

COMMONWEALTH,
Appellee

TRIAL DOCKET NO. CR-1183 – 2015
OTN: L 953660-1

v.

69 MDA 2017

GARY COLEMAN,
Defendant / Appellant

APPEAL - 1925 (a)

OPINION AND ORDER
Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This Court issues the following Opinion and Order pursuant to P.R.A.P. 1925(a). Gary Coleman appeals from a judgment of sentence imposed on December 9, 2016 after a jury convicted him of aggravated assault and related crimes. Coleman raises four issues on appeal. In his first issue, Coleman challenges the admission of photographs. In his second and third issues, Coleman challenges the sufficiency of the evidence supporting each of the aggravated assault counts. In his final issue, Coleman challenges the denial of his request for continuance / mistrial.¹ This Court respectfully submits that none of the issues merit relief. The Court

¹ On February 15, 2017, Gary Coleman filed a statement of matters complained of on appeal pursuant raising three issues and reserving the right to supplement the Statement upon receipt of the transcript. On March 24, 2017, Coleman filed a supplemental statement of matters complained of on appeal adding a fourth issue. All four matters are set forth verbatim as follows.

1. Whether the trial court erred by allowing the admission of photographs 6396, 6407, 6440, 6410, 6413, 6418, 6419, 6435, 6436 despite their misleading and unduly prejudicial nature?
2. Whether the verdict as to the charge of Aggravated Assault 18 Pa.C.S. § 2702(a)(1) is supported by sufficient evidence regarding Defendant's intent to cause serious bodily injury given that he refrained from using available implements, such as shards of glass, that certainly would have caused serious bodily injury?
3. Whether the verdict as to the charge of Aggravated Assault 18 Pa.C.S. § 2702(a)(4) is supported by sufficient evidence regarding Defendant's actual causation of Mr. Allen's injuries given the large number of people involved in the ensuing fracas and the lack of any testimony regarding when Mr. Allen started bleeding?
4. Whether the trial court erred in denying Defendant's Motion for Continuance and Mistrial after the Commonwealth informed the Court that a defense witness, Angela DiMarco, was being investigated for potential witness intimidation charges and, further, should be warned about a potential perjury charge should she choose to testify as planned, thus preventing the defense from presenting the testimony needed

believes that the photographs were properly admitted, and that an abundance of evidence supports all of the convictions. Finally, the Court believes that it correctly denied the motion for continuance and/or mistrial. This Court respectfully relies upon its reasoning on the record, its opinion filed on October 26, 2016 as to the motion in limine, and submits the following in support of affirming the convictions.

PROCEDURAL BACKGROUND.

On July 8, 2015, the Commonwealth charged Coleman with aggravated assault and related crimes for multiple assaults occurring at Ann's Tavern on July 4, 2015. No omnibus pre-trial motion was filed. On October 25, 2016, Coleman filed a motion in limine seeking to preclude the use of certain photographs at trial. Following argument, on October 26, 2016, the Court denied the motion in part (ruling most of the photographs were admissible) and granted the motion in part (excluding two photographs as cumulative).

A jury trial was held on October 27 and 28, 2016. On October 28, 2016 the jury returned a verdict of guilty on all counts. Specifically, the jury rendered a guilty verdict as to count 1, aggravated assault, as to attempt only, count 2 aggravated assault, count 3, possessing instruments of crime, count 4, simple assault (victim, Jason Allen), count 5, simple assault (victim, Jordan Royal) and count 6, disorderly conduct.²

The Court imposed sentence on December 9, 2016. The Court sentenced Mr. Coleman to incarceration in a State facility for a minimum of eighty months and a maximum of one hundred sixty months as to Count 1, aggravated assault of Jason Allen and a minimum of 12 to a

to support its theory of the case?

