IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-304-2015**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
TY KINNEY,	:	
Appellant	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's judgment of sentence dated February 3, 2016. The relevant facts follow.

On January 26, 2015, Matthew Alexander and Daniel Pepperman, who are brothers, were walking on High Street when three individuals turned onto High Street from Rose Street. Alexander and Pepperman moved over so these individual could pass by them. Two of the individuals passed, but the third individual, who both Alexander and Pepperman subsequently identified as Appellant, hit Alexander in the head with brass knuckles and shoved him to the ground. Appellant then kicked Alexander in the side and hit him in the head. One of the other individuals also started kicking Alexander until Pepperman started to run away to get help. Appellant demanded that Alexander give him everything he had. Alexander gave Appellant a pack of cigarettes, his wallet, and an orange Taurus lighter.

The other individuals chased Pepperman, tripped him and then began kicking and punching Pepperman in the side and the face. Appellant, who was wearing a dark coat with fur on it and Timberland boots, got off of Alexander and participated in the assault of

Pepperman.

Pepperman saw a tan boot come towards him and strike his face "non-stop until his eye was swollen shut." He was kicked and punched repeatedly until he lost consciousness. Alexander was afraid his brother was going to die, so Alexander yelled for the individuals to stop and "play acted" like he was pulling a gun from his waistband and said he would kill all of them if they didn't stop. The individuals then ran away.

When Pepperman regained consciousness, he was spitting blood and his nose felt like it was completely congested but when he attempted to blow his nose, nothing but blood came out. The beanie he had been wearing was missing.

The police were called. The police observed footprints in the snow, which they followed to 655 Wildwood Boulevard. They saw males at different times looking out of the windows of the residence at 655 Wildwood Boulevard. The police knocked on the door and made contact with Stacy Fillman. The police told Fillman that they were investigating a serious crime scene, but she told them to come back the next day. The police told Fillman that wasn't an option; she could either consent to let them in or they would get a search warrant. Fillman slammed the door in their face.

The police obtained a search warrant for the residence. They took three males out of the residence, including Appellant. The police discovered a soaking wet pair of boots with the same sole or tread pattern as the footprints in the snow. They also found an orange Taurus lighter in the pocket of a long, green coat with fur around the hood, homemade brass knuckles in an upstairs bedroom dresser drawer, and a beanie in the dining room.

Appellant was arrested and charged with eight counts of robbery, two counts

of aggravated assault, two counts of simple assault, two counts of theft, two counts of receiving stolen property, two counts of conspiracy and one count of prohibited offensive weapons.

A jury trial was held on November 17, 2015. The jury convicted Appellant of seven counts of robbery, two counts of aggravated assault, two counts of simple assault, one count of theft, one count of receiving stolen property, and one count of possession a prohibited offensive weapon.

On February 3, 2016, the court sentenced Appellant to incarceration in a state correctional facility for 9 to 25 years, consisting of 7 ½ to 20 years for aggravated assault, a felony of the first degree, and 1 ½ to 5 years for possessing a prohibited offensive weapon (brass knuckles), a misdemeanor of the first degree. The remaining convictions either merged for sentencing purposes or the court imposed a concurrent sentence.

Appellant did not file any post sentence motions. He did, however, file a notice of appeal on February 26, 2016. Appellant asserted five issues in his concise statement of errors on appeal:

> 1. The evidence presented at trial was insufficient to establish that it was Appellant who committed two counts of aggravated assault, two counts of robbery, and one count of prohibited offensive weapons;
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> 2. The prosecution committed prosecutorial misconduct by misrepresenting plea negotiations with a cooperating co-defendant who testified at trial;
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> 3. The cooperating witness committed perjury when confronted on cross-examination with a letter he wrote to his attorney detailing plea negotiations with the assigned [assistant] district attorney;
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> 4. These allegations are supported by the cooperating co-defendant's subsequent guilty plea and sentencing to misdemeanor charges for a county sentence which was consistent with the letter he wrote to his attorney; and

> 5. Appellant's counsel was unable to raise these issues in a post sentence motion since he was not trial counsel, the court having allowed trial counsel to withdraw from the case without filing post sentence motions or requiring trial counsel to give her file to Appellate counsel; plus Appellate counsel did not receive the trial transcript within ten days of sentencing and therefore was not aware of the issues raised herein.

