NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LAWRENCE COTTMAN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3060 EDA 2011

Appeal from the Judgment of Sentence September 22, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0008994-2009

BEFORE: BOWES, GANTMAN, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: Filed: March 8, 2013

Lawrence Cottman appeals from the judgment of sentence of nine to eighteen years imprisonment that was imposed after he pled guilty to aggravated assault, possession of an instrument of crime ("PIC"), and reckless endangerment and was thereafter convicted at a bench trial of attempted murder. We reject his challenges to the sufficiency and weight of the evidence supporting the offense of attempted murder and affirm.

Appellant's convictions stem from his assault of James Moore in the 4800 block of North 17th Street, Philadelphia, at approximately 3:00 p.m. on April 5, 2009. After Appellant struck Mr. Moore numerous times with a metal baseball bat, the victim sustained a broken arm, shoulder bone, and ribs, as well as head wounds, and his injuries led to renal failure. Mr. Moore underwent surgery and suffered residual adverse mental effects from the

attack. Appellant, who was arrested at the scene, had no visible injuries on his body. As there were various eyewitnesses to the attack and due to the severity of Mr. Moore's injuries, Appellant proceeded to plead guilty on June 27, 2011, to aggravated assault, PIC, and reckless endangerment, which left a pending charge of attempted murder. Appellant contested that he committed that crime and proceeded to a nonjury trial on July 12, 2011.

The Commonwealth's first witness was Wayne Oliver. On the afternoon of April 5, 2009, Mr. Oliver was sitting on his front porch smoking when Appellant, a neighbor, approached and asked for a cigarette. Mr. Moore, another neighbor, arrived soon thereafter and asked Appellant about money that Mr. Moore believed that Appellant owed to Mr. Moore for denting his truck. Mr. Oliver described the communications between the victim and Appellant as a conversation.

After Appellant refused to compensate Mr. Moore, Mr. Moore laid his coat on the ground and retrieved a piece of rotting wood. He was standing holding the board, and "he moved suddenly, so he just turned . . . with the board, but the board was so rotten, the board [broke] in his hand." N.T. Trial (Waiver) 7/12/11, at 18. When Mr. Moore turned, "the side of the board knocked [Appellant's] glasses off." ***Id***. Mr. Oliver denied that Mr. Moore intentionally swung the board at Appellant. ***Id***.

After the board crumbled, both men placed their fists in the air, appearing as though they intended to fistfight. No one threw any punches,

and the two men separated. Mr. Moore walked across the street to the porch of another house and started a conversation with a person at that location.

After Mr. Moore retreated, Appellant retrieved his glasses from the ground, went to the rear of a house, obtained an aluminum baseball bat, approached Mr. Moore, and pulled him backward down the porch steps. Appellant then started beating Mr. Moore, who was lying on the ground, with the bat. Mr. Oliver indicated that the unarmed victim was struck more than ten times. During the attack, Appellant was saying different things to Mr. Moore, but Mr. Oliver only heard Appellant say, "don't ever f__ with me no more." ***Id***. at 25. Mr. Moore attempted to stand but was unable to do so due to the blows. After the victim called for help, men intervened and stopped the assault. By that time, Mr. Moore had "blood just shooting up from the head" from five to six head wounds. ***Id***. at 16. Mr. Oliver stemmed the flow of blood by applying pressure, and an ambulance was called to the scene.

Edith Butler also lived in the neighborhood and witnessed the attack. She was in her home when she heard Mr. Moore screaming "somebody get him off me." ***Id***. at 54. As she ran across the street to the scene of the crime, Mrs. Butler saw Appellant hit Mr. Moore with the metal bat five or six times. Mrs. Butler yelled at Appellant to stop striking the victim, who was on the ground. Appellant ignored her, continued his assault, and told

Mrs. Butler, "I am going to kill him." ***Id***. at 62. The attack ceased because Mrs. Butler's husband, Dominic, stepped between the two men. Mrs. Butler went to retrieve Mr. Moore's sister.