² 18 Pa.C.S. § 2702(a)(1); 18 Pa.C.S. § 2702(a)(4); 18 Pa.C.S. § 907(a); 18 Pa.C.S. § 2701(a)(1); 18 Pa.C.S. § 2701(a)(1); 18 Pa.C.S. § 5503 (a)(1).

maximum of twenty-four months for the simple assault of Jordan Anderson Royal in Count 5.³ The sentence as to counts two, three, and six ran concurrent to count 1 and count 4 merged.⁴ No post-sentence motion was filed. Instead, Coleman filed his direct appeal on January 9, 2017.

FACTUAL BACKGROUND.

The Commonwealth presented the following evidence at trial. The two victims in this case, Jason Allen (“Allen”), and Jordan Anderson Royal, went to Anne’s Tavern with Christopher Allen and Joshua King around 11 p.m. on July 4, 2015. N.T., Jury Trial 10-27-15, at 11-12; 28-29. Jason Allen and Joshua King are brothers, Christopher Allen is their cousin, and Jordan Anderson Royal is their friend. *Id.* At Anne’s Tavern, Jason Allen played pool. While playing pool, Jason Allen greeted Angela Dimarco, an acquaintance from school, who he grew up with and with whom he was friendly. *Id.* at 13-14; 41-42. Angela Dimarco is Coleman’s fiancé and mother of Coleman’s two young children. *Id.* at 117. Coleman observed Jason Allen speaking to Dimarco and concluded that Allen said something that Dimarco did not like. *Id.* at 122. Coleman and Allen talked with each other about what Allen may have said to Dimarco. *Id.* at 42. While body language signaled discord between Coleman and Allen, they did not yell or argue. *Id.* at 14-15; 26; 39; 42; 59. The conversation ended and Allen resumed playing pool. *Id.* at 17.

As Allen was taking a shot at pool, Coleman calmly walked around him and smashed a glass beer mug over Allen’s head with such force that it broke into pieces. Coleman was lining up the cue ball to take his next shot when he heard and felt glass breaking over him. *Id.* at 21; 26;

³ It should be noted that Coleman had a prior record score of 5 and the Commonwealth asserted that the deadly weapon enhancements applied to some counts.

⁴ As to Count 2, aggravated assault, the Court sentenced Mr. Coleman to undergo incarceration in a State Correction Institution for a minimum of thirty-three months and a maximum of sixty-six months to run concurrent with Count 1. As to Count 3, possessing the instruments of crime, the Court sentenced Mr. Coleman to undergo incarceration in a State Correction Institution for a minimum of sixteen months and a maximum of thirty-two months, again to run concurrent to Count 1. Finally, as to Count 6, disorderly conduct, the Court sentenced Mr. Coleman to serve a period of one year probation to run concurrent with the previous sentence.

46-47. Coleman then pushed Allen into a corner, swinging at him, kicking him, striking him with pool sticks and chairs on Allen's face, back and stomach area. Id. at 21-23, 46-47; 50-51.

Multiple people blocked assistance to Allen and other people joined in striking Allen. Id. at 19.

After the altercation, Allen was the only individual observed bleeding. Id. at 23-24; 51-52.

Coleman was seen striking Allen more than five times. As Coleman was leaving Ann's Tavern,

Coleman stuck Jordan Anderson Royal and the right side of his body. Id. at 20; 31. After

Coleman struck Royal, Royal fell to the ground. Id. at 31. Once on the ground, Coleman and

others kicked and stomped on Royal's right side of his torso. Id. at 32.