Appellant first challenges the sufficiency of the evidence to support his convictions for two counts of aggravated assault, two counts of robbery and one count of prohibited offensive weapons.

> In reviewing the sufficiency of the evidence, [the court] must determine whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as the verdict winner, was sufficient to enable the fact finder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt. The Commonwealth may sustain its burden by means of wholly circumstantial evidence. Further, the trier of fact is free to believe all, part, or none of the evidence.

Commonwealth v. Woodward, 129 A.3d 480, 489-90 (Pa. 2015).

Appellant's convictions for aggravated assault are for violations of 18 Pa.C.S.A. §2702(a)(1), which defines the crime as follows: "A person is guilty of aggravated assault if he: (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." Serious bodily injury is "[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." 18 Pa.C.S.A. §2301.

The Commonwealth presented ample evidence from which the jury reasonably concluded that Appellant attempted to cause serious bodily injury to Alexander and Pepperman.

Matthew Alexander testified that Appellant hit him in the face with brass knuckles. (N.T., Nov. 17, 2015, at 25-26). Then Appellant shoved him to the ground, kicked him in the side, and hit him in the head. (N.T. at 27) Appellant and one of the other individuals punched and kicked Mr. Alexander. (*Id*.). Appellant hit him four to five times (N.T. at 27-28). Mr. Alexander's teeth were chipped and cracked; he ended up losing four teeth as a result of this incident. (N.T. at 31).

Mr. Alexander knew it was Appellant that punched him because he looked right in his face and there was a street lamp above where the incident happened. (N.T. at 35-36). He could say without hesitation that Appellant was the one that hit him (N.T. at 38). Daniel Pepperman also identified Appellant as the person who struck Mr. Alexander. (N.T. at 43, 51). He indicated that he "got a good look" at him. (N.T. at 43).

Mr. Alexander and Mr. Pepperman also described Appellant as wearing tan Timberland boots and a dark, hooded coat with fur on it. (N.T., at 30, 60). The police executed a search warrant at 655 Wildwood Boulevard, the residence where Appellant, and the two other perpetrators were apprehended. (N.T. at 78). Inside the residence the police discovered brass knuckles, a soaking wet pair of boots with the same sole tread pattern as footprints in the snow leading from the scene of the incident to 655 Wildwood Boulevard, and a soaking wet Woolrich coat that matched the description provided by the witnesses. (N.T., at 75, 79-83, 156-158).

A pocket and a cuff of the coat were swabbed for DNA. (N.T., at 135-136). The swab from the cuff of the coat contained a DNA mixture from three individuals, and the major component matched the known DNA sample from Appellant. (N.T., at 145, 148).

Evidence, such as that presented here, that Appellant along with others repeatedly struck and kicked the victim in the head and side is sufficient to establish that Appellant attempted to cause serious bodily injury and that he intended to do so. ***Commonwealth v. Glover***, 449 A.2d 662, 665-66 (Pa. Super. 1982)(finding evidence sufficient to prove the appellant guilty of aggravated assault because jury could reasonably infer that the appellant attempted to cause serious bodily injury and had the requisite intent from the fact that the appellant struck the victim repeatedly and did not act alone); see also ***Commonwealth v. Gregory***, 406 A.2d 539 (Pa. Super. 1979).

The evidence also was sufficient to prove that Appellant and his cohorts committed an aggravated assault against Daniel Pepperman. Mr. Alexander testified that, while he was being assaulted and robbed by Appellant and another individual, Mr. Pepperman tried to run away to get help. Appellant was still on top of Mr. Alexander as he was "giving up his stuff" when the other two individuals ran after and caught up to Mr. Pepperman. They tripped Mr. Pepperman and knocked him to the ground, and then they started kicking and punching him in the head. Appellant then got off Mr. Alexander and ran over and helped the other two individuals beat up Mr. Pepperman. All three of them were kicking and punching Mr. Pepperman and screaming at him to give them his stuff. Mr. Pepperman lost consciousness. The whole side of his face was swollen and covered in blood. There was blood all over on Mr. Pepperman's clothes, the sidewalk and the snow. (N.T. at 29-31).

