J-S26020-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: J.J., A MINOR	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
APPEAL OF: J.J., A MINOR	:	No. 2138 EDA 2012

Appeal from the Dispositional Order of July 31, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-JV-0002187-2011

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J. AND WECHT, J.

MEMORANDUM BY BENDER, J.: **FILED JUNE 03, 2013**

J.J. (Appellant), a minor, appeals from the dispositional order of July 31, 2012, following her adjudication of delinquency for the offense of simple assault. After careful review, we affirm.

The facts adduced at trial were as follows:

> At the July 7, 2011, adjudicatory hearing in this matter, the only witness was Kathleen Fitzpatrick. Ms. Fitzpatrick testified that on the date of the incident, May 11, 2011, she was on duty as the principal of Middle Years Alternative (MYA) Middle School where [Appellant] was a student. Ms. Fitzpatrick explained that around 8:30 AM that morning, she was clearing the hall as students went to their classroom when she observed Defendant leaving her classroom. Ms. Fitzpatrick instructed the Defendant to go back to her classroom and they "had words". Ms. Fitzpatrick explained that Defendant then went back into the classroom but because of her response, Ms. Fitzpatrick followed her into the room and directed her to go to the main office.
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> Ms. Fitzpatrick testified that the Defendant stepped out of the room but attempted to back into the classroom. Ms. Fitzpatrick explained that she herself stood in the doorway and the Defendant directed her to move repeatedly. Ms. Fitzpatrick testified that when she refused to move, the Defendant pushed on both her forearms with open palms and said, "Move out of the way. I'm about to slap you." Ms. Fitzpatrick said she asked the office to send a police officer and, when the officer approached, the Defendant ran away. Ms. Fitzpatrick indicated that the police eventually found the Defendant and she had to be

> handcuffed before being escorted to the school police office. Ms. Fitzpatrick noted that the Defendant had been having problems throughout the year. Ms. Fitzpatrick was not injured as a result of the incident. There was a stipulation between the attorneys that if the Defendant's mother were called to testify, she would attest to the Defendant's good character.

Trial Court Opinion (TCO), 10/16/12, at 5 – 6 (citations omitted).

Appellant presents a single claim on appeal:

> Did not the court err in finding the evidence sufficient to sustain Appellant's adjudication of delinquency for simple assault where Appellant pushed the complainant once, and where there was no evidence of intent to cause injury and no injury occurred?

Appellant's Brief, at 3.

In evaluating a challenge to the sufficiency of the evidence supporting an adjudication of delinquency, our standard of review is as follows:

> When a juvenile is charged with an act that would constitute a crime if committed by an adult, the Commonwealth must establish the elements of the crime by proof beyond a reasonable doubt. When considering a challenge to the sufficiency of the evidence following an adjudication of delinquency, we must review the entire record and view the evidence in the light most favorable to the Commonwealth.
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> In determining whether the Commonwealth presented sufficient evidence to meet its burden of proof, the test to be applied is whether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences therefrom, there is sufficient evidence to find every element of the crime charged. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by wholly circumstantial evidence.
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> The facts and circumstances established by the Commonwealth need not be absolutely incompatible with a defendant's innocence. Questions of doubt are for the hearing judge, unless the evidence is so weak that, as a matter of law, no probability of fact can be drawn from the combined circumstances established by the Commonwealth.

In re A.V., 48 A.3d 1251, 1252–1253 (Pa. Super. 2012) (quoting ***In re M.J.H.***, 988 A.2d 694, 696-97 (Pa. Super. 2010)).

Simple assault is defined by statute as follows:

> **(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;
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> (2) negligently causes bodily injury to another with a deadly weapon;
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> (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
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> (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person.

