IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 99-10,589**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
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	:	
DAN MACK,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Judgment of Sentence dated January 26, 2000 and it's Order of February 17, 2000 wherein the Court denied the defendant's Post Sentence Motion.

The relevant facts are as follows. On April 2, 1999, Dan Mack, the defendant and estranged husband of Michelle Mack, went to Ms. Mack's residence to see his children. N.T., October 18, 1999, at p.36. Ms. Mack agreed to the visit, but told the defendant that she was having company for the weekend. Id. The individual that was staying for the weekend was Ms. Mack's boyfriend, Earl Byron. Id. The defendant visited with the children, then left. Id.

At approximately 7:00 p.m., when Ms. Mack, Mr. Byron and the children were getting ready to go to Wal-Mart, the defendant returned to Ms. Mack's residence. N.T., October 18, 1999, at p.36. The defendant observed Mr. Byron there and he didn't like it. Id. He objected to the children going shopping with Ms. Mack and Mr. Byron and them

traveling in Mr. Byron's vehicle. Id. Rather than get into an argument with her estranged husband, Ms. Mack said he could keep the children with him until she returned. Id.

When Ms. Mack and Mr. Byron returned a couple of hours later, the defendant and the children were walking up the street. N.T., October 18, 1999, at pp. 36-37. Mr. Byron took some packages into the house and Ms. Mack met the defendant and the kids on the porch. N.T., October 18, 1999, at p.37. Ms. Mack told the children to say goodnight to their dad and go in the house. Id. The defendant then began to tussle with Ms. Mack. Id. Ms. Mack told him not to enter the residence, because she knew Mr. Byron was in there and she didn't want anything to happen.[1] Id. The defendant, however, pushed Ms. Mack through the screen door, damaging it, and forced his way inside the residence. Id. Ms. Mack pulled at him and said, "No, Dan. Get out. Don't go in." Id. Ms. Mack then yelled to her daughter to go the neighbor's and call the police. Id. at p. 38. When her daughter said no and asked her dad just to leave, Ms. Mack went to the neighbor's to call the police. Id.

The defendant went directly to the kitchen where Mr. Byron was. N.T., October 18, 1999, at p. 12. A scuffle erupted between the defendant and Mr. Byron. During the course of the scuffle, the defendant stabbed Mr. Byron in the right shoulder with a black knife.[2] Id. at p. 13. The wound required four stitches. The defendant sustained a

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[1]Earlier in the evening when the defendant objected to the children traveling in Mr. Byron's car to go shopping, the defendant kicked Mr. Byron's vehicle. In response, Mr. Byron called the defendant a "pussy." N.T., October 19, 1999 at p.7.

[2]The defendant denied having a knife and stabbing Mr. Byron. Instead, he claimed the following: (1) when he went into the kitchen to get a drink of water, Mr. Byron said, "what the f*** are you doing here" and thrust or kicked a chair at him; (2) a scuffle ensued; and (3) during

scratch and some mild swelling under his right eye, a small laceration to the top of his index finger, cut marks in his clothing and a scratch on his chest that lined up with the cut marks to his clothing. N.T., October 19, 1999, at pp. 39-40.

As a result of this incident, the defendant was arrested and charged with burglary, criminal trespass, aggravated assault (bodily injury with a deadly weapon), two counts of simple assault, recklessly endangering another person, and terroristic threats.[3] A jury trial was held on October 18-19, 1999. The jury acquitted the defendant on the burglary, aggravated assault, both counts of simple assault and terroristic threats offenses, but convicted him of criminal trespass and recklessly endangering another person.

On January 26, 2000, the Court sentenced the defendant to incarceration at a state correctional for an aggregate term of one year and four months to three years. The Court applied the deadly weapon enhancement on the recklessly endangering conviction.

On February 4, 2000, the defendant filed a Post Sentence Motion challenging the sufficiency of the evidence for both convictions and the Court utilizing the deadly weapon enhancement. The Court denied this Motion in its Order dated February 18, 2000, and on February 24, 2000 the defendant filed his Notice of Appeal.

The defendant first asserts that the evidence presented failed to establish beyond a reasonable doubt that the defendant did not have license or privilege to enter the

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the course of the scuffle Mr. Byron tried to cut or stab him. Mr. Byron claimed he never had a knife and he picked up a chair to defend himself from the defendant's attack.