Mr. Pepperman testified that he was running to get help. Right before the first light pole on Rose Street, he was tripped and knocked down. He was kicked and punched

over and over again in the stomach and mostly in the face with a lot of force. Then he started hearing "give me all your shit, give me your shit now." He tried to reach for his wallet and all he remembers is seeing a tan boot coming toward his face non-stop until his eye was swollen shut. He felt more blows to mainly his head, but also to his back and stomach, until he became unconscious. When he regained consciousness, he was spitting up blood and felt like his nose was completely congested. When he went to blow his nose, nothing but blood came out. Blood started bubbling in his right eye and made it really hard to see. (N.T. at 47-49).

Mr. Alexander testified that Appellant was wearing tan Timberland work boots. (N.T. at 30).

Officer Brittany Alexander took photographs of Mr. Pepperman at the hospital emergency room. Mr. Pepperman's right eye was swollen and bulging, and his lips were swollen to two to three times their original size. (N.T. at 67).

This evidence was sufficient to prove that Appellant attempted to cause serious bodily injury to Mr. Pepperman. Although the other two individuals started the assault on Mr. Pepperman, the evidence clearly established that Appellant joined in the fray and participated in the assault. Mr. Pepperman was savagely kicked and punched in the head until he lost consciousness. Mr. Pepperman repeatedly saw a tan boot coming toward his right eye until it was swollen shut. Mr. Alexander testified that Appellant was wearing tan boots and he ran over and helped the other two individuals beat up his brother, Mr. Pepperman. Based on this evidence, Appellant's claim that the evidence was insufficient to show that he committed an aggravated assault on Mr. Pepperman lacks merit.

Appellant also contends that the evidence was insufficient to sustain his convictions for two counts of robbery. Appellant was convicted of seven counts of robbery and he does not specify for which two counts he is contending that the evidence was insufficient. He also does not indicate how or why the evidence is insufficient. The court does not know whether the two counts in question are Appellant's convictions for robbery graded as a felony of the first degree or if Appellant is contending he should not have been convicted of any of the robberies committed against Mr. Alexander and Mr. Pepperman. Either way, Appellant's claims lack merit.

> A person is guilty of robbery if, in the course of committing a theft, he:
> (i) inflicts serious bodily injury on another;
> (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
> (iii) commits or threatens to commit any felony of the first or second degree;
> (iv) inflicts bodily injury on another or threatens another with or intentionally puts him in fear of immediate bodily injury;
> (v) physically takes or removes property from the person of another by force however slight; or
> (vi) takes or removes the money of a financial institution without the permission of the financial institution by making a demand of an employee of the financial institution orally or in writing with the intent to deprive the financial institution thereof.

18 Pa. C.S. §3701(a)(1).

The evidence presented at trial was sufficient to establish that Appellant robbed Mr. Alexander. Appellant beat Mr. Alexander and took his property. While wearing brass knuckles, Appellant punched Mr. Alexander in the face. (N.T. at 25-26, 35). Appellant also kicked Mr. Alexander in the head and face. (N.T. at 25-27). He pressed something against Mr. Alexander's head that Mr. Alexander believed was a gun. (N.T. at 27). He demanded everything Mr. Alexander had and took Mr. Alexander's wallet, cigarettes, and

orange Taurus lighter. (N.T. at 27-28). Mr. Alexander was terrified. (N.T. at 30). As a result of the beating, several of Mr. Alexander's teeth were cracked and chipped. Four teeth were damaged so badly that Mr. Alexander lost them. (N.T. at 31).

The police found Mr. Alexander's lighter in the pocket of a long green heavy coat inside the residence located at 655 Wildwood Boulevard. (N.T. at 67, 84-85). Appellant's DNA was found on the cuff of that coat. (N.T. at 145, 148).

