IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**: No. 00-10239**
	:
vs.	**: CRIMINAL DIVISION**
	:
RONALD UNGARD,	**: Motion for Judgment of**
Defendant	**: Acquittal and a New Trial**

OPINION AND ORDER

This matter came before the Court on the defendant's Motion for Judgment of Acquittal and a New Trial. The defendant contends the jury verdict finding him guilty of aggravated assault - attempt to cause serious bodily injury[1] is not based upon sufficient evidence or against the weight of the evidence.

The defendant's position is that while the evidence was sufficient to prove the crime of simple assault, it was not sufficient for a finding that the defendant committed the crime of aggravated assault by attempting to cause serious bodily injury to the victim.

Since the Court believes the sufficiency issue creates a close legal question, the Court will outline the facts on which the jury relied. In summarizing the facts, the Court is mindful that the facts should be construed in a manner most favorable to the verdict winner, the Commonwealth. See Commonwealth v. Williams, 476 Pa. 557, 383 A.2d 503 (1978).

The victim in this case is Katherine McGinn. Ms. McGinn is age 71. She is small of stature, about 5'4" inches tall. She was quite thin at the time of the incident, even thinner than she appeared at trial which was held September 27, 2000. See testimony of Officer Terry O'Connell.

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[1] 18 Pa.C.S.A. Section 2702(a)(1).

Although the Court does not recall the Commonwealth presenting actual testimony as to the defendant's age at trial, the defendant was age 58, some thirteen (13) years younger than the victim. The jury, of course, saw and observed the defendant at trial, and he is clearly a much larger individual than Ms. McGinn.

On January 21, 2000, Ms. McGinn resided at 816 West Southern Avenue, South Williamsport, Pennsylvania with her boyfriend of fifteen (15) years, the defendant Ronald Ungard. A verbal argument ensued between Ms. McGinn and the defendant. The defendant was on the phone with another woman and was talking about going over to her trailer live with her. Ms. McGinn yelled to the defendant to get off the phone. Ultimately, the defendant became enraged with Ms. McGinn, and in a fast and menacing manner moved across the room towards her. Ms. McGinn, who was about thirty (30) feet from the defendant, started to run away toward the door. The defendant caught up with her about fifteen (15) from the door and he violently struck her in her head around her hair line.

In her testimony at trial, the victim appeared to make some effort to minimize the matter. She claimed she didn't know whether the defendant used an open or closed fist. She also claimed she bruises easily. However, Commonwealth exhibits 1-5, photographs taken of the victim shortly after the incident at the hospital, depict Ms. McGinn having a large gash on the right side of her head near the hairline. The photographs also portrays a baseball size welt above her right eye and up into hairline. Commonwealth exhibit 4. Commonwealth Exhibit 5 shows Ms. McGinn with

an extreme black bruised eye below her right eye.[2] Although the Commonwealth presented no medical evidence, the Court believes the jury could reasonably find the defendant offered a significant and violent blow to the seventy-one (71) year old victim's right forehead and eye based on the physical evidence. Upon being hit by the defendant, Ms. McGinn was dazed, but she managed to walk out of house.

Ms. McGinn testified she talked to a friend outside and told her what happened. The friend advised her to call the police. Ms. McGinn went back into her house. She claimed she was still dazed at this time. To keep the defendant at bay she dialed 911. Although Ms. McGinn claimed she was only pretending to dial 911, the call went through to the 911 operator. The 911 tape was played for the jury at trial in the defense portion of the case. In listening to the tape, the defendant can be heard yelling at Ms. McGinn. In the Court's notes of the trial, it noted comments from the defendant such as "rotten son-of-a-bitch"; "I'm warning you"; "you son-of-a-bitch, you're no good.". Ms. McGinn, who did not engage the 911 operator in conversation, then left the house again.

Ms. McGinn went to a nearby restaurant where she called a friend to take her to the hospital. She had throbbing pain in her head from the blow inflicted the defendant.

At the hospital, she was seen by a doctor. The doctor did a CAT scan of her head. The police arrived to interview her and took the photographs of Ms. McGinn previously discuss in this Opinion and offered into evidence as Commonwealth's exhibits 1-5. Officer Terry O'Connell of the South Williamsport Police Department was the officer

[2]Commonwealth exhibit 5 was taken the morning after the assault.

who arrived at the hospital and took the photographs. He described the victim as having a deep cut on the side of her face. Ms. McGinn was crying. She had a "welt" on her head the size of a baseball. Ms. McGinn was reluctant to talk with him about what happened. She did tell the officer that the defendant punched her. She also claimed that when she returned to the house that the defendant shoved her off the porch. The officer was also present when the doctor interviewed Ms. McGinn. Ms. McGinn told the doctor that the defendant punched her in the head and that he shoved her off the porch. Ms. McGinn was given Tylenol to help her with her head pain.

