IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-622-2011**
vs.	**:**	
	:	
PERRY BENSON,	**:**	
Defendant	**:**	

OPINION AND ORDER

Before the Court is Defendant's post sentence motion. The relevant facts follow.

On April 23, 2011, William Dincher and Seth Allison were working as bartenders at the Shamrock Bar in Williamsport, Pennsylvania. Defendant was a patron in the bar. Defendant was getting loud and belligerent about his service at the bar. Defendant had a bulge in his waistband. He told Mr. Dincher and Mr. Allison, "Don't make me start popping off in here" and he reached toward his waistband. Dincher asked Defendant what he was reaching for. Defendant replied, "What do you think, a gun." Defendant then made threatening statements such as "I'll put a bullet in your f---ing head" and "I'll see you after you get off work" to the bartenders. They called 911. They then told Defendant that the police had been called and asked him to leave.

Defendant went out the front door, but he came back into the bar through the adjoining sub shop and went into the bathroom of the bar with two other individuals. Just as the police arrived, Defendant exited through the back door. The police ordered Defendant to put up his hands and to get down on the ground. Defendant was not being entirely cooperative with the police efforts to handcuff him and take him into custody, but he was eventually arrested and taken to City Hall.

The police charged Defendant with terroristic threats, simple assault by physical menace, resisting arrest and disorderly conduct, as well as the summary offenses of criminal mischief and public drunkenness.

A trial was held on November 16, 2011. The jury found Defendant guilty of terroristic threats and simple assault by physical menace, but acquitted him of resisting arrest and disorderly conduct. Consistent with the jury's verdict, the Court found Defendant guilty of public drunkenness and acquitted him of criminal mischief.

On January 4, 2012, the Court sentenced Defendant to incarceration in a state correctional institution for 18 months to 3 years for terroristic threats and a concurrent term of 12 to 24 months for simple assault by physical menace.

Defendant filed a timely post sentence motion in which he asserts the guilty verdicts were against the weight of the evidence and the sentence imposed by the Court was excessive.

An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. Commonwealth v. Sullivan, 820 A.2d 795, 805-806 (Pa. Super. 2003). A new trial is awarded only when "the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." Id. at 806 (citation omitted). The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. Id.

Defendant first asserts that the verdict was against the weight of the evidence

because the testimony of Dincher and Allison was not credible. The Court cannot agree.

Credibility is within the sole province of the trier of fact, who is free to believe all, part, or none of the evidence presented. Commonwealth v. Cooper, 596 Pa. 119, 130, 941 A.2d 655, 662 (2007); Commonwealth v. Gibson, 553 Pa. 648, 720 A.2d 473, 480 (1998). The jury credited the testimony of Allison and Dincher, which was within their province. Therefore, this claim does not entitle Defendant to a new trial.

Defendant next alleges that the threats, if any, were mere spur-of-the-moment threats while angry, which the statute does not intend to penalize. Defendant relies on Commonwealth v. Anneski, 362 Pa. Super. 580, 525 A.2d 373 (1987), appeal denied, 516 Pa. 621, 532 A.2d 19 (1987).

In Anneski, the alleged victim threatened to run over the defendant's children with her vehicle if they did not get out of her way, and the defendant responded by threatening to get a gun and use it against the alleged victim. The Superior Court characterized the defendant's statement as a mere spur-of-the-moment threat, made during a heated argument.

In Commonwealth v. Tizer, 454 Pa. Super. 1, 684 A.2d 597 (1996) and Commonwealth v. Hudgens, 400 Pa. Super. 79, 582 A.2d 1352, 1359 (1990), however, the Superior Court rejected the appellants' claims that their threats were merely spur-of-the-moment when the victim never threatened to do anything to the appellants or to harm the appellants in any way.

Here, as in Tizer and Hudgens, Dincher and Allison never threatened to do

anything to Defendant or to harm him in any way. Instead, Defendant became loud and belligerent, and when Allison and Dincher asked him to calm down, Defendant threatened them with his words and his conduct. Therefore, this spur-of the-moment allegation does not entitle Defendant to a new trial.

Defendant also contends the guilty verdict for public drunkenness is against the weight of the evidence because no preliminary breath test (PBT) or blood alcohol content (BAC) evidence was presented to establish that Defendant was intoxicated. PBT and BAC evidence is not the only way to establish that a person is intoxicated. Intoxication may be established through the testimony of lay witnesses. Commonwealth v. Spencer, 888 A.2d 827, 831 (Pa. Super. 2005)("Established Pennsylvania law generally accepts that intoxication is a condition within the understanding or powers of observation of ordinary citizens."); Commonwealth v. Neiswonger, 338 Pa. Super. 625, 488 A.2d 68, 69 (1985)("opinion testimony is admissible to prove a state of intoxication.").

The guilty verdicts did not shock the conscience of the Court. The evidence presented at trial established that Defendant became loud and belligerent because he was intoxicated. Defendant responded to the bartenders' requests to calm down by: reaching toward his waistband, telling them he possessed a gun, and threatening to use it. These threats put the bartenders in fear that they would be shot. Therefore, the guilty verdicts for terroristic threats, simple assault by physical menace, and public drunkenness were not against the weight of the evidence.

Defendant also avers that his sentence is excessive in light of the nature of the

charges. The Court cannot agree.

The sentence imposed in this case was not excessive. A pre-sentence investigation was prepared and the Court reviewed it prior to sentencing. Although the convictions were for misdemeanors that had an offense gravity score (OGS) of 3, Defendant had a significant prior criminal history and he was under supervision when he committed the current offenses. Defendant prior record score (PRS) was RFEL and consisted of first degree felony convictions for corrupt organizations and burglary in the 1990s, as well as misdemeanor convictions for resisting arrest, disorderly conduct, and driving under the influence of alcohol (DUI), for which Defendant was still under the supervision of the Lycoming County Adult Probation Office. With an OGS of 3 and a PRS of RFEL, the standard guideline range for Defendant's minimum sentence as 12 to 18 months incarceration. The minimum sentence was within the standard guideline range, and the maximum was the least the Court could give and still comply with the "min/max" rule found at 42 Pa.C.S. §9756(b).

Accordingly, the following Order is entered

O R D E R

AND NOW, this ___ day of May 2012, the Court DENIES Defendant's post sentence motion.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Trisha Hoover, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file