This evidence and the reasonable inferences that can be drawn from this evidence are sufficient to show that in the course of committing a theft against Mr. Alexander, Appellant intentionally put Mr. Alexander in fear of immediate serious bodily injury, inflicted bodily injury on Mr. Alexander, and took or removed property from Mr. Alexander by force however slight. Therefore, the evidence was sufficient to sustain all of Appellant's robbery convictions involving Mr. Alexander as the victim.

The evidence also was sufficient to sustain Appellant's robbery convictions related to Mr. Pepperman. When Mr. Pepperman saw Appellant beating up Mr. Alexander, Mr. Pepperman tried to run away and get help, because he didn't know if Appellant or the other two individuals had a gun. (N.T. at 47). Appellant and his cohorts chased down Mr. Pepperman and savagely beat him to the point that Mr. Pepperman lost consciousness and when he awoke he was spitting blood. (N.T. at 48). Mr. Pepperman's right eye was swollen shut and bulging and his lips were two to three times their original size. (N.T. at 48, 67). Mr. Alexander was afraid that Mr. Pepperman was going to die (N.T. at 30). While Mr. Pepperman was being assaulted, he heard his assailants saying "give me all your shit, give

me your shit now." (N.T. at 48).[1]

The testimony of Mr. Alexander, and Mr. Pepperman as well as DNA evidence established that Appellant was involved in the robberies. Mr. Alexander testified that Appellant hit him in the face with brass knuckles. (N.T., Nov. 17, 2015, at 25-26). Appellant hit him four to five times (N.T. at 27-28). Mr. Alexander knew it was Appellant that punched him because he looked right in his face and there was a street lamp above where the incident happened. (N.T. at 35-36). He could say without hesitation that Appellant was the one that hit him (N.T. at 38).

Daniel Pepperman also identified Appellant. (N.T. at 43, 51). He indicated that he "got a good look" at him. (N.T. at 43).

Mr. Alexander and Mr. Pepperman also described Appellant as wearing tan Timberland boots and a dark, hooded coat with fur on it. (N.T., at 30, 60). The police executed a search warrant at 655 Wildwood Boulevard, the residence where Appellant and the two other perpetrators were apprehended. (N.T. at 78). Inside the residence the police discovered tan boots and a soaking wet Woolrich coat that matched the description provided by the witnesses. (N.T., at 75, 79-83, 156-158). The police found Mr. Alexander's lighter in the pocket of a green coat with fur around the hood inside the residence located at 655 Wildwood Boulevard. (N.T. at 67, 84-85). Appellant's DNA was found on the cuff of that coat. (N.T. at 145, 148).

Regardless of whether Appellant or his cohorts actually obtained any property

[1] Regardless of whether Appellant or one of the other two individuals demanded Mr. Pepperman's property, Appellant could properly be convicted of robbery because, at a minimum, he was an accomplice of the other two individuals. See 18 Pa.C.S. §306(c)(A person is an accomplice of another person in the commission of an offense if, with the intent of promoting or facilitating the offense, he aids or attempts to aid such other person in

from Mr. Pepperman, they attempted to do so. The Crimes Code defines the phrase "in the course of committing a theft" as follows: "An act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit a theft or in flight after the attempt or commission." 18 Pa.C.S. §3701(a)(2). Since the assault of Mr. Pepperman occurred in the course of committing a theft, the evidence was sufficient to sustain Appellant's convictions for robbery of Mr. Pepperman.[2]

Appellant also contends that the evidence was insufficient to sustain his conviction for possession of an offensive weapon. Again, the court cannot agree.

Section 908(a) of the Crimes Code defines the prohibited offensive weapon offense as follows: "A person commits a misdemeanor of the first degree if, except as authorized by law, he makes, repairs, sells or otherwise deals in, uses or possesses any prohibited offensive weapon." 18 Pa.C.S. §908(a). Metal knuckles are prohibited offensive weapons. 18 Pa.C.S. §908(c).

The evidence presented at trial was sufficient to establish that Appellant possessed and used brass knuckles when he assaulted and robbed Mr. Alexander. Mr. Alexander testified that Appellant punched him in the face while wearing brass knuckles. (N.T. at 25-26). The police also found a homemade set of brass knuckles in the residence where Appellant was arrested. (N.T. at 88-89).

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committing it).

