IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 98-11,197; 99-10,322

VS :

STEPHEN ZELLERS :

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

Defendant appeals this Court's Order dated November 1, 1999, wherein the Defendant was sentenced to undergo incarceration for an aggregate minimum of four (4) years and a maximum of eight (8) years under information 99-10,322, and an aggregate minimum of eleven and a half (11 ½) years to twenty-three (23) years under information 98-11,197. This sentence was entered after the Defendant was found guilty of criminal attempt robbery, kidnapping and related charges following a jury trial held on August 9th, 12th and 13th, 1999. On appeal Defendant first alleges that the Commonwealth did not present sufficient evidence to establish that the Defendant committed the offenses of attempt robbery or attempt kidnapping. The evidence presented at trial with regard to the charges of attempt robbery and attempt kidnapping was as follows.

Katie Derby and the Defendant were in the area of the Weis Markets in Hughesville on June 10, 1998 because they were waiting for a friend to pick them up at the nearby McDonalds. (N.T. 8/9/99, p. 111). The person was supposed to pick them up at approximately 2:30 p.m.. When he did not show up by 3:00 p.m., she and the Defendant decided that they were going to find another way to get to Williamsport (Id., p. 113). She and the Defendant discussed what they were going to do.

The Defendant told her "to go up to a woman and ask her – well, to act like I was looking for a contact or looking for something on the ground." . . . " And then – or to ask her for thirty five cents and during that moment during the time while she was either saying yes or no or agreeing to give me thirty-five cents or whatever then I was to – supposed to hit her in the head with a brick." (Id., pp 114- 115). Ms. Derby told the Defendant she thought it would be "absurd" to hit someone with a brick. The Defendant then gave her a gun and told her to point it at them. (Id., p. 116). She asked the Defendant why she had to approach someone, and the Defendant had told her that "people are more likely to help girls than they are to help guys." (Id., p. 117) The Defendant also told her to choose an older woman, since they would be less of a threat. The Defendant told her that after pointing the gun at the person, she was to get the person into the car. They were then going to drive the car to Williamsport. (Id., p. 118).

Ms. Derby approached one older woman, who agreed to give her thirty-five cents. After getting the change, she could not follow through with the plan. She went back to where the Defendant waited, and watched for another lady to exit the store. (Id. p. 119). Ms. Judith Swisher was the next person to exit the store that day. Ms Swisher unloaded her groceries into her car and returned the cart to the porch. As the returned to her car, Ms. Derby approached her and asked for thirty-five cents to make a phone call. Ms. Swisher told her "no," and she got into her car. Ms. Derby then rapped her finger on the car window, and as she turned to look, Ms. Derby "raised her gun out of her pocket slowly and pointed it at [her]." (Id., p.35).

Ms. Swisher slowly opened the car door, and Ms. Derby told her to shove over. (Id., p. 36) Before Ms. Swisher she could move over, Ms. Derby struck her with the

pistol several times. (Ibid.) Ms. Swisher testified that she feared that if she had moved over, she would have been dead. Ms. Swisher stood up slowly, and she and Ms. Derby struggled. Ms. Swisher was hit on her head several times with the gun.

Ms. Derby testified that after they started struggling, she "yelled over to [her] side to where Stephen was at and I had been directed to call him Eric instead of Stephen so that he would come over and help and I called for Eric." (Id., p. 121). The Defendant went to the passenger side door to attempt to aid Ms. Derby. (Id., p. 137). At some point, someone from the store heard Ms. Swisher yelling, and came out of the store and yelled out. Ms. Derby became sidetracked at that time and Ms. Swisher broke away from her and ran to the store. Ms. Derby and the Defendant ran from the scene. (Id., p. 123).

Ms. Swisher was aided by the store employees, and was eventually taken to the hospital for treatment. She received stitches for the cuts she received from the blows to her head. (Id., pp. 41-44). Prior to being taken to the hospital, Ms. Swisher positively identified Ms. Derby as her attacker. Louis Metzger, a Weis store employee, also saw and recognized Katie Derby and the Defendant as they ran from the scene. Both Ms. Derby and the Defendant were apprehended later that same evening. In a statement recorded by Pennsylvania State Police Tropper Troy Hickman, the Defendant relayed a similar story. (Id., p.187).

SUFFICIENCY OF THE EVIDENCE

The Defendant first alleges that there was insufficient evidence to find the Defendant guilty of the charge of attempt robbery under 18 Pa.C.S.A. §3701 beyond a reasonable doubt. The Court does not agree. "The test of the sufficiency of the

evidence in a criminal case is whether, viewing the evidence admitted at trial in the light most favorable to the Commonwealth and drawing all reasonable inferences in the Commonwealth's favor, there is sufficient evidence to enable the trier of fact to find every element of the [crime] charged beyond a reasonable doubt." Commonwealth v. Jones, 449 Pa. Super. 58, 672 A.2d 1353, 1354, (1996), citing, Commonwealth v. Carter, 329 Pa. Super. 490, 495-96, 478 A.2d 1286, 1288 (1984); Commonwealth v. Peduzzi, 338 Pa. Super. 551, 555, 488 A.2d 29, 31-32 (1985).

