IN THE

Supreme Court of Virginia

RECORD NO. 122178

CHRISTOPHER BURKEEN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF PROCEEDINGS

Christopher Burkeen (hereafter referred to as "Burkeen") was indicted by a Newport News, Virginia, grand jury for one count of malicious wounding in violation of Virginia Code Section 18.2-51.

On August 22, 2011, Burkeen entered a plea of not guilty to the charge, and the case was tried without a jury before the Honorable H. Vincent Conway, Jr., of the Newport News Circuit Court. Following the presentation of the Commonwealth's evidence, Burkeen moved to strike the evidence, which motion Judge Conway denied. Burkeen presented evidence in his own behalf, following which the Commonwealth called a rebuttal witness. Following argument of counsel, Judge Conway found Burkeen guilty and a presentencing report was ordered.

On December 12, 2011, Burkeen was heard on his motion to set aside and vacate the court's finding of guilt, which Judge Conway denied. On that same date, Judge Conway sentenced Burkeen to twenty years with eighteen years suspended.

The Notice of Appeal was timely filed. In an unpublished decision, a three-judge panel of the Court of Appeals affirmed the judgment against Burkeen on November 27, 2012.

The Petition for Rehearing En Banc was timely filed. The Court of Appeals denied the Petition for Rehearing En Banc on December 18, 2012.

The Notice of Appeal was timely filed.

ASSIGNMENT OF ERROR

I. THE COURT OF APPEALS ERRED WHEN IT FOUND THAT THE EVIDENCE WAS SUFFICIENT TO PROVE INTENT TO MAIM, DISFIGURE, DISABLE OR KILL WHERE THE DEFENDANT STRUCK THE VICTIM WITH A SINGLE BLOW WITH HIS BARE FIST. (Memorandum Opinion of November 27, 2012; Joint Appendix, hereafter denoted as J.A., at pp. 99-102 and 117-120; Defendant's Motion to Set Aside/Vacate).

STATEMENT OF FACTS

The Commonwealth's evidence at trial consisted of the following testimony pertinent to the issues raised in this brief:

In the evening hours of December 30, 2009, Donald Mayer was standing outside a bar after playing pool. In Mayer's possession was his personal pool cue. (J.A. at 36). Burkeen approached Mayer and asked him a number of questions about the cue. Burkeen then asked Mayer if he would allow him to hold the cue. Mayer agreed and handed the cue to Burkeen. (J.A. at 37). As Burkeen was examining the cue, Mayer warned him not to damage it. Burkeen then asked Mayer to sell him the cue. Mayer declined and requested that the cue be returned. Mayer then reached for the cue and Burkeen delivered a single blow with his bare fist to Mayer's face. Mayer stumbled, but did not fall down. (J.A. at 38).

Mayer testified that after hitting him, Burkeen called him a "bitch" and said that he would "kick my ass." Mayer also stated that Burkeen made other comments about being in the Army and stating he could bench press 200 pounds. Mayer did not, however, testify that Burkeen moved to strike him again. (J.A. at 38-39).

Keith Taylor was a friend of Mayer's who was also present at the bar. He testified that upon leaving the bar, he encountered Mayer after he had

been hit by Burkeen. (J.A. at 53). From Taylor's perspective, it appeared that Burkeen was going to strike Mayer again because "he had his arm pulled back and his fist balled up." (J.A. at 54). When Taylor attempted to intervene, Burkeen assaulted him and then fled the scene. (J.A. at 55-56).

According to his doctor, Mayer suffered fractures of the left orbital bone of the face and to his nose as a result of the blow. (J.A. at 64).

ARGUMENT

I. Standard of Review

The evidence presented at trial was insufficient to support a conviction for malicious wounding. When a criminal conviction is reviewed for sufficiency of the evidence, the appellate court must view the evidence in the light most favorable to the Commonwealth. Furthermore, the evidence is to be accorded all reasonable inferences fairly deducible therefrom. Commonwealth v. Jenkins, 255 Va. 516, 499 S.E.2d 263 (1988). The judgment of a trial court sitting without a jury may be disturbed on appeal only if it is plainly wrong without evidence to support it. Robertson v. Commonwealth, 31 Va. App. 814, 525 S.E.2d 640 (2000).

