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Commonwealth v. Reese

COMMONWEALTH OF PENNSYLVANIA
v. DONALD R. REESE, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 695 of 2002

Impeachment of witnesses; Qualifications of expert witness; Simple assault by mutual affray

1. A witness can be impeached only on matters which are relevant and which are not merely collateral to the issue before the trier of fact. Pa.R.E. 607.
2. The defendant was precluded from impeaching the victim using extrinsic evidence on a collateral matter which was not relevant and which was injected by the defendant himself through the testimony of witnesses which he had previously presented.
3. A witness is qualified to give an opinion if he has specialized knowledge, training, skill or experience beyond the layman's, and his opinion will assist the trier of fact to understand the evidence or to decide a fact in issue. Pa.R.E. 702.
4. The emergency room doctor who treated the victim was qualified to opine that the defendant's version of the incident was inconsistent with the victim's nasal injuries, where the doctor was trained in internal medicine and had extensive experience in emergency medicine.
5. Simple assault can be classified as a misdemeanor of the third degree if it was entered into by mutual consent.
6. The court refused to give a jury instruction on simple assault by mutual affray where the evidence was insufficient to present a jury question as to whether the victim attempted to cause or intentionally, knowingly, or recklessly caused the defendant bodily injury, where the victim, who was 5'2" tall and weighed 100-109 pounds, repeatedly slapped the defendant, who stood at least 5'5" tall and weighed 185-195 pounds, on his chest.

Appearances:

Todd R. Williams, Esq., *Assistant District Attorney*

Mark David Frankel, Esq., *Counsel for Defendant*

OPINION

Opinion sur Pa.R.A.P. 1925(a)

Introduction

The defendant was charged with aggravated assault and simple assault in connection with an incident involving his girlfriend, Heather Winfield. A jury convicted the defendant of simple assault and acquitted him of aggravated assault at a trial on May 5 and 6, 2003. The court sentenced the defendant on July 9, 2003 to serve 12-24 months at a state correctional institution, a sentence in the standard range under the guidelines. The defendant filed a notice of appeal. The court directed him to file a concise statement of matters complained of on appeal, which he did on August 13, 2003. The trial transcript was prepared and filed on September 15, 2003.

Background

Heather Winfield was the defendant's girlfriend. As of the time of the incident, she and the defendant had known each other for approximately seven years and had lived together for approximately one year. They lived in the defendant's home along with their minor child, two minor children from Winfield's prior relationship with another man, and the defendant's mother.

The evidence showed the defendant was drinking heavily in the early evening hours of April 17, 2002 and did not return home until 1:30 a.m. Winfield testified she remained home during that time waiting for him to return. Upon his arrival, Winfield noted the defendant was intoxicated. She let him know she was upset about his drinking because it was not the first time he had been in that condition. The defendant then began arguing with Winfield about her ex-boyfriend. As Winfield began walking back toward the house, the defendant pursued her, grabbed her by the hair, picked her up and threw her onto a bush near the front of the residence. Once she fell onto the pavement and was lying on her back, the defendant used his knee to pin her face to the concrete surface of the patio and began kicking her on her back, side and arms as she lay curled up in a ball. The defendant kicked her approximately 10-15 times. At least one of the blows fractured her nose, causing a piece of bone to protrude through the skin. Winfield lost consciousness toward the end of the attack. When she regained her senses, 911 was summoned and she was taken by ambulance to the Waynesboro Hospital. The emergency room physician, Dr. Bruce Foster, M.D. treated her compound nose fracture and shattered sinus cavities. The physician removed the shattered bone and stitched up her wounds.

Washington Township police officer Richard Robinson, Jr. responded to the scene that evening. He observed the multiple bruises on Winfield's face, as well as the bone protruding from her nose. The defendant was intoxicated and combative with Officer Robinson and the other officers at the scene who transported him to the police station.

The Commonwealth and counsel for the defendant presented the following three stipulations to the jury: the stained work boots seized that evening belonged to the defendant; the stains on the front toe and inside the right boot were human blood stains; the human blood stains in those portions of the boot came from the victim, Heather Winfield.

Winfield received follow-up treatment with ear, nose and throat specialist Dr. Bibhas Bandy, M.D. over the next year. Dr. Bandy has also seen Winfield when she first received treatment in the emergency room. She underwent two operations aimed at restoring her sinuses and breathing. The procedures were somewhat successful, although as of the date of trial, she still suffered from sinus problems, severe headaches and ear blockage which muffles her ability to hear. Cosmetically, her nose looks like it has been pushed to one side, and she has a large visible scar.