[3]The simple assault by physical menace and terroristic threats charges arose out of allegation that when the defendant was leaving the residence Ms. Mack and the neighbor arrived and the defendant flicked out the knife and threatened to kill Ms. Mack. See N.T., October 18, 1999, at p. 38.

home of his estranged wife. This Court cannot agree. Mr. Byron testified that Ms. Mack was outside trying to prevent the defendant from entering the residence. N.T., October 18, 1999, at p.12. Ms. Mack testified that at the time of the incident the defendant did not have permission to enter the house. Id. at p. 37. In fact, she told him not to enter and physically tried to prevent him from doing so. Id. The defendant, though, forced his way into the house while Ms. Mack pulled at him, telling him "no Dan, don't go in" and "get out." Id. This testimony was sufficient to prove that the defendant did not have license or privilege to enter Ms. Mack's residence. Although the defendant claimed Ms. Mack permitted him to enter the house to get a drink of water, credibility is within the sole province of the trier of fact, who was free to accept all, part, or none of the evidence presented. Commonwealth v. Brown, 538 Pa. 410, 437-38, 648 A.2d 1177, 1190-91 (1994); Commonwealth v. Hopkins, 747 A.2d 910, 917 (Pa.Super. 2000).

The defendant next avers that the guilty verdict for recklessly endangering is inconsistent with his acquittal on charges of aggravated assault, simple assault, and terroristic threats. Consistency in verdicts between different counts of a criminal information is not required and a guilty verdict will not be disturbed because of inconsistency as long as there is sufficient evidence to support it. Commonwealth v. Mechalski, 707 A.2d 528, 530 (Pa.Super. 1998); Commonwealth v. Oliver, 693 A.2d 1342, 1347 (Pa.Super. 1997). The rationale for this rule rests in the jury's sole prerogative to decide that conviction on some counts will provide sufficient punishment to acquit on the remaining counts. Commonwealth v. Oliver, supra.

The defendant was convicted of recklessly endangering another person. An

individual commits this offense if he "engages in conduct which places or may place another person in danger of death or serious bodily injury." Viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, the evidence was sufficient to establish that the defendant recklessly endangered Mr. Byron. The defendant forced his way into his estranged wife's residence and went after her boyfriend, Earl Byron, with a knife. During the ensuing scuffle, Mr. Byron sustained a cut to his shoulder which required four stitches. Although the attack did not result in death or serious bodily injury, it placed Mr. Byron in danger of suffering such harm. Therefore, assuming arguendo that this conviction was inconsistent with the acquittal of aggravated assault, simple assault and terroristic threats,[4] the evidence was sufficient to sustain the defendant's conviction for recklessly endangering and his conviction should not be overturned.

The defendant's final contention is that the Court erred by utilizing the weapon enhancement when sentencing the defendant for recklessly endangering when the defendant was acquitted of all charges for which the alleged victim testified he had a weapon. As stated previously, consistency in verdicts is not required. Furthermore, an acquittal on some of the charges cannot be construed as a specific finding in relation to some of the evidence. Oliver, supra. Here, the defendant is improperly attempting to interpret his acquittal on the charges of aggravated assault and simple assault as a specific finding that he did not stab or attempt to stab Mr. Byron with a knife. Rather, the Court looks upon the acquittal "as no more than the jury's assumption of a power to which

[4]The Court notes that Mr. Byron was not even the alleged victim of the terroristic threats charge; Ms. Mack was.

they had no right to exercise, but to which they were disposed through lenity." Commonwealth v. Miller, 657 A.2d 946, 948 (Pa.Super. 1995), quoting Commonwealth v. Lloyd, 376 Pa.Super. 188, 191, 545 A.2d 890, 892 (1988).

For the forgoing reasons, as well as the reasons set forth in the Order dated February 17, 2000, the Court finds that the evidence was sufficient to sustain the defendant's convictions and that the Court properly utilized the deadly weapon enhancement.

DATE: _____ By The Court,

_____
Kenneth D. Brown, Judge

cc: District Attorney
Nicole Spring, Esquire (APD)
Law Clerk
Superior Court (original & 1)
Work file
Gary Weber, Esquire (Lycoming Reporter)