Allen lost a lot of blood and required about 30-40 stitches. Id. at 51. Prior to stitching his wounds, medical staff pulled out pieces of glass from Allen. Id. at 53. Medical records indicate that Allen suffered "a minor closed head injury, no concussion, multiple deep lacerations to the right ... periorbital area and the right cheek area," and noted a "foreign body present, complicated repair." Id. at 60:1-7. Medical staff advised Allen that he may have "a few small pieces of glass left behind." Id. at 61:14. In his testimony, Allen rated his pain level as a 9 on a scale of 1 to 10, with 10 being "the most extreme amount of pain[,]" lasting for about three to four days after the assault. Id. at 54. Allen suffered scarring on his side and back from the pool stick or chairs. Id. at 53-54. Allen suffered swelling to the face and mouth area of the jaw and inside his lip. Id. at 51-52. Allen suffered permanent scarring on his face and body. Id. at 54-55. Allen was off work for two weeks. Id. at 54. Allen endured eye twitching for a period of about four to six months and double vision of the right eye for a couple of months. Id. at 56. Allen increased visits to the chiropractor. Id. at 56. As a result of his injuries, Allen stopped playing semi-pro football for a couple of weeks and now uses a special padded helmet when playing football. Id. at 57-58.

DISCUSSION.

The Court will discuss the issues in the Order in which they were raised.

THE PHOTOGRAPHS WERE RELEVANT, PROBATIVE AND PROPERLY ADMITTED.

In his first issue, Coleman contends that the trial court erred in admitting photographs of the victim's injuries and of the crime scene. As noted in this Court's Opinion and Order of October 26, 2016, the Court conducted a two part analysis when it determined in the first instance that none of the photographs were inflammatory, and in the second instance, that the photographs were relevant, probative and not misleading.⁵

When determining whether a photograph is inflammatory, our Courts have indicated that even "a photograph [that] depicts the corpse of a victim does not render it inflammatory per se." Commonwealth v. Frederick, 327 Pa. Super. 199, 212, 475 A.2d 754, 761 (Pa. Super. 1984) "Rather the depiction must be of such a gruesome nature or be cast in such an unfair light that it would tend to cloud an objective assessment of the guilt or innocence of the defendant." Frederick, *supra*, *citing*, Commonwealth v. Hubbard, 472 Pa. 259, 281, 372 A.2d 687, 697 (Pa. 1977). In Commonwealth v. Hudson our Pennsylvania Supreme Court noted the following with respect to whether photographs may be inflammatory.

The mere fact that blood is visible does not necessarily make photographs inflammatory. Commonwealth v. Sullivan, 450 Pa. 273, 299 A.2d 608, cert. denied, 412 U.S. 923, 93 S.Ct. 2745, 37 L.Ed.2d 150 (1973). Moreover, we have held similar and even more explicit photographs not to be inflammatory. See, e. g., Commonwealth v. Woodward, 483 Pa. 1, 394 A.2d 508 (1978) (photograph depicting bloodied male corpse surrounded by pools of blood); Commonwealth v. Hilton, 461 Pa. 93, 334 A.2d 648 (1975) (eight inch by ten inch, black-and-white photograph of clothed corpse without visible wounds and with a small puddle of blood around the head of the corpse); Commonwealth v. Petrakovich, *supra* (eight inch by ten inch, black-and-white photographs showing corpse wearing blood-stained uniform and nude upper torso showing bullet wounds). Commonwealth v. Hudson, 489 Pa. 620, 631, 414 A.2d 1381, 1387 (1980)

⁵ All of the admitted photographs were attached to Defendant's motion in limine filed on October 25, 2016. The Court found that none of those photographs were inflammatory.

After examining the photographs at issue in this case, the Court was satisfied that nothing about the pictures was gruesome or would inflame the passions of the jury. The photographs depicted Jason Allen's facial injuries after being cleaned up and stitched. There was also a photo of Allen's injured hand. The pictures included some spots of blood on Allen's lip, face and knuckle. Other pictures captured the crime scene. The crime scene photos included smeared blood on the floor, broken pool sticks, the broken beer mug, and unbroken beer mugs.