The defendant admitted at trial he had been drinking heavily for many hours on April 17, 2002 and was highly intoxicated by the time he arrived home. He testified he went to sleep in the back of his truck but was awakened by Winfield punching him and pulling at him and yelling that she was going to move out. The defendant testified he pushed her away but that she continued to hit him in the chest. When he again pushed her back, she tripped, landed on her back and he fell on top of her. The defendant testified he was trying to defend himself from her blows and was too drunk to have kicked her repeatedly as she claimed. He denied punching or kicking Winfield at all. In this context we note Winfield is 5'2" tall and 100-109 pounds, and the defendant is at least 5'5" tall and 185-195 pounds.

The defendant called his mother, Dorothy Biser, and his aunt, Catherine Green as witnesses for the purpose of impeaching certain parts of Winfield's testimony. Biser testified that at approximately 10:00 p.m. on April 17, 2002, Winfield told her that she (Winfield) was going to Chocolate Park, a bar three miles away in Maryland. Biser did not see Winfield leave the house that night, however, and had no further contact with her that evening. Biser came down later that night to find police in the house, who informed her that her son had been arrested. Green testified Winfield telephoned her at approximately midnight to inquire as to the defendant's whereabouts. According to Green, Winfield said she had been to Chocolate Park that evening but did not find the defendant there. Winfield steadfastly maintained that she did not

leave the house that evening, denied telling Biser she was on her way to Chocolate Park or that she told Green she'd already been there in an effort to find the defendant.

Discussion

The defendant alleges the court committed four errors at trial.

1. The Court did not allow witness Brian Varner to testify relative to seeing the victim at the Chocolate Inn. Said testimony would have given the jury additional information upon which to establish [the] credibility of Defendant.

2. Over objections of defense counsel, Dr. Bruce Foster, the emergency room physician, was allowed to testify to the manner in which a blow would have come to the victim and suggesting information about the force of the blow, the mechanics of same, and other testimony which was improper.

3. Dr. Bruce Foster is an emergency room physician and is neither a forensic examiner or forensic pathologist. Furthermore, said doctor, over objections by defense counsel, was allowed to opine about the future aspects of the break of victim's nose, despite the emergency room doctor not being an ENT [ear, nose and throat] physician, nor had he handled her case at any other time than when she was in the emergency room.

4. Over objections by defense counsel, the Court did not allow the jury to consider simple assault by mutual affray.

As to the first issue, the defendant sought to have Brian Varner testify that he has known Heather Winfield for many years and saw her at Chocolate Park Bar at approximately 9:00 p.m. on April 17, 2002, in contradiction to her testimony that she was at home the entire evening. The Commonwealth objected to the defendant's efforts to impeach Winfield's credibility by presenting witnesses to testify that she went to Chocolate Park to locate the defendant.

Pennsylvania Rule of Evidence 607 governs impeachment of witnesses. It provides: "(a) The credibility of any witness may be attacked by any party, including the party calling the witness; (b) The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules." It is well-established that a witness can be contradicted or impeached only on matters which are relevant and not merely collateral to the issue before the trier of fact. *Commonwealth v. Petrillo*, 19 A.2d 288 (Pa. 1941). A matter is collateral if it has no relationship to the issue being tried. *Commonwealth v. Johnson*, 638 A.2d 940 (Pa. 1994). Pa.R.E. 401-403.

The court found the proffered testimony was not admissible because it was an attempt to impeach Winfield using extrinsic evidence on a collateral matter which was not relevant and was injected by the defendant through the testimony of Dorothy Biser and Catherine Green. Winfield steadfastly testified on direct examination that she was home during the entire evening of April 17th. Her testimony did not in itself "open the door" to permit the defendant to use extrinsic evidence to contradict her on that matter. Winfield's testimony was directly relevant to the issue of what took place between Winfield and the defendant. Biser's and Green's testimony that Winfield went out to a local bar was **not** relevant. There was nothing in the Commonwealth's case in general which generated an ambiguity on that matter which the defendant was entitled to explore using extrinsic evidence on a collateral matter. (N.T. Proceedings of Jury Trial, May 6, 2003, pp. 37-40.)

The defendant's second and third appeal issues pertain to the testimony of Dr. Foster. The Commonwealth offered Dr. Foster as both a fact and expert witness. He completed medical school, a three-year residency in internal medicine, and has practiced emergency medicine since 1985. He is chief of emergency medicine at Waynesboro Hospital. Counsel for the defendant initially indicated that he had no objections to Dr. Foster's qualifications to render an opinion. (N.T. Proceedings of Jury Trial, May 6, 2003, p. 6.)

Dr. Foster treated Heather Winfield in the emergency room in the early morning hours of April 18, 2002. He conducted a physical examination and also took an x-ray of her head. He noted multiple contusions to her nose and face, swelling, blood collection beneath her right eye, a laceration across the bridge of her nose, and a piece of bone protruding from the right side of her nose. Dr. Foster opined that the nature of Winfield's injuries were inconsistent with the defendant's version of events, specifically, that she hit her face on the concrete pavement as a result of being pushed over a bush. Dr. Foster opined that no single blow could have caused all her injuries. In support he pointed to the multiple contusions, the extent to which the nasal bone was shattered, and the direction of the bone's protrusion from beneath her skin. According to Dr. Foster, for the nasal bone to be driven forward through the skin on the right side of Winfield's nose, the blow must have come from her left side. If Winfield had fallen face down as the defendant suggested, her nose would have been pushed in and depressed, not driven outward through the right side of her nose.

