

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

PIERRE MENDEZ,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2454 EDA 2012

Appeal from the Judgment of Sentence of August 16, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0010687-2011

BEFORE: GANTMAN, DONOHUE AND OLSON, JJ.

MEMORANDUM BY OLSON, J.:

FILED DECEMBER 20, 2013

Appellant, Pierre Mendez, appeals from the judgment of sentence entered on August 16, 2012. We affirm.

At approximately 7:00 p.m. on June 29, 2012, Edwin Cruz was standing outside of his Philadelphia residence when he saw Appellant and Mark Marquez stop their vehicle one block away from him. As Mr. Cruz testified, Mr. Marquez then exited the vehicle with a retractable metal nightstick in hand, and began "striking [Mr. Cruz] with the nightstick."¹ N.T. Trial, 6/22/12, at 60-61. Mr. Cruz testified that, while Mr. Marquez was striking him with the nightstick, Appellant pulled his vehicle closer, exited the vehicle, and joined in the assault. *Id.* at 66-67.

¹ Mr. Cruz testified that the nightstick was of a type "that the police carry." N.T. Trial, 6/22/12, at 60.

According to Mr. Cruz, after Mr. Marquez struck him with the nightstick, Mr. Marquez accidentally dropped the weapon. **Id.** at 61 and 69. Mr. Marquez nevertheless continued the assault by punching Mr. Cruz in the eye and causing Mr. Cruz's glasses to go "into [his] eye" and fly off his face. **Id.** at 61, 69, and 79. Further, Mr. Cruz testified, Appellant picked the nightstick up off the ground and began striking Mr. Cruz with the weapon. **Id.** at 61 and 69-70.

Mr. Cruz testified that, as a result of the beating, he fell to the ground and curled up in a fetal position. While he was lying helplessly on the ground, Appellant and Mr. Marquez punched him more times than he could remember and kicked him "three or four times." **Id.** at 70. Appellant and Mr. Marquez then stole Mr. Cruz's \$1,400.00 gold chain and drove away. **Id.** at 67 and 70-73. In total, the entire assault lasted approximately 30 seconds. **Id.** at 66-67.

Mr. Cruz testified that the beating caused him to suffer injuries to his head, eye, hip, and knees. **Id.** at 72. Moreover, Mr. Cruz testified, the injuries to his right hip still cause him pain and he now has a scar on his head. **Id.** at 72-73.

After Appellant was arrested, the Commonwealth charged Appellant with a number of crimes, including aggravated assault, theft by unlawful taking, receiving stolen property, possessing an instrument of crime, simple assault, and recklessly endangering another person (REAP). Appellant proceeded to a non-jury trial, where the above evidence was presented.

Moreover, during Appellant's trial, the Commonwealth presented a video from Mr. Cruz's home surveillance camera, which showed the entirety of the assault. *Id.* at 62-68.

Following Appellant's trial, the trial court found Appellant guilty of aggravated assault, simple assault, possessing an instrument of crime, and REAP.^{2, 3} On August 16, 2012, the trial court sentenced Appellant to serve 11 ½ to 23 months in prison for the aggravated assault conviction and to serve a consecutive term of four years of probation for the possessing an instrument of crime conviction.

Appellant filed a timely notice of appeal and now raises the following claim to this Court:⁴

Was not the evidence insufficient to establish aggravated assault as a felony of the first degree where the assault was seconds long in duration, ended without outside intervention, and did not result in serious bodily injury?

Appellant's Brief at 3.

We review Appellant's sufficiency of the evidence challenge under the following standard:

² 18 Pa.C.S.A. §§ 2702(a)(1), 2701(a), and 907(a), respectively.

³ The trial court found Appellant not guilty of theft by unlawful taking and receiving stolen property. N.T. Trial, 6/22/12, at 107.

⁴ The trial court ordered Appellant to file and serve a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant complied and preserved the one claim he currently raises on appeal.

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 [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 or none of the evidence.

Commonwealth v. Brown, 23 A.3d 544, 559-560 (Pa. Super. 2011) (*en banc*), quoting ***Commonwealth v. Hutchinson***, 947 A.2d 800, 805-806 (Pa. Super. 2008).

Appellant was convicted of aggravated assault under 18 Pa.C.S.A. § 2702(a)(1). This subsection provides:

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). The Crimes Code defines "serious bodily injury" as "[b]odily injury which 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.A. § 2301.

