

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1472-2011
vs. :
LARRY L. BURDEN, JR., : Opinion and Order regarding
Defendant : Defendant's Post Sentence Motion
:

OPINION AND ORDER

Before the Court is Defendant's post sentence motion filed on July 9, 2012.

The relevant facts follow.

At approximately 9:50 a.m. on October 9, 2011, the Rite Aid store on Fifth Street was robbed. The robber approached the clerk and told the clerk to get behind the register and give him all the money. As the clerk was walking around the counter, the robber said "hurry up or I'll hurt you." The clerk noticed that the robber kept his hands inside the pouch of his hoodie, where there was a bulge that the clerk recognized as the outline of a gun. The clerk opened the cash drawer and handed the robber \$149, which consisted predominantly of \$1 bills.

A customer observed the robbery take place and, while calling 9-1-1, the customer followed the perpetrator. The customer observed the robber remove some of his clothing and discard it. When the police arrived, the customer pointed out the robber to them.

Officers took the robber into custody and he was identified as Defendant Larry Burden, Jr. As a result of a search incident to arrest, the officers discovered a .357 reovolver loaded with four rounds of live ammunition in Defendant's waistband, the \$149 in cash stolen from Rite-Aid, and nine baggies of crack cocaine. The police also recovered a

hat and hoodie that Defendant discarded along the route he took after he left the store.

During booking, Defendant commented to the officers, “You got the money; you got what you want.”

The police charged Defendant with persons not to possess a firearm, possession of a firearm without a license, terroristic threats, theft by unlawful taking, receiving stolen property, possessing instruments of crime, simple assault by physical menace, and three counts of robbery.

A jury trial was held on all of the counts except: one count of robbery, which was withdrawn by the Commonwealth; and the persons not to possess a firearm charge, which was severed and tried non-jury. Defendant was convicted of all the charges.

On July 3, 2012, the Court imposed an aggregate sentence of 9 ½ to 20 years incarceration in a state correctional institution. The aggregate sentence consisted of 5 ½ to 12 years on count 1, robbery, a felony of the first degree and a consecutive 4 to 8 years on count 4, persons not to possess a firearm, a felony of the second degree. The Court imposed a concurrent sentence of 6 months to 2 years of incarceration on Count 9, possessing instruments of crime, a misdemeanor of the first degree. The other charges merged for sentencing purposes. In arriving at the robbery sentence, the Court utilized the guideline ranges applicable when a deadly weapon is possessed.

On July 9, 2012, Defendant filed a post sentence motion, in which he avers that the verdicts of guilt with respect to robbery and simple assault by physical menace were not supported by sufficient evidence, were against the weight of the evidence, and were

based on mere speculation.

Defendant first asserts that the evidence was insufficient to establish beyond a reasonable doubt the crimes of robbery graded as a felony of the first degree and simple assault by physical menace, because a threat to cause serious bodily injury or intentionally putting another in fear of imminent serious bodily injury is an element of both offenses.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431, 435 (2005); Commonwealth v. Murphy, 577 Pa. 275, 844 A.2d 1228, 1233 (2004). Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt. Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610, 618 (1989)(citations omitted).

Although Defendant never pulled the gun out of his hoodie while he was inside the Rite-Aid store, Defendant intentionally put the clerk in fear of imminent serious bodily injury when he stood about a foot away from the clerk and said “hurry up or I’ll hurt you” while visibly possessing a firearm. The clerk saw the outline of the gun as Defendant held it loosely in the pocket of his hoodie and, predictably, the clerk was afraid that Defendant was going to shoot him.

Defendant contends that the Court must find that the evidence was

insufficient, because the Court refused to impose the sentencing enhancement for use of a deadly weapon. Defendant, however, is comparing apples and oranges, because the language of the deadly weapon enhancement is different from the statutory elements of the crimes.

The deadly weapon enhancement states, in relevant part:

- (1) An offender has possessed a deadly weapon if any of the following were on the offender's person or within his immediate physical control:
 - (i) Any firearm (as defined in 42 Pa.C.S. §9712) whether loaded or unloaded...
- (2) An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual:
 - (i) Any firearm (as defined in 42 Pa.C.S. §9712) whether loaded or unloaded....

204 Pa.Code §303.10(a). Since Defendant never pulled the gun out of his hoodie or pointed it at the clerk, the Court found that he did not “employ” the weapon; he possessed it.

This does not mean, however, that Defendant failed to intentionally put the clerk in imminent fear of serious bodily injury. Defendant intentionally possessed a firearm in the pocket of his hoodie while he demanded money from the clerk and said “hurry up or I’ll hurt you.” The clerk saw the outline of the gun in Defendant’s hoodie pocket and was afraid that Defendant would shoot him if he didn’t comply with his demands. A jury could reasonably infer that Defendant intended the natural consequences of his actions. The natural consequence of robbing someone while visibly possessing a firearm is that the person being robbed will legitimately become fearful that the robber intends to shoot him or her if the robber’s demands are not met. If Defendant only intended to put the clerk in fear of bodily injury, he should have left his gun at home or at least carried it in a manner so that the

clerk would not have known that Defendant had a gun on his person.

Defendant also avers that the verdict was against the weight of the evidence. 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. The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. Id.

The jury's verdict did not shock the Court's conscience. Intent is seldom proven by direct evidence. A jury drawing reasonable inferences from the evidence presented in not "mere speculation." Although Defendant never expressly said give me the money or I'll shoot or kill you, his visible possession of a firearm during the commission of a robbery in conjunction with his statement "hurry up or I'll hurt you" still conveyed that message to the clerk.

Accordingly, the following Order is entered:

ORDER

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

By The Court,

Marc F. Lovecchio, Judge

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