Even had the photographs been inflammatory, the probative value outweighed the potential for prejudice. To sustain the conviction for count 1, the Commonwealth was required to prove that Coleman attempted to cause serious bodily injury to Allen. Therefore, the pictures were probative as to the seriousness of the injuries sustained by Allen and the force Colman used in inflicting them. To sustain the conviction for count 2, the Commonwealth was required to prove Coleman attempted or caused bodily injury to Allen with a deadly weapon. Therefore the crime scene photographs of the broken glass beer mug smashed on Allen and the unbroken mugs were probative of whether Coleman used a deadly weapon and whether Allen sustained bodily injury. The photographs depicted the thickness of the glass beer mug that Coleman smashed onto Allen and the intact glass beer mugs.

Lastly, there was nothing misleading about the photographs. The Commonwealth presented testimony that only Allen was bleeding and that the photographs accurately depicted Allen's injuries and the crime scene.

SUFFICIENCY OF THE EVIDENCE

In his second and third issues, Coleman challenges the sufficiency of the evidence as to the aggravated assault counts.

The standard of review for sufficiency is well settled and provided in case-law as follows.

The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any 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. Velez, 51 A.3d 260, 263 (Pa. Super. 2012), quoting, Commonwealth v. Mobley, 14 A.3d 887, 889-890 (Pa. Super. 2011).

In his second issue, Coleman challenges the sufficiency of the evidence as to Coleman's intent to cause serious bodily injury as required for conviction in count 1.⁶ "The intent to cause serious bodily harm may be shown by circumstances surrounding the incident." Commonwealth v. Caterino, 451 Pa. Super. 42, 46, 678 A.2d 389, 391 (Pa. Super. 1996), citing, Commonwealth v. Alexander, 477 Pa. 190, 194, 383 A.2d 887, 889 (1978); Commonwealth v. Elrod, 392 Pa. Super. 274, 277, 572 A.2d 1229, 1231 (1990), allocatur denied, 527 Pa. 629, 592 A.2d 1297 (1990). "Furthermore, the conduct giving rise to the inference that the defendant intended to inflict serious bodily harm need not in itself be life threatening." Caterino, citing, Elrod, supra, at 277, 572 A.2d at 1231.

In this case there was sufficient evidence that Coleman intended to cause Allen serious bodily injury. A video captured Coleman striking Allen with a glass beer mug that broke into pieces upon contact with Allen's head. Coleman admitted hitting Jason Allen with a glass beer mug and striking him with such force that the thick glass broke into pieces. N.T., Jury Trial 10-27-15. at 125, 126, 129, & 139. Although Coleman asserted that he was not trying to hurt Allen, Coleman never testified that he did not intend to hit Coleman with the force that he did. Indeed, Coleman testified that he was angry, ignored pleas by Dimarco to leave, thought his life was threatened, and broke a thick glass beer mug across Allen's head because he got angry. Id.

⁶18 Pa.C.S. § 2702(a)(1) "Serious bodily injury." Is bodily 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." 18 Pa. Cons. Stat. Ann. § 2301

at 123 & 124. 129; 135; 139; 141. Coleman admitted that he picked up the beer mug knowing he was going to hit Allen. Id. at 125:11.

After striking Allen with such force as to break a thick glass beer mug on Allen's head, Coleman then attacked Allen in a corner, swinging at him, kicking him, striking him with pool sticks and chairs on Allen's face, back and stomach area. Id. at 21-23, 46-47; 50-51. Coleman admitted that he and his crew of people attacked Allen. Id. at 131. Allen's friend and family were blocked from reaching Allen to help. That Coleman refrained from utilizing shards of glass to harm Coleman does not erase what Coleman intended and did do with the glass beer mug, pool sticks, chairs and that he attacked Allen.⁷ Upon review of all the evidence in the light most favorable to the Commonwealth, and upon review of the video which clearly captured Allen playing pool and Coleman walking around him and striking Allen with the glass beer mug in the head, there was more than sufficient for the jury to find that Coleman intended to and attempted to cause Allen serious bodily injury.