18 Pa.C.S. § 2701(a).

Neither § 2701(a)(2) nor § 2701(a)(4) are applicable based upon the uncontroverted facts adduced at trial. Furthermore, based upon the fact that no injury resulted from Appellant's conduct, an adjudication of delinquency for simple assault in this instance could have only been sustained premised upon one of two permutations of the simple assault statute: first, that Appellant "attempt[ed] to cause … bodily injury to another" pursuant to § 2701(a)(1); or second, that Appellant "attempt[ed] by physical menace to put another in fear of imminent serious bodily injury" pursuant to § 2701(a)(3). "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.

Appellant contends that she never took a substantial step toward causing bodily injury to Ms. Fitzpatrick. Thus, Appellant reasons, "no specific

intent was demonstrated, and thus [there was] no criminality." Appellant's Brief, at 9. Appellant argues that:

> In all of the jurisprudence surrounding this matter, actual conduct must necessarily be involved to demonstrate attempt. There were no such steps at any point here as Appellant had done nothing assaultive, only speaking of such an act without any demonstration by means of further conduct from which an actual intent to perform the act might be inferred. "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." ***Commonwealth v. Sanders***, 627 A.2d 183, 186 (Pa. Super. 1993), *appeal denied*, 634 A.2d 220 (Pa. 1993); 18 Pa.C.S.A. § 302(b)(1)(i). Appellant's mumbled threat, in view of her non-forcible, non-damaging touch of the complainant's arms, is insufficient by itself to constitute an overt act constituting a substantial step. Appellant did not repeat her remark, nor was evidence presented that she made a move to touch the complainant in any way other than as she had already, non-injuriously, done. Thus, on this record, the evidence was insufficient to find an attempt to commit simple assault by a specific intent to cause bodily injury. 18 Pa. C. S. 2701(a)(1). As this Court has held in another case, "[t]he facts of this matter are that Appellant acted impulsively; she was at least inconsiderate, at worst callous. None of these lapses, while scarcely estimable, rise to the level of criminality." ***In the Interest of K.J.V.***, 939 A.2d 426, 429-30 (Pa. Super. 2007).

Appellant's Brief, at 11.

The trial court found the evidence sufficient to sustain an adjudication of delinquency for simple assault. "The evidence in this case was sufficient to permit a reasonable inference that [Appellant's] act of pushing the complain[ant] coupled with the words, 'I'm about to slap you' are sufficient to indicate the Defendant's intent to inflict bodily injury upon Ms. Fitzpatrick." TCO, at 8. We agree.

In ***Commonwealth v. Brown***, 822 A.2d 83 (Pa. Super. 2003), this Court found the evidence sufficient to support convictions for aggravated and simple assault where the appellant pushed a teacher once, without any resulting bodily injury. The appellant entered the teacher's classroom unannounced, yelling threats at the teacher and students that she was going to kill them, and during her tirade, the appellant pushed the teacher. We held that the appellant's "actions coupled with the threats are enough to find that she was attempting to cause bodily harm" to the teacher. 822 A.2d at 85. On that basis, this Court affirmed the appellant's convictions for both aggravated and simple assault.

Appellant posits that "actual conduct must necessarily be involved to demonstrate attempt." Appellant's Brief, at 11. However, Appellant did, in fact, engage in "actual conduct" in this case by pushing Ms. Fitzpatrick, conduct that is substantially similar to what occurred in ***Brown***. That act was not sufficient to sustain a conviction for simple assault under the provisions of the statute requiring the causation of bodily injury because bodily injury did not result from the push. Nevertheless, that act, coupled with the attendant circumstances, including Appellant's threat and her subsequent flight, are collectively sufficient to support a reasonable inference that Appellant attempted to inflict bodily harm on Ms. Fitzpatrick. The act of pushing was a substantial step towards the commission of a simple assault, despite the fact that the push did not, by itself, result in bodily injury. Accordingly, we conclude that the evidence was sufficient to support Appellant's adjudication of delinquency for simple assault.

Order of disposition affirmed.

Judgment Entered.

Prothonotary

Date: 6/3/2013