Mr. Butler also observed the initial interaction between Mr. Moore and Appellant at Mr. Oliver's home. Unlike Mr. Oliver, he described their conversation as an argument. Mr. Butler did not observe the incident with the board. He did see Appellant and Mr. Moore ready themselves for a fistfight. Mr. Butler confirmed that no mutual physical confrontation transpired, and, instead, the two men separated. At that point, Mr. Butler overheard Mr. Moore say, "I am not going to fight you," and watched Mr. Moore leave the area. ***Id***. at 75. Minutes later, Mr. Butler heard Mr. Moore screaming for help and saw Appellant striking the victim repeatedly with the baseball bat.

Mr. Moore took the stand and testified as follows. Before the incident in question, Appellant and another neighbor, whose first name was Darnell, damaged Mr. Moore's truck. At about 3:00 p.m. on April 5, 2009, Mr. Moore saw Appellant on North 17th Street in front of Mr. Oliver's house, approached him, and asked when he was "going to give me my money for my truck, are you going to pay for the damage to my truck." ***Id***. at 82. Appellant retorted that he was not going to pay Mr. Moore anything.

Mr. Moore, who was upset, began to walk away when Appellant made a movement that led Mr. Moore to think that Appellant "was coming after

[Mr. Moore.]" *Id*. at 83. Mr. Moore specified that Appellant appeared to "jump, like, and I thought he was coming toward me," and, due to Appellant's action, Mr. Moore obtained the piece of wood that was on the ground to protect himself. *Id*. at 90. Mr. Moore said that he "went to swing it, [but] there was nothing there. It was an old piece of crumbled up wood." *Id*.

Mr. Moore confirmed that, after this confrontation, he crossed the street to Darnell's residence, started to speak with a member of Darnell's family, and was standing on the porch to the home. A few minutes later, Mr. Moore felt himself fall backward and then looked up to see Appellant beating him with the baseball bat. Mr. Moore said that he was struck at least ten times. He knew Appellant was speaking to him during the assault. The victim was only able to recall Appellant stating, "I have a bat now, what are you going to do[?]" *Id*. at 86. Mr. Moore, who was fifty-four at the time of the crime, related that Appellant was one-half Mr. Moore's age and twice Mr. Moore's size.

Based on this proof, the trial court concluded that Appellant had the specific intent to kill Mr. Moore and had taken a substantial step toward that goal. Accordingly, it convicted him of attempted murder. This appeal followed imposition of a nine-to-eighteen-year term of incarceration and the ensuing denial of Appellant's post-sentence motion, which included a challenge to the weight of the evidence. Appellant raises two positions, "1.

Was the Verdict of Guilt against the weight of the evidence?"; and "2. Was there insufficient evidence to convict [Appellant] of Attempted Murder?" Appellant's brief at 6.

While Appellant would be discharged if granted relief on his second claim but receive a new trial if the first contention was meritorious, we address the issues in reverse order. Our standard of review of a sufficiency claim is settled:

> 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 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. Knox, 50 A.3d 749, 754 (Pa.Super. 2012) (quoting ***Commonwealth v. Brown***, 23 A.3d 544, 559–60 (Pa.Super. 2011) (*en banc*)).

"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 (a). For a defendant to be found guilty of attempted murder, the Commonwealth must establish that the defendant had the specific intent to kill as well as the existence of a substantial step toward effectuating that desire. ***See Commonwealth v. Geathers***, 847 A.2d 730, 734 (Pa.Super. 2004).

In the present case, Appellant challenges the intent element of the crime. He maintains that he credibly testified that "he did not intend to kill Moore," and that "[a]t no point did the Commonwealth present any evidence to the contrary." Appellant's brief at 13. We disagree with Appellant's position that the Commonwealth did not adduce any evidence to refute Appellant's testimony. First, Mrs. Butler stated that Appellant, in response to her plea to cease the attack, continued to strike the victim and responded that he was going to kill Mr. Moore. Thus, there was direct proof, from Appellant himself, that he wanted to murder the victim.

