abuse of discretion whatsoever in the trial court's careful analysis of the weight of the evidence issue. There is no merit in appellant's second issue either.

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

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/2/2014