Defense counsel objected to Dr. Foster's testimony, arguing that he was not qualified to give an opinion in forensic medicine. The court took up the matter at sidebar and then overruled the objection on the record. The defendant argues it was error for the court to permit Dr. Foster to testify about the mechanics of Winfield's facial injuries, that is, what kinds of blows -- their force and direction -- were inflicted to cause the damage to her face and nose. According to the defendant, admission of this testimony was error because Dr. Foster is not trained in forensic medicine, either as a forensic examiner or as a forensic pathologist.

While being cross-examined on his qualifications, Dr. Foster explained that pathologists are trained to study disease using tissues and blood samples and they also perform autopsies to that end. A forensic pathologist has these same skills, but also specializes in determining cause of death for legal proceedings. Dr. Foster further explained that it is normally the treating clinician, not a forensic pathologist, who comments on the nature of injuries in a patient with an injury such as a broken nose. (N.T. Proceeding of Jury Trial, May 6, 2003, pp. 5-6.)

Dr. Foster examined and treated Heather Winfield at the emergency room shortly after she sustained her injuries. Defense counsel did not object to Dr. Foster's qualifications to offer an opinion pertaining to his practice of emergency medicine. That practice routinely involves analyzing the mechanics of injuries with an eye toward their proper treatment. Dr. Foster, trained in internal medicine and with substantial expertise in the types of injuries frequently treated in the emergency room, was clearly qualified to state whether Winfield's injuries were inconsistent with the defendant's version of events. In addition, defense counsel vigorously cross-examined Dr. Foster about his opinion as to the direction and force of the blows Winfield sustained. This ground for appeal has no merit.

The defendant also contends the court erred in allowing Dr. Foster to opine about the future functioning of Winfield's nose because Dr. Foster is not an ear, nose and throat physician and he did not treat her again after the night of the assault. We disagree with this assertion of error. Dr. Foster personally treated Winfield and had ample opportunity to analyze the nature and extent of her injuries, both from his own observation and from reviewing the x-ray. He testified about the long-term problems which might be experienced by a person who suffered the types of injuries Winfield suffered. These include breathing difficulties due to shifted air passages, and sinus drainage problems which cause inflammation and infections. These are precisely the same category of problems experienced by Heather Winfield on a chronic basis. As a doctor of internal medicine with extensive training and experience in emergency medicine, Dr. Foster clearly had a "reasonable pretension to specialized knowledge on the subject of the investigation...." Pa.R.E. 702.

Finally the defendant contends the court erred in refusing to charge the jury on simple assault by mutual affray. Under the Crimes Code, 18 Pa.C.S.A. §2701, simple assault can be classified as a misdemeanor of the third degree if it was entered into by mutual consent. The court took up this matter with counsel outside the presence of the jury. The court reviewed the defendant's testimony, specifically his contention that Winfield initiated the incident by approaching him as he lay sleeping in the bed of his truck, verbally harassing him and slapping him on his chest. The court found that this evidence was insufficient to present a jury question as to whether Winfield attempted to cause or intentionally, knowingly or recklessly caused bodily injury to the defendant, as required by the definition of simple assault. (N.T. Proceedings of Jury Trial, May 6, 2003, pp. 41-45.) We note in this context that the evidence showed the defendant is at least 5'5" tall and 185-195 pounds, whereas Winfield is 5'2" tall and weighs 100-109 pounds.

We submit that the court committed no error in any aspect of this proceeding and we respectfully request that the defendant's conviction be affirmed.

ORDER OF COURT

Now, on October 2, 2003, pursuant to Pennsylvania Rules of Appellate Procedure 1931(c), it is hereby ordered that the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion Sur Pa.R.A.P. 1925(a).

Photographs of Heather Winfield were admitted into evidence during the trial as Commonwealth exhibits #1, 2, and 3. They show Winfield's face, including close-ups of her swollen, bruised and bloody nose and eye areas. Also admitted were Commonwealth exhibits #4, 5, 6, 7, and 8, which are photographs showing the portion of the front porch where the assault took place. These photographs show a large pool of blood on the concrete surface of the patio, and blood splatter on the adjacent wall of the house.

Dr. Bandy's office notes were admitted into evidence as Commonwealth exhibit #9.

The actual name of the bar is Chocolate Park, not The Chocolate Inn.

Forensic medicine is "a science that deals with the relation and application of medical facts to legal

problems." Webster's New Collegiate Dictionary.