II. Intent to Maim, Disfigure Disable or Kill

To support a conviction for malicious wounding, it must be proven beyond a reasonable doubt that the accused inflicted serious bodily injury upon another with the intent to maim, disfigure, disable or kill. The evidence at trial showed that Burkeen delivered a single blow to Mayer's face with his bare fist. Although the blow was unprovoked and the resulting injuries were relatively severe, it has been long settled that a blow with a naked fist is insufficient to prove the element of a specific intent to maim, disfigure, disable or kill. See Lee v. Commonwealth, 135 Va. 572, 115 S.E. 671 (1923). The reason for this long-standing rationale is that one might expect temporary, but not permanent, injury to result from the typical bare-knuckled blow. If the assault is attended by circumstances of such brutality and violence, however, the requisite intent may be presumed. Dawkins v. Commonwealth, 186 Va. 55, 41 S.E.2d 500 (1947). Supreme Court of Virginia cases affirming convictions for malicious wounding based upon blows with a bare fist involve sustained, vicious assaults comprised of multiple blows. See Dawkins (defendant hit victim in and about face with his fists, kicked him on the legs and struck him at least twice in the groin with his knee); Shackleford v. Commonwealth, 183 Va. 423, 32 S.E.2d 682 (1943) (defendant struck the victim three times in the face, in addition to

making statements during the assault evidencing an intent to kill her). The Court of Appeals appeared to follow suit in Williams v. Commonwealth, 13 Va. App. 393, 412 S.E.2d 202 (1991), in which the defendant assaulted a man he found in bed with his girlfriend by hitting him numerous times with his fists, continuing the attack until police arrived.

Then, in Johnson v. Commonwealth, 53 Va. App. 79, 669 S.E.2d 368 (2008), the Court of Appeals held for the first time that a single blow with a bare fist could constitute sufficient evidence to permanently injure. In that case, a defendant in a criminal prosecution with a history of belligerent, unruly and defiant courtroom behavior delivered a single blow to the prosecuting attorney, causing serious injury. The Court's reasoning in affirming the jury's verdict was that the circumstances surrounding the assault suggested an intent to permanently injure the victim, including the fact that the attack was unprovoked, the defendant later made statements suggesting pride in the attack and that the blow itself was delivered with such tremendous force that its momentum carried the defendant to the floor along with his victim.

In a subsequent unpublished case, Worrell v. Commonwealth, 2010 Va. App. LEXIS 497 (Va. Ct. App. Dec. 21, 2010), the Court of Appeals, in overturning a malicious wounding conviction based upon a single bare-

fisted blow on other grounds, acknowledged that "[a]lmost every case involving bare fists where either the Supreme Court of Virginia or this Court has held the evidence sufficient to support and inference of intent to cause permanent bodily injury has involved multiple blows delivered in particularly violent and brutal settings." Id. at 7.

Further confusion arises when comparing the Court of Appeals' logic in an unpublished case from 2004. In Tran v. Commonwealth, 2004 Va. App. LEXIS 195 (Va. Ct. App. Apr. 27, 2004), the defendant stabbed the victim below the eye with a knife and fork. Relying on Lee, the defendant contested the trial court's refusal of a jury instruction stating that "the wounding was with intent to *permanently* maim, disfigure, disable, or kill the victim." Tran at *5. The Court of Appeals agreed that the trial court had erred in refusing the instruction, but found harmless error "because, unlike in Lee, there was no dispute in this case that the victim's wound was caused by anything other than a sharp instrument." Id. at *13. The Court of Appeals rested its decision on this Court's logic in Lee, that when a defendant wields an object "like a knife or steel knuckles ... a permanent disfigurement would be the natural and probable consequence of a violent blow in the face with such a weapon." Lee, 135 Va. at 577, 115 S.E. at 673

(1923). When a defendant uses "no instrument but his fist," permanent injury is neither a natural nor probable result.