Additionally, our Supreme Court has continually noted that "specific intent to kill can be inferred from the use of a deadly weapon upon a vital part of the victim's body." ***Commonwealth v. Fletcher***, 986 A.2d 759, 792 (Pa. 2009) (citation omitted). A "deadly weapon" under the Crimes Code is defined to include, in pertinent part, any "device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury." 18 Pa.C.S. § 2301. We have specifically characterized a baseball bat as a deadly weapon when it is swung

at someone's head. ***Commonwealth v. Nichols***, 692 A.2d 181, 184-85 (Pa.Super. 1997); ***see also Commonwealth v. Johnson***, 719 A.2d 778, 785 (Pa.Super. 1998) (indicating that baseball bats used during murder were deadly weapons). In this case, Mr. Oliver established that there were five to six wounds on Mr. Moore's head, one of which was gushing blood, from strikes by the baseball bat. Hence, specific intent to kill was also established in this case by Appellant's use of an aluminum baseball bat to strike his victim in the head numerous times.

Appellant also suggests that the trial court must have found his testimony that he did not want to kill Mr. Moore credible since at no point in its opinion did it state that Appellant's testimony was incredible. However, this position does not speak to the issue at hand, which is whether the Commonwealth's evidence, which is the only proof that we consider in this context, was sufficient to establish Appellant's specific intent to kill. As delineated, the Commonwealth's proof established the intent element of the crime, and Appellant's testimony to the contrary is not considered in this context. Accordingly, we reject Appellant's challenge to the sufficiency of the evidence supporting his attempted murder conviction.

As noted, Appellant also claims that the verdict was against the weight of the evidence, which argument was presented to the trial court in a post-sentence motion and, therefore, contrary to the Commonwealth's position, was preserved. We employ an exceedingly narrow review in this context.

"[A] trial court's denial of a post-sentence motion 'based on a weight of the evidence claim is the least assailable of its rulings.'" ***Commonwealth v. Sanders***, 42 A.3d 325, 331 (Pa.Super. 2012) (partially quoting ***Commonwealth v. Diggs***, 949 A.2d 873, 880 (Pa. 2008)); ***accord Commonwealth v. Brown***, 648 A.2d 1177, 1189-90 (Pa. 1994) ("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[.]") (citation omitted). In this setting, "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." ***Sanders***, ***supra*** at 331 (*quoting* ***Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003)). We reverse the trial court's ruling only if the verdict "is so contrary to the evidence as to shock one's sense of justice." ***Sanders***, ***supra*** at 331 (*quoting* ***Champney***, ***supra*** at 408).

Appellant's argument is that, when delivering its verdict, the trial court mentioned that it found that Appellant acted with premeditation. He continues that premeditation is not an element of attempted murder and that the court did not employ the correct legal elements in rendering its decision. While this position does not appear to be one relating to the weight of the evidence, we will nevertheless address it. The trial court did mention that it found that premeditation was evident from the fact that,

after the confrontation ceased, Appellant retrieved a baseball bat and proceeded to find the victim to attack him. However, the fact that Appellant acted with premeditation in obtaining a weapon to attack the retreated victim was pertinent to his specific intent to kill.

Moreover, the court specifically determined both that Appellant had engaged in a substantial step toward killing the victim and that he had the specific intent to do so. N.T. Trial (Waiver), 7/12/11, at 182 (1. delineating the extensive number of blows inflicted by Appellant on the prone Mr. Moore and finding that, but for the neighbors' intervention, the victim probably would have died; and 2. stating that it believed that the baseball bat was "under the circumstances, a deadly weapon" and that Appellant's "continued blows demonstrate[d his] intent to kill the complainant."). As it is clear that the court applied the proper elements to determine whether Appellant committed the crime of attempted murder, we reject this position.

Appellant also avers that it is "unclear whether the Court gave any consideration to the Defense theory that [Appellant] was enraged and did not have the time to form the requisite intent to kill." Appellant's brief at 12. Actually, when the trial court discussed how Appellant's actions established premeditation, it was speaking directly to this issue. Further, there is no case law mandating that the factfinder specifically state that it considered and rejected the testimony of a witness and the proffered defense. By rendering the verdict that it did, the trial judge implicitly found

incredible Appellant's statement that he did not want to kill Mr. Moore. As the factfinder, the trial court was free to discount Appellant's statement that he did not intend to kill Mr. Moore. As the court did not abuse its discretion in concluding that the verdict herein does not shock one's sense of justice, Appellant's challenge to the weight of the evidence fails.

Judgment of sentence affirmed.