[2] The jury acquitted Appellant of the theft of Mr. Pepperman's beanie. This acquittal is arguably inconsistent with the conviction for robbery graded as a felony of the third degree, i.e., by force however slight which requires physically removing or taking property from the person of another. A sufficiency review, however, is a separate inquiry from a review of inconsistent verdicts. ***United States v. Powell***, 469 U.S. 57, 67 (1984). Furthermore, verdicts are not required to be consistent. ***Commonwealth v. Moore***, 103 A.3d 1240, 1247 (Pa. 2014). Mr. Pepperman testified that one of the individuals physically removed his beanie from his head (N.T. at 45). Appellant was, at a minimum, an accomplice during the robbery of Mr. Pepperman. Therefore, the evidence was also sufficient for this robbery conviction.

Mr. Alexander knew it was Appellant that punched him because he looked right in his face and there was a street lamp above where the incident happened. (N.T. at 35-36). He could say without hesitation that Appellant was the one that hit him (N.T. at 38). Daniel Pepperman also identified Appellant. (N.T. at 43, 51). He indicated that he "got a good look" at him. (N.T. at 43).

This evidence was sufficient to establish that Appellant possessed and used a prohibited offensive weapon, namely brass knuckles, during the assault and robbery of Mr. Alexander.

In his remaining issues Appellant asserts that the prosecution committed prosecutorial misconduct by misrepresenting plea negotiations with Jeffrey Randolph and that Jeffrey Randolph committed perjury when he denied that the plea agreement detailed in a letter he wrote to his attorney accurately represented his discussions with the assigned prosecuting attorney. According to Appellant, these allegations are supported by Mr. Randolph's subsequent guilty plea and sentencing to misdemeanor charges with a county sentence.

These issues might be waived or procedurally defaulted. Generally, issues not raised in the trial court are waived and cannot be asserted for the first time on appeal. Pa.R.App.P. 302(a).

The court notes that the guilty plea and sentencing hearing for the co-defendant (Jeffrey Randolph) occurred approximately 3 weeks after Appellant's trial. The court recognizes that current counsel was not Appellant's trial counsel and, as a result, probably was not aware of this issue during the time period for filing post sentence motions.

Once counsel discovered the issue, however, he neither attempted to file a request with the court to file post sentence motions *nunc pro tunc* nor filed or attempted to file a post sentence motion for a new trial on the ground of after-discovered evidence, which is not subject to the ten-day time limit for the filing of post sentence motions. Pa.R.Crim.P. 720(A)(1); Pa.R.Crim.P. 720(C); ***Commonwealth v. Trinidad***, 93 A.3d 1031 (Pa. Super. 2014). If counsel discovered this evidence after the notice of appeal was filed and more than 30 days after Appellant was sentenced, his remedy was, and is, a petition to the Pennsylvania Superior Court for a remand to pursue his claims in the trial court. ***Trinidad***, 93 A.3d at 1035 n.4 (citing ***Commonwealth v. Perrin***, 59 A.3d 663, 665-667 (Pa. Super. 2013) and Pa.R.Crim.P. 720, cmt.)).

The court is not opposed to a remand to develop a record on these issues. Based on the current record, though, even if these issues are not waived or defaulted, the court does not believe Appellant is entitled to a new trial. Merely because a plea agreement ultimately was reached that was similar to the one Mr. Randolph wrote about in his letter does not necessarily mean that the agreement was reached prior to trial, the witness committed perjury or the prosecutor committed prosecutorial misconduct. Furthermore, the information regarding Mr. Randolph's plea agreement would only be used to impeach Mr. Randolph's testimony and it is unlikely that this evidence would result in a different verdict if a new trial were granted.

The jury was well aware that Mr. Randolph expected leniency in exchange for his testimony, as he admitted such during both direct and cross-examination. (N.T. at 107, 114). Mr. Randolph's testimony also did not appear to carry much, if any, weight. In his

testimony, Mr. Randolph minimized his involvement in this incident and the offenses he was charged with committing as a result of this incident. Furthermore, the testimony of both victims as well as DNA evidence established that Appellant was one of the perpetrators of these crimes.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: District Attorney
William Miele, Esquire (PD)
Work File
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)