In this case, Burkeen arguably struck Mayer without provocation, although the evidence suggested that Mayer made a sudden movement toward Burkeen in an effort to seize his pool cue from Burkeen's hands. However, none of the circumstances that attended the assault in Johnson is present. Burkeen struck Mayer once in the face, and then made statements afterwards that, although insulting and obnoxious, do not suggest intent to cause permanent injury. In addition, the force of the blow caused neither man to fall to the ground. The trial judge based his finding that the circumstances of this case supported an inference to permanently injure on the extent of the injuries and the fact that the assault was unprovoked.[1]

In its memorandum opinion affirming the trial court's judgment, a three-judge panel of the Court of Appeals draws parallels to Johnson. First,

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[1] The trial judge also noted that Burkeen was a "military person." (J.A. at 119). Although Burkeen was in the Army, he testified upon cross examination by the prosecutor that his training did not include any specialized instruction in hand-to-hand combat or other techniques that might have increased the effectiveness of the assault. (J.A. at 76-77). In addition, although Burkeen testified that he is six feet tall and weighs 180 pounds (J.A. at 82), there is no comparison to Mayer's size in the record, nor does any comment by the court or counsel reference any disparity in size between the two men.

the panel notes the seriousness of the injuries suffered by Mayer, a point the appellant concedes. But this is not, alone, dispositive of intent to maim. See Lee v. Commonwealth, 135 Va. 572, 115 S.E. 671 (1923). This point is not lost by the dissent in Johnson. Judge Humphreys argues powerfully that "one cannot reason backward from the result, as the majority has done, and find the requisite intent solely from the resulting injury and a remorseless comment." Johnson, 53 Va. App. at 112, 669 S.E.2d at 384. The dissent criticizes the majority opinion for over-emphasizing the severity of the injuries, or the result, rather than focusing on the defendant's intent with reference to the natural and probable consequences of a single bare-knuckled blow. There, as here, such injuries were amongst a number of possible results. In this case, a fractured orbital bone and nose are possible, not probable, consequences of a single blow with a fist. Burkeen also concedes that the blow came as a surprise to Mayer, but that does not prove Burkeen's intent.

Finally, the panel adopts the Commonwealth's position that Burkeen taunted and threatened Mayer after the lone punch, and that these words proved Burkeen's intent. But Burkeen's spontaneous name-calling and boasting shortly after the offense do not prove an intent to permanently maim Mayer, and they do not rise to the level of the defendant's comments

in Johnson. In that case, the defendant hit the attorney who prosecuted him. Police heard Johnson say "that if he saw Mr. Casey, he would do the same thing again," and that "Casey got what he deserved. It was a long time coming ... I would do it again." Johnson, 53 Va. App. at 87, 669 S.E.2d at 372. Later Johnson refused to apologize and instead said, "I'm proud of what I've done. ... I did it for everybody he's wronged up in here." Id. Burkeen's comments pale in comparison to Johnson's, and the Court of Appeals erred in failing to distinguish the two cases.

CONCLUSION

For the reasons stated herein, Christopher Burkeen, the appellant, respectfully requests that his convictions be reversed and remanded for disposition on the appropriate lesser included offense.

Respectfully submitted,

CHRISTOPHER BURKEEN

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RULE 5:26(h) CERTIFICATE

The Appellant is Christopher Burkeen, represented by Robert J. Poggenklass, Assistant Public Defender, VSB# 80810, 2600 Washington Avenue, Suite 105, Newport News, VA 23607, (757) 247-2034, ext. 111, Fax: (757) 247-2065, Email: rpoggenklass@new.idc.virginia.gov.

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I hereby certify that on the 21st day of May 2013, I delivered a copy of the Opening Brief of Appellant to Katherine Quinlan Adelfio, Assistant Attorney General, and to the Appellant, Christopher Burkeen. I also complied with Rule 5:26(e) and filed the copies by hand in the office of the Clerk of the Supreme Court of Virginia on the same day. In compliance with Rule 5:26(h), this brief does not exceed 35 pages. Counsel for the Appellant is court-appointed.

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