In his third issue, Coleman contends that there was insufficient evidence that Coleman caused bodily injury to Allen as required for conviction of count 2. There was abundant and compelling evidence that Gary Coleman caused bodily injury to Mr. Allen. Bodily injury means impairment of physical condition or substantial pain. 18 Pa.C.S. § 2301. Coleman admitted hitting Jason Allen with a glass beer mug and striking him with such force that the thick glass broke into pieces. Id. at 125, 126, 129, & 139. Coleman then attacked Allen in a corner, swinging at him, kicking him, striking him with pool sticks and chairs on Allen's face, back and stomach area. Id. at 21-23, 46-47; 50-51. There was only one broken beer mug on the floor and

⁷ In *Commonwealth v. Matthews*, 870 A.2d 924, 932 (Pa. Super. 2005), affirmed, 2006 Pa. LEXIS 2275 (Pa., Nov. 22, 2006) the Superior Court rejected a similar contention and determined that the Commonwealth can establish a defendant's intention to cause serious bodily injury when the defendant merely threatened serious bodily injury but declined to inflict any injury despite ample opportunity.

there was a significant amount of the blood on the floor where the broken mug was. *Id.* at 88; 92. 85-87. Witnesses testified that Allen was the only individual bleeding. *Id.* at 23-24; 51-52. And there was testimony that removal of the stitches required pulling out glass pieces from Allen, suggesting injury from the glass beer mug. Allen sustained permanent scarring. In sum, there was more than sufficient evidence to support the jury verdict.

In his final issue, Coleman contends that the trial court erred by not granting Coleman a continuance/mistrial when a defense witness, Angela Dimarco, came under investigation for witness intimidation related to all three prosecution witnesses who testified in this case. *Id.* at 71. It is well-settled that the decision to declare a mistrial rests within the discretion of the trial court and is subject to review for an abuse of such discretion. Commonwealth v. Chamberlain, 30 A.3d 381, 422 (Pa. 2011); Commonwealth v. Wright, 961 A.2d 119, 142 (Pa. 2008); Commonwealth v. Simpson, 754 A.2d 1264, 1272 (Pa. 2000). Our Pennsylvania Supreme Court stated that “[a] trial court may grant a mistrial only “where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict.” Wright, 961 A.2d at 142, *quoting*, Simpson, 754 A.2d at 1272.

Defense Counsel requested a continuance/mistrial stating that he planned to call Ms. Dimarco as a witness and that not having her available greatly hampered Mr. Coleman’s defense. N.T., Jury Trial 10-27-15, at 72. Ms. Dimarco obtained legal counsel and informed the Court herself and through counsel that she would not be testifying. *Id.* at 98. The Court denied the request for a continuance/mistrial. *Id.* at 72; 79. The Court does not believe Coleman was deprived of a fair trial by denying the mistrial. A jury would likely view testimony by Dimarco

as potentially biased. Dimarco was Coleman's fiancé and mother of his small children. Coleman should not profit from the alleged misconduct of his fiancé.

There was no specific proffer as to what Ms. Dimarco's testimony would have been or how it would advance Coleman's theory of the case. There was no suggestion that that circumstances surrounding Ms. Dimarco's ability to testify would change within a reasonable time. The Commonwealth asserted that those circumstances would not change. *Id.* 75-76. Any testimony by Ms. Dimarco would be weighed as having some potential for bias in Coleman's favor. Given the admissions by Coleman and the video, Ms. Dimarco's testimony would not go toward whether Coleman struck Allen with a glass beer mug and attacked Allen but rather would likely have been cumulative evidence as to what transpired verbally between Allen and Coleman. Since Coleman did not allege self-defense or defense of others so it is unclear what theory of the case Dimarco's testimony could support. The Court believes it was appropriate to deny the continuance / mistrial.

For these reasons, the Court respectfully requests that the jury verdict be affirmed.

BY THE COURT,

April 5, 2017

Date

c: DA (NI) (for Commonwealth)
Jeffrey A. Rowe, Esquire (for Defendant)
Superior Court & 1
Prothonotary (LG)

Richard A. Gray, J.