The remainder of the Commonwealth's evidence described the arrest of the defendant. Chief Norman Cowden of the Duboistown Police Department was dispatched to the victim's home because of the 911 hang-up phone call from 816 West Southern Avenue. He met Officer O'Connell on the front porch. They pounded loudly on the door, however, no one answered. The officers noticed what appeared to be fresh blood on the middle portion of the door. The blood seemed to be smeared. As the officers were quite concerned about the incident they put out an all call advisory to County Communication, which advisory requested any available law enforcement officers to respond. They also had the county dispatcher continue to telephone the home, but no one answered.

Officer O'Connell perceiving the situation to be a potential emergency used a pry bar to force open the front door of the home.[3] However, after disengaging the lock

[3]Although the jury was never told of the this, the officers were aware of a prior significant history of the defendant beating and injuring this elderly victim. This information was developed in more detail at the defendant's sentencing hearing.

with the pry bar, a 4 by 4 piece of lumber behind the door held the door closed. Finally, the officers were able to kick the piece of lumber away from the door and they obtained entry in the home. They saw some blood on the inside corner of the door.

The officers then went through the home looking for the potential victim. They continually shouted that they were the police and they were there to help. Finally, the officers went down to the basement. They continued shouting. Although the basement was dark, Officer O'Connell saw the shadow of an individual standing in a shower stall behind a curtain. The officer ordered the individual to come out of the shower stall, but the individual did not respond. Finally, the defendant responded and appeared. The defendant's demeanor was angry and boisterous. He demanded to know what the officers were doing in his home. The officer, who was aware Ms. McGinn lived in the home, asked the defendant about her whereabouts. The defendant denied knowing where she was and he said that she went to a store. The defendant denied knowing anything about the blood seen by the officers. He also denied making the 911 call. The defendant also made statements that Ms. McGinn went for a walk and that she went to a friend's house. Eventually, Officer O'Connell received a call from the Williamsport Hospital emergency room that they had an elderly assault victim from South Williamsport and they wanted an officer to respond. Officer O'Connell responded to the Williamsport Hospital where he met Ms. McGinn as previously discussed.

While the defense concedes there was ample evidence presented to

establish the crime of simple assault,[4] the defense claims that the Commonwealth did not present sufficient evidence to prove that the defendant attempted to cause serious bodily injury to Ms. McGinn. The narrow issue presented is whether the evidence proves that the defendant intended to cause serious bodily injury to the victim.[5]

Intent to cause serious bodily injury may be proven circumstantially. See Commonwealth v. Rightley, 421 Pa.Super. 270, 281, 617 A.2d 1289, 1295 (1993). Further, the conduct giving rise to an inference that the defendant intended to cause serious bodily injury need not be in itself life threatening. Id. In the case of Commonwealth v. Cassidy, 447 Pa.Super. 192 668 A.2d 1143 (1995), appeal denied, 545 Pa. 660 681 A.2d 176 (1996) a domestic altercation between a husband and wife occurred in the bedroom of their home. The defendant/husband became enraged and picked up his wife and threw her with such force that she truck the door frame to the bathroom, ricocheted across the hall and struck the door frame to another room and finally landed on the floor. The victim was crying for help and was in and out of the consciousness. The parties' daughter called the police upon hearing the commotion. The police found the victim laying on the hallway floor. The victim was transported to the hospital where she was placed in a brace that went from the top of her chest down to her thighs and a removable wrist case, both of which she wore for two months. While the Pennsylvania Superior Court in Commonwealth v. Cassidy, supra, in fact, found the evidence sufficient to prove that the

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[4]18 Pa.C.S.A. Section 2701(a(1).

[5]The Commonwealth concedes they have not presented evidence that the victim suffered serious bodily injury.

victim suffered serious bodily injury, the Court also noted the evidence sufficient to show that the defendant intended to cause serious bodily injury. The Court noted that the defendant was larger and stronger than his wife and the Court noted that the violence and force of the defendant's actions in throwing his wife across the room. The Superior Court concluded that the jury could have found that the defendant acted in "a fit of rage" and thereby intended to inflict serious bodily injury. 447 Pa.Super at 199-200, 668 A.2d at 1146; See also Commonwealth v. Kibe, 258 Pa.Super. 353, 392 A.2d 831 (1978), (finding intent to cause serious bodily injury where defendant struck the victim breaking her nose after she screamed when defendant attempted to sexually assault her).

The defendant submits that the Pennsylvania Supreme Court decision in Commonwealth v. Alexander, 477 Pa. 190, 383 A.2d 887 (1978) controls this case. In Alexander, a victim was standing on a street in Philadelphia. The victim saw something coming towards his head and then was struck once in the face by the defendant using a closed fist. The defendant then walked away. The victim fell to the ground, but he did not lose consciousness. The victim apparently suffered a broken nose. The Pennsylvania Superior Court upheld the verdict of aggravated assault.[6] The Pennsylvania Supreme Court overturned the Superior Court finding the evidence insufficient to sustain the conviction. The Supreme Court opinion noted that the Commonwealth did not contend that serious bodily injury occurred and, therefore, the Court analyzed the issue as to whether the Commonwealth proved that the defendant had the intent to cause serious bodily injury.

[6]See Commonwealth v. Alexander, 237 Pa.Super. 111, 346 A.2d 319 (1975).

The Supreme Court concluded that the evidence was insufficient to prove the requisite intent:

> While there can be no dispute about the physiological significance of the head, where the victim did not actually sustain the requisite serious bodily injury, we cannot say that the mere fact that a punch was delivered to that portion of the body is sufficient, without more, to support a finding that appellant intended to inflict serious bodily injury. Where the injury actually inflicted did not constitute serious bodily injury, the charge of aggravated assault can be supported only if the evidence supports a finding that the blow delivered was accompanied by the intent to inflict serious bodily injury.

Alexander, 477 Pa. at 194, 383 A.2d at 889 (emphasis added). However, the Pennsylvania Supreme Court in Alexander noted that such criminal intent may be proven by circumstantial evidence. They noted in the facts of that particular case that the defendant said nothing and simply walked away from the victim after delivering the punch. The Supreme Court further noted there was no evidence that the defendant was disproportionately larger or stronger than the victim. Importantly, the Supreme Court in Commonwealth v. Alexander, supra, stated as follows:

> We hasten to add that a 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.

477 Pa. at 194, A.2d at 889-90.

Although the Court, as stated earlier, believes this is a close question, the Court finds the evidence shows other facts beyond the punch to the victim's head from which the jury may have inferred the requisite intent required for aggravated assault. The photographs of the victim's head depict an injury which would be caused by a very violent

blow to the head. The defendant was apparently so angry that he came across an entire room at a rapid pace to attack the victim. Thus, the jury could have found the defendant was enraged. The victim escaped by immediately leaving the home, unlike the situation in Alexander where the defendant immediately walked away from the victim. Also, unlike the Alexander case, the victim in the instant case was a frail woman in her early seventies. She was attacked by a younger man who was bigger and obviously stronger than the victim.

The jury may also have considered the statements made by the victim to Officer O'Connell and her treating physician at the emergency room that when she returned to the home, the defendant shoved her off the porch.[7] The blood seen on and by the door may well have convinced the jury that the defendant's violent actions toward the victim at some point escalated to the porch. Also, the comments made by the defendant on the tape of the 911 call showed his angry and hostile demeanor.

While other inferences and arguments can be made as to the intent of the defendant, the Court cannot says that the conclusions reached by the jury were unreasonable. The conduct by the defendant's belligerence when the police searched the home after the victim left the scene may also have been considered by the jury in

[7]In her trial testimony, the victim did not testify about the matter on the porch. However, evidence was presented by Officer O'Connell about her statements at the hospital. To our memory, defense counsel did not object to this evidence. If objection had been made, the evidence would probably have been permitted by the Court as an exception to the hearsay rule as the statement was made to a doctor treating the victim in the emergency room. It also possibly could be argued to be an excited utterance as the victim was crying and emotional at the hospital.

assessing the defendant's state of mind.

While the Court, or perhaps other individuals could come to a different conclusion regarding the issue in this case, the Court cannot substitute its judgment for that of the jury. As the Pennsylvania Superior Court explained in Cassidy, supra:

> ...We may not weigh the evidence and substitute our judgment for that of the fact finder. See Commonwealth v. Blystone, [421 Pa.Super. 167, 617 A.2d 778 (1992)]; See Commonwealth v. Blystone, supra. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. See Commonwealth v. Nicotra, 425 Pa.Super. 600, 625 A.2d 1259 (1993). 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.

Cassidy, 477 Pa.Super. at 195, 668 A.2d at 1144. Therefore, the Court believes there is sufficient evidence to support the verdict, and that the verdict is not against the weight of the evidence.

The second issue raised in the defendant's motion is that the Court erred in denying the defendant's request for a mistrial. Although the Court does not have the benefit of a trial transcript, it believes the defendant is contending that some testimony from Chief Norman Cowden inferred prior criminal conduct of the defendant to the jury. At one point in his testimony Chief Cowden referred to the fact that, when the defendant was removed from his home, probationary people took him away. The Court believes any possible problem was cured when Officer O'Connell, in his testimony, explained that they had put out an all call advisory when they saw blood on the victim's front door. Officer

O'Connell explained that the all call advisory requests any and all Lycoming County law enforcement officials, if available, to respond to a particular location. Officer O'Connell further explained that only one South Williamsport officer was on duty at the time and, thus, the all call request caused Duboistown police, Old Lycoming Township police and court officers in the area to respond to the scene. The court believes, in light of this testimony, Chief Cowden's reference to probationary people coming to the home did not prejudice the defendant.

According, the following is entered:

O R D E R

AND NOW, this _____ day of March 2001, the defendant's Motion for Judgment of Requittal and for New Trial is DENIED.

By The Court,

_____
Kenneth D. Brown, J.

cc: Kenneth Osokow, Esq. (ADA)
David Marcello, Esq.
Work File