In the case at bar, the Commonwealth concedes that the assault did not cause victim serious bodily injury. **See** Commonwealth’s Brief at 7. Thus, the issue on appeal is whether the evidence was sufficient to support the trial court’s conclusion that Appellant attempted to cause Mr. Cruz serious bodily injury. As we have stated:

Where the victim does not suffer serious bodily injury, the charge of aggravated assault [under Section 2702(a)(1)] can be supported only if the evidence supports a finding of an 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.A. § 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). “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[.]” **Id.** at 1257-1258 (quotation omitted). “As intent is a subjective frame of mind, it is of necessity difficult of direct proof.” **Id.** (citation omitted). The intent to cause serious bodily injury may be proven by direct or circumstantial evidence.

Commonwealth v. Fortune, 68 A.3d 980, 985 (Pa. Super. 2013) (*en banc*).

Moreover, on the issue of “intent to cause serious bodily injury,” our Supreme Court has explained:

[In **Commonwealth v. Alexander**, 383 A.2d 887 (Pa. 1978), the Pennsylvania Supreme Court] created a totality of the circumstances test, to be used on a case-by-case

basis, to determine whether a defendant possessed the intent to inflict serious bodily injury. **Alexander** provided a list, albeit incomplete, of factors that may be considered in determining whether the intent to inflict serious bodily injury was present, including evidence of a significant difference in size or strength between the defendant and the victim, any restraint on the defendant preventing him from escalating the attack, the defendant's use of a weapon or other implement to aid his attack, and his statements before, during, or after the attack which might indicate his intent to inflict injury. **Alexander** made clear that simple assault combined with other surrounding circumstances may, in a proper case, be sufficient to support a finding that an assailant attempted to inflict serious bodily injury, thereby constituting aggravated assault.

Matthew, 909 A.2d at 1257 (internal quotations and some internal citations omitted).

On appeal, Appellant claims that the evidence was insufficient to support the conclusion that he intended to inflict serious bodily injury upon Mr. Cruz. Specifically, Appellant claims, the following facts demonstrate his lack of intent: 1) the assault lasted approximately 30 seconds; 2) Appellant voluntarily withdrew from the assault; and, 3) the assault "ended without outside intervention." Appellant's Brief at 11-16. Appellant's claim fails.

Appellant is correct to note that the assault lasted approximately 30 seconds and that Appellant voluntarily withdrew from the assault. Nevertheless, viewing the totality of the circumstances in the light most favorable to the Commonwealth, we conclude that the evidence was sufficient to support the factual finding that Appellant intended to inflict serious bodily injury upon Mr. Cruz. Indeed, the evidence demonstrates that Appellant: joined with another man to beat a single, unarmed, and non-

aggressive victim; repeatedly beat Mr. Cruz with a weapon; beat Mr. Cruz so severely that Mr. Cruz fell to the ground and curled in a defensive, fetal position; continued to punch and kick Mr. Cruz while Mr. Cruz was helpless and lying on the ground; and, assaulted Mr. Cruz for a fairly lengthy period of time. Moreover, the fact that Appellant stopped the assault before he actually caused Mr. Cruz serious bodily injury does not militate against a finding that Appellant intended to cause Mr. Cruz serious bodily injury. Certainly, Appellant might have stopped the assault because it was occurring in the middle of a city street and Appellant wished to get away or because Appellant believed he had already caused Mr. Cruz serious bodily injury.

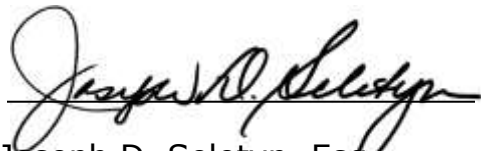
Viewed in the light most favorable to the Commonwealth, the evidence demonstrates that, when Appellant attacked Mr. Cruz, Appellant intended to cause Mr. Cruz “[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” 18 Pa.C.S.A. § 2301; **see also Commonwealth v. Rodriguez**, 673 A.2d 962 (Pa. Super. 1996) (“[t]he jury could infer intent to inflict serious bodily injury from evidence that [the defendant] and his [two] confederates punched and kicked the lone victim while the victim was on the ground, stopping only when a police officer arrived”); **Commonwealth v. Aycock**, 470 A.2d 130 (Pa. Super. 1983) (evidence was sufficient to support the conclusion that the defendant intended to inflict serious bodily injury upon the victim, where the defendant used an 18-inch piece of channel steel to strike the victim in the

head and back); ***Commonwealth v. Glover***, 449 A.2d 662 (Pa. Super. 1982) (“the jury could have found the requisite intent [to cause serious bodily injury] in the fact that the [defendant] struck the victim repeatedly . . . in the head with their fists and kicked [the victim] . . . and did not act alone. Three men attacked [the victim].”).

Appellant’s sufficiency of the evidence claim thus fails.

Judgment of sentence affirmed. Jurisdiction relinquished.

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: 12/20/2013