Applying the foregoing standard, in order to have found the Defendant guilty of attempt robbery, the Commonwealth must have proven beyond a reasonable doubt that the Defendant did an act which constituted a substantial step toward robbery. Under 18 Pa.C.S.A. §3701(a)(1)(ii), a person is guilty of robbery if, in the course of committing a theft, he threatens another with or intentionally puts him in fear of immediate serious bodily injury. Instantly, the Count finds the evidence that the Defendant and Ms. Derby had agreed and planned to point the gun at the victim to facilitate the robbery of the victim's vehicle established the elements of this offense. The Court therefore rejects Defendant's argument.

Defendant next argues that the evidence was insufficient to establish that the Defendant intended to kidnap the victim. In order to have found the Defendant guilty of attempt kidnapping, the Commonwealth must have proven beyond a reasonable doubt that the Defendant did an act which constituted a substantial step toward unlawfully removing another a substantial distance from the place where he is found, with the intent to facilitate commission of any felony or flight thereafter, 18 Pa.C.S.A. § 2901(a)(2). In the instant case, there was evidence that the Defendant and Ms. Derby

agreed that in the process of robbing the victim's car, they were going to take the victim with them. Ms. Derby testified:

> Q: Now, after you were to point the gun at the lady after she was going to help you what were you to do at that time?
> A: I was to try and get her in the car.
> Q: And who told you to do that?
> A: Stephen.
> Q: And was—what was to occur after you got the lady into the car?
> A: Well, we were to drive to Williamsport.
> Q: Was anything to be done with the lady?
> A: Nothing was discussed about that. I imagine we were just to drop her off somewhere.
>
> (N.T. 8/9/00, p. 118).

Additionally, Ms. Derby testified that when Ms. Swisher declined to give her the thirty-five cents, she "opened the door, pulled the gun out and told her to move over." (Id., p. 120). The fact that Ms. Swisher did not stay in the vehicle does not negate the fact that the parties had the intent to commit an offense, and took a substantial step toward completion of the offense.[1] The Court therefore rejects the Defendant's argument.

SENTENCE ISSUES

Defendant next alleges that the sentences for Robbery, 18 Pa.C.S.A. § 3701 and Robbery of a Motor Vehicle, 18 Pa.C.S.A. § 3702, should merge, in that the elements of the charges are identical except for the subject matter of the theft. Under Commonwealth v. Williams, 521 Pa. 556, 559 A.2d 25 (1989) crimes do not merge unless: (1) the crimes have the same elements, and (2) the facts of the case are such that the facts which establish one criminal charge also serve as the basis for the additional criminal charge.

[1] Even if it were found that the evidence was insufficient to establish the elements of kidnapping, it would not have changed the Defendant's sentence since he was not sentenced on that charge.

In the instant case, the Court finds that elements of the crimes are not the same. The Defendant was charged with and found guilty of Robbery under 18 Pa.C.S.A. § 3701(a)(1)(ii). Under that section, a person may be found guilty of robbery if, in the course of committing a theft, *he threatens another with or intentionally puts him in fear of immediate serious bodily injury*. Under 18 Pa.C.S.A. § 3702 a person may be found guilty of robbery of a motor vehicle if he steals or takes a motor vehicle from another person in the presence of that person. Since the first robbery charge requires the additional elements of a threat or an intent to put another in fear of immediate serious bodily injury, the Court finds the elements are not the same and should not merge for sentencing purposes.

The Defendant last argues that his sentence was excessive, in that he received a harsher sentence than that of his co-conspirator who was the actor in the offenses. The Court rejects this argument. A trial court is not bound to impose a like sentence on all participants of a crime. After considering the circumstances relating to each Defendant, the trial court may impose different sentences. Commonwealth v. Landi, 280 Pa.Super. 134, 421 A.2d 442 (1980), *citing* Commonwealth v. Burton, 451 Pa. 12, 301 A.2d 675 (1973); Commonwealth v. Andrews, 248 Pa. Super. 1, 373 A.2d 459 (1977).

Instantly, the Court considered the circumstances relating to each Defendant, and the Sentencing Guidelines in determining the time of incarceration for the offenses. Initially, the Defendant and Ms. Derby had different prior record scores, which would have made a considerable difference in the recommended time of incarceration.[2]

[2] The Defendant was found to have a prior record score of five (5). His co-conspirator, Ms. Derby was found to have a prior record score of two (2).

Additionally, although the Defendant and Ms. Derby were co-conspirators, they were neither charged with, nor sentenced on identical offenses. The Court therefore finds the Defendant's argument without merit.

Dated: July 5, 2000

By The Court,

Nancy L. Butts, Judge

xc: Kyle Rude, Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges