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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Commonwealth of Pennsylvania v. Jemoni Ghee, Petitioner
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Criminal Action No. 66-2013

HEADNOTES

Sufficiency of the Evidence; Weight of the Evidence; Second Strike Mandatory Sentence

1. Where the Commonwealth and Defendant have conflicting theories as to what actually occurred, there are facts to support both theories, it is within the province of the jury to determine which theory is more credible.

2. A “Second Strike” mandatory sentence pursuant to 42 Pa. Con. Stat. 9714(a)(1) must be proven by a preponderance of the evidence.

3. When determining whether another jurisdiction’s statute is similar for purposes of a “Second Strike” mandatory sentence the court must consider the elements of the foreign offense in terms of classification of the conduct proscribed, its definition of the offense, and the requirements for culpability. The court may also consider policy considerations, but the policy behind the statute is not controlling.

Appearances:

Todd Sponseller, Esq., *Attorney for Defendant*

Laura Kersetter, Esq., *Attorney for Commonwealth*

OPINION

Before Herman, P.J.

Procedural History

The co-defendants in this matter are Jemoni L. Ghee (No. 65-2013) and Jelani L. Ghee (66-2013). They were charged by way of criminal complaint by Pennsylvania State Police – Chambersburg on November 8, 2011 with Criminal Attempt to Commit Homicide, Aggravated Assault, Robbery, and Simple Assault. The cases were consolidated for purposes of trial. The matter was tried to a jury on August 12 through August 15, 2013. The jury found the defendants guilty of aggravated assault, and not guilty as to the remaining charges. The defendants were sentenced on September 18, 2013.

Both defendants filed timely post sentence motions and requested that the briefs not be due until transcripts of the trial have been produced.

The transcripts have been filed and all parties have submitted their briefs. The matter is now ready for decision. The facts relevant to these post sentence motions are the same for both defendants, but the issues raised as to each defendant are different. Therefore, the issues in the discussion section below will be identified as to each defendant.

Factual Background

Many of the facts of this case are undisputed unless otherwise noted. On November 7, 2012, the Defendants and the victim, Clarence Green, traveled from Franklin County to the Hollywood Casino in Dauphin County. Jelani drove, Jemoni sat in the front passenger seat, and Clarence Green sat in the rear passenger side seat. While driving, the three drank beer and smoked marijuana. At the casino, Green had gambled and lost all of the money he had on hand, and asked to borrow Jelani's vehicle so that he could locate a Western Union in order to retrieve money that a friend had wired to him. Green, unfamiliar with the area, got lost and took a long amount of time finding his way back to the casino. Upon returning to the casino, Green noticed the Ghee brothers walking along the side of the road. Green stopped to pick them up, and Jelani again drove the vehicle back towards Franklin County. There appeared to be no bitterness about the length of time Green had taken. Green gave Jelani money for gas, and the three continued to drink and smoke marijuana, and stopped for food.

According to the Ghee brothers, at some point, Green accused Jemoni of slipping a pill in his drink. He then punched Jelani in the back of the head. Green denies this argument ever happened. Soon after, Jelani parked the vehicle along Wibymarch Drive which is a dark, not often traveled road. Green believed they had stopped in order to take a bathroom break along the side of the road. After exiting the vehicle, Green testified that Jemoni had come from behind him and wrapped his arm around Green's neck. Green then testified that Jelani began kicking and punching him, and told Green, "you're gonna die, nigger." He said that Jelani then hit him in the head with an object. Green said that he began bleeding immediately after the first hit and that it was difficult for him to breath. The brothers wrestled Green to the ground. As the beating continued, Green testified that he heard Jelani ask if Jemoni had broken Green's neck yet. Jemoni replied that he thought he had, but it didn't break yet. After another attempt, Green felt a pop in his neck and his body went limp. He stopped struggling and recalls the brothers removing his watch and removing items from his pockets, including money. The Ghee brothers drove away and Green staggered across the road to a cornfield where he laid down waiting for a vehicle to drive by. He estimated it was about 10-15 minutes before a car

came and that it was very cold. After flagging down a vehicle, he was taken to Chambersburg Hospital, however, due to the extent of his injuries, he was taken by helicopter to York Hospital. He testified that he was in the hospital for approximately 10 days. He suffered a broken hyoid bone in his neck, a split liver, 6 broken ribs, and had a filter installed in his chest to prevent blood clots. On cross examination, Green admitted that he had not originally told police that the snap in his neck is what made him go limp. Rather, he had done it as a way to “play dead.” Further, he testified that he told police Jemoni put a pill in a bottle, possibly for himself, but did not say that Jemoni put a pill in a bottle that was intended for Green to drink.

Jelani testified that following Green’s accusation of Jemoni putting a pill in Green’s drink, and Green punching Jelani in the head, the argument escalated and Jelani parked the car on the side of Wibymarch Drive. Green exited the car with his hands up, prepared to fight. Green and Jelani began fighting and Green took Jelani down. Jemoni attempted to break up the fight, but Green then wrestled Jemoni down. Jelani then began punching Green, but Green continued to punch Jemoni. Jelani then wrapped his arm around Green’s neck, choking him, to pull him off. Once Green stopped fighting back, the brothers ran to the car and drove away. Jelani testified that Green chased after the car. The Ghee brothers then called a mutual friend and told them that Green may need a ride home.

Dr. Michael Hughes, trauma surgeon at York Hospital testified for the Commonwealth. He stated that Green was found to have a broken hyoid bone in his neck, fractured ribs, and a severe liver injury. He also had other minor injuries such as abrasions and a laceration on his forehead. The liver injury was graded a level 5 injury on a scale of 1 through 6, 6 being the highest with a high risk of fatality. This type of injury normal comes from blunt force trauma. The thyoid injury normally occurs from some sort of force being applied to the neck, such as strangulation. On cross examination, he testified that he did not personally check to see if the thyoid was, indeed, broken or if it had never naturally fused together in the first place. Dr. Hughes did testify that it is the radiologist who would check such a detail, and that the radiologist would look to determine if the bone had a more jagged or smooth edge in determining if the bone was recently fractured, or if it had never fused.

Dr. Jonathan Arden, forensic pathologist testified as an expert for the defendants. He stated that the hyoid fracture was not a fracture but, rather, was a natural gap between the two bones that normally fuse together. He testified that he has seen thousands of hyoid bones and testified that it is not uncommon for a hyoid bone not to fuse until later in life. Upon reviewing all the medical records and radiologist’s report, he noted that the bone had

smooth edges which indicates that there was no break. A break would show rough or jagged edges on the bone. Dr. Arden also discussed the injuries to Green’s ribs and liver. He stated that the skin abrasions in that area did not indicate that Green was kicked or punched there. Nor were they consistent with the type of injuries one would receive if they were dragged by the neck along a road. Rather, they were consistent with the type of abrasions one would receive after being struck by a car. Dr. Arden testified, at length, the reasons for his belief that these injuries were likely caused by being struck by a vehicle and not caused by the fight that occurred between Green and the Ghee brothers.

A nurse from York Hospital also testified that the abrasions on Green’s skin appeared to be what is referred to as “road rash” which can be caused when an individual is struck by a vehicle on a paved road.

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Weight of the Evidence

The defendant, Jemoni Ghee, challenges the verdict as being against the weight of the evidence pursuant to Pa. R. Crim. P. 607. When determining a motion for a new trial due to a challenge to the weight of the evidence

[a] new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. . . . [T]he role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Commonwealth v. Bruce, 916 A.2d 657, 665 (Pa. Super. 2007) (quoting Commonwealth v. Widmer, 744 A.2d 745, 751–52 (2000)). There must be a verdict so contrary to the evidence that it shocks one’s sense of justice. Bruce, 916 A.2d at 665.

The argument posed by the defendant is that the conviction of aggravated assault was so against the weight of the evidence, that it shocks one’s sense of justice. First, the defendant notes that Green’s testimony was not credible. Second, the testimony of Dr. Arden provided evidence that the “seriously bodily injuries” of a broken hyoid and the injured liver were not caused by the beating that the Ghee brothers delivered. Rather, the hyoid was never fused to begin with, and the liver injury could not have occurred

by mere kicking and stomping since no marks were left on the victim's skin. Indeed, there are instances, although many were minor, where Green testified to facts that were inconsistent with statements made previously. Further, Dr. Arden was convinced as to the conclusiveness of his findings. However, the issue of credibility is for the jury to decide and they have, clearly, found the Commonwealth's evidence to be more credible than that of the Defendant's testimony. See Commonwealth v. Rabold, 920 A.2d 857 (Pa. Super. 2007). It is within the province of the factfinder to determine what weight should be assigned to evidence, and that the factfinder is free to believe all, none, or some of the evidence. There was evidence to support both theories regarding this case and the jury chose to believe the testimony of Clarence Green, Dr. Hughes, and the other evidence, such as the evidence police found at the scene that supported the Commonwealth's theory that the injuries were sustained as a result of the Ghees' commission of an aggravated assault.

The jury assigned more weight to the evidence proffered by the Commonwealth and rendered their verdict accordingly. We will not disturb that verdict because we find that the verdict does not shock one's sense of justice.

Reconsideration and Modification of Sentence

Jemoni Ghee's second argument is that the court should vacate the mandatory "Second Strike" sentence because Virginia's malicious wounding statute, under which he was initially convicted, is not substantially similar to Pennsylvania's aggravated assault statute.

Pursuant to 42 Pa. Con. Stat. 9714(a)(1), any person convicted of a second crime of violence must be sentenced to a minimum of ten years in prison. At sentencing, the Commonwealth must prove by a preponderance of the evidence that the prior conviction is a crime of violence under the definition of the state. Id. at § 9714(d). A crime of violence can be any one of the enumerated offenses or an equivalent crime in another jurisdiction. Id. at § 9714(g).

Here, defendant was convicted of Malicious Wounding in Lunenburg County, Virginia. The Malicious Wounding statute requires the perpetrator to (1) maliciously shoot, stab, cut, wound any person by any means, and (2) he must do so with the intent to maim, disfigure, disable, or kill. Va. Code Ann. § 18.2-51. A conviction under the statute is a felony of the third degree.¹

¹ The defendant was originally charged with Aggravated Malicious Wounding, Va. Code Ann. § 18.2-51.2. While the word "Aggravated" would suggest that this statute is more akin to our Aggravated Assault statute, we note that this statute requires that the victim be caused to suffer permanent and significant impairment. Our statute has no such requirement.

The Pennsylvania Aggravated Assault statutes, under which defendant was convicted, requires the perpetrator to (1) attempt to cause or cause serious bodily injury to another intentionally, knowingly or recklessly, and (2) that it is done under circumstances manifesting extreme indifference to the value of human life.

In determining whether another state's statute is equivalent to a Pennsylvania statute for purposes of sentencing, we must adhere to the test set forth in Commonwealth v. Shaw, 744 A.2d 739 (2000).

Thus, the court must consider “the elements of the foreign offense in terms of classification of the conduct proscribed, its definition of the offense, and the requirements for culpability.” Shaw, 744 A.2d at 743 (citation omitted). With respect to the underlying policy of the statutes, we hold that analysis of policy considerations is appropriate, though not controlling. See Shaw, 744 A.2d at 744-45 (noting the relevance of the statutes' policies but rejecting the Commonwealth's claim that the statutes were equivalent merely because they shared a policy of punishing impaired drivers).

Commonwealth v. Northrip, 985 A.2d 734 (Pa. 2009).

We find it noteworthy to the discussion of “classification of the conduct proscribed” that Va. Code. Ann. § 19.2-297.1 provides for a repeat violent felony offender enhancement, as does 42 Pa. Con. Stat. 9714(a) (1), however Virginia's is more severe. The Virginia statute requires an offender to have committed “acts of violence.” Under the definition of “acts of violence,” the crime of Malicious Wounding is listed. This is similar to our statute which requires the offender to have committed a prior crime of violence.

The defendant's argument is that while the language of the two statutes are similar, the distinguishing feature is that Virginia's statute only requires mere bodily injury, while the Pennsylvania Statute requires serious bodily injury. Thus, making it more similar to Pennsylvania's assault statute. We disagree. As argued by the Commonwealth, 18 Pa. Con. Stat. § 2301 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.” This definition is equivalent to the Virginia requirement that the injury in a Malicious Assault be committed with the intent to maim, disfigure, disable, or kill.

We find that the prior conviction of Malicious Assault in Virginia is

a prior crime of violence for purposes of sentencing under 42 Pa. Con. Stat. 9714(a)(1). Therefore, we will deny the defendant’s motion for modification of his sentence.

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Sufficiency of the Evidence

Defendant, Jelani Ghee, challenges the sufficiency of the evidence supporting his conviction of Aggravated Assault. In determining whether sufficient evidence exists on the record to allow the jury to have found that the Commonwealth has met its burden of proof

[w]e must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

Commonwealth v. Mobley, 14 A.3d 887, 889 (Pa. Super. 2011).

“[T]he Commonwealth . . . may sustain its burden by means of wholly circumstantial evidence.” Further “[a]ny doubt about the defendant’s guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.” Commonwealth v. DiPanfilo, 993 A.2d 1262, 1264 (Pa. Super. 2010).

The crime of Aggravated Assault requires the perpetrator to (1) attempt to cause or cause serious bodily injury to another intentionally, knowingly or recklessly, and (2) that it is done under circumstances manifesting extreme indifference to the value of human life.

At trial, the Commonwealth proceeded under a theory of accomplice liability. The jury heard the following evidence which supports their finding that Jelani and his codefendant, Jemoni attempted and did intentionally cause serious bodily injury, and did so with extreme indifference to the value of human life: The defendants both attacked the victim in a 2 to 1 fight; One of the defendants told the victim, “You’re gonna die;” The defendants repeatedly punched, kicked, and stomped on the victim’s head, face, and torso; One of the defendants hit the victim in the head with an object; Jemoni attempted to break the victim’s neck, Jelani asked if he had

broken it yet, Jemoni continued to try and break it and eventually felt the pop of the hyoid bone breaking; Upon believing the victim's neck had been broken and his body had gone limp, the defendants drove away and left the victim partially dressed in the cold. The jury also heard testimony that the damage caused was a severed liver rated a stage 5 liver injury, which is one stage below the most severe and usually fatal stage 6.

Although there was plenty of evidence to the contrary that was produced by the defendants, the jury chose to believe the evidence offered by the Commonwealth. The evidence listed above is sufficient to sustain the jury's verdict and we will not disturb it. The motion challenging the sufficiency of the evidence will be denied.

Weight of the Evidence

Defendant, Jelani Ghee, also challenges the verdict as being against the weight of the evidence. For the same reasons discussed above in his co-defendant, Jemoni Ghee's challenge to the weight of the evidence, we will deny this motion.

Motion for the Return of Property

Lastly, the defendant has included a motion for return of property pursuant to Pa. R. Crim. P. 588 as part of his post sentence motion. This type of motion is not traditionally brought as a post sentence motion under Pa. R. Crim. P. 720, and can be brought at any time. Further, it has been demonstrated by the Commonwealth that case law strongly suggests that an evidentiary hearing is necessary before any relief can be granted. See Commonwealth v. Howard, 931 A.2d 129 (Pa. Super. 2007). Defendant has made no request for a hearing. The first mention of the need for an evidentiary hearing came by way of the Commonwealth's reply brief.

We will not consider the motion at this time because this type of motion should not be subject to the time constraints of Rule 720. If defendant wishes, the court will entertain a motion for a hearing on the matter to be considered outside of the instant post sentence motion. See Commonwealth v. Allen, 59 A.3d 677 (Pa. Cmwlth. Ct. 2012).

Conclusion

In light of the foregoing discussion, the post sentence motions filed by co-defendants Jelani and Jemoni Ghee will be denied. In regards to the motion filed by Jemoni Ghee, 65-2013, we find that the jury's verdict was not against the weight of the evidence and that the mandatory "second

strike” sentence was proper because the Virginia conviction arose from an equivalent statute to Pennsylvania’s aggravated assault statute. In regards to the motion filed by Jelani Ghee, 66-2013, we find that the jury’s verdict was supported by sufficient evidence and was not against the weight of the evidence. Further, the motion for return of evidence may be considered at a later time if counsel wishes to pursue an evidentiary hearing.

ORDER

AND NOW, this 23 day of January 2014, upon consideration of the Defendant’s Post-Sentence Motion, brief in support, the Commonwealth’s answer thereto, and the record,

IT IS HEREBY ORDERED that

- (1) Defendant’s motion challenging the sufficiency of the evidence is DENIED pursuant to the attached opinion.
- (2) Defendant’s motion challenging the weight of the evidence is DENIED pursuant to the attached opinion.
- (3) Defendant’s motion requesting return of property will not be considered at this time. Counsel is to file a motion for a hearing on this matter to be heard separate from the instant post-sentence motion.

Pursuant to Pennsylvania Rules of Criminal Procedure 114, the Clerk of Courts shall immediately docket this Order and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Order, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.