

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: M.H., A MINOR

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1126 MDA 2012

Appeal from the Order Entered March 27, 2012
In the Court of Common Pleas of York County
Juvenile Division at No(s): CP-67-JV-0000241-2011

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.:

FILED MAY 21, 2013

M.H. appeals *nunc pro tunc* from the dispositional order entered on March 27, 2012, in the Court of Common Pleas of York County, that ordered him to be placed on formal probation. The juvenile court found M.H. committed the acts of aggravated assault – attempt to commit serious bodily injury, riot, disorderly conduct and simple assault,¹ and adjudicated him delinquent. In this appeal, M.H. presents a challenge to the weight of the evidence. Based upon the following, we affirm.

* Retired Senior Judge assigned to the Superior Court.

¹ **See** 18 Pa.C.S. §§ 2702(a)(1); 5501(1); 5503(a)(1), (4); and 2701(a)(1), (3) respectively.

The Honorable Joseph C. Adams has aptly summarized the facts and procedural history of this case, as follows:

Corporal Ed Hernandez of the York City Police Department filed a Juvenile Allegation Form with York County Juvenile Probation on April 11, 2011. Cpl. Hernandez alleges therein that, on March 31, 2011, [M.H.] committed ... delinquent acts [of Aggravated Assault, Riot, Simple Assault, and Disorderly Conduct] at [a middle school]. On August 22, 2011, a Juvenile Petition was filed by York County Juvenile Probation Officer, Steve Vajda, and a Fact-finding hearing was held on November 30, 2011.

At that hearing, the Commonwealth introduced testimony from seven witnesses. [T]he victim in this matter[] testified that on March 31, 2011, he was attacked by a number of persons. [The victim] stated that, when returning from lunch during school, he was punched by one individual involved in this matter while another person grabbed his legs and took him to the ground. [The victim] further testified to immediately being punched and stomped more than 10 times by approximately ten people. As a result of this altercation, [the victim] sustained a bloody nose, a black eye, and a knee injury that caused him to limp for several days. The Commonwealth also introduced four exhibits consisting of photos taken of the injuries sustained by [the victim].

The Commonwealth's next witness was Jennifer Heasley, an eighth grade science teacher at [the middle school]. Ms. Heasley testified that on March 31, 2011, at approximately 12:30 PM, she witnessed [M.H.], along with a group of other boys, punching and kicking [the victim] in the hallway at [the middle school]. She stated that the altercation lasted three to four minutes and that she recognized most of the boys because she currently has or previously had them in her class.

The Commonwealth next introduced the testimony of Dr. Fleischman, [the victim's] family physician in Hershey. Dr. Fleischman testified that she treated [the victim] for a black eye to his left eye, a left arm abrasion, bruises to his left elbow and a bruise on his right upper back. Dr. Fleischman stated that there were a total of six distinct areas of injury.

The Commonwealth also introduced the testimony of [J.R.], a friend of [the victim], who had witnessed the altercation on March 31, 2011. [J.R.] testified to having witnessed the group of boys punch and kick [the victim] until Steve Gantz, a teacher at [the middle school], grabbed [the victim] and pulled him to safety.

The Commonwealth also had three other witnesses, Steve Gantz, Martin Odom, and Corporal Ed Hernandez, testify in this matter. The testimony of these witnesses offered little further insight than that which had already been put on the record.

[M.H.] did not testify at the November 30, 2011, hearing, nor did he call any witnesses to testify on his behalf or submit any exhibits on the record.

At that hearing, the Court found beyond a reasonable doubt that [M.H.] had committed the delinquent acts alleged in the above captioned matter, namely Aggravated Assault, Riot, Simple Assault, and Disorderly Conduct.¹² On March 27, 2012, [M.H.] was adjudicated delinquent, and other dispositional sanctions were ordered. [M.H.] filed a Nunc Pro Tunc Notice of Appeal on June 14, 2012, to the Court's delinquent adjudication. The Court granted [M.H.] leave to file said appeal on June 14, 2012. [M.H.] filed a Statement of Matters Complained of on Appeal (hereinafter "Statement of Matters Complained") on July 20, 2012.

¹² The Court notes, as stated in this Court's Order of November 30, 2011, that the delinquent acts of Simple Assault and Disorderly Conduct are lesser included offenses to the delinquent act of Aggravated Assault. Those lesser delinquent acts merged when [M.H.] was found to have committed the delinquent act of Aggravated Assault, and will therefore not be addressed further in this memorandum.

The sole contention of M.H. is stated in his brief, as follows:

[T]he court's finding that [M.H.] committed the delinquent acts of aggravated assault and riot was against the weight of the evidence presented in that:

- a. [The] victim failed to identify [M.H.] as one of the individuals striking him.
- b. Commonwealth witness Steven Gantz testified that [M.H.] was outside his classroom when the fight began and that [M.H.] only arrived at the scene a matter of seconds before he broke up the fight.
- c. The testimony of [Commonwealth witness] Jennifer Heasley is in direct conflict with the testimony of both Steven Gantz and the victim.
- d. The testimony of Commonwealth witness Juan Reyes was biased and unreliable.

M.H.'s Brief at 4.²

The Pennsylvania Supreme Court has recently reiterated our standard of review of a challenge to the weight of the evidence:

A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion

² It bears mention that M.H., following the close of the evidence, argued at the fact-finding hearing that "[W]e have four or five accounts of what occurred, and each one a contradiction to the preceding one." N.T., 11/30/2011 at 155. **See also id.** 155-157. Therefore, we conclude that M.H. preserved his weight claim. **See** Pa.R.J.C.P. 520A(2) [renumbered Pa.R.J.C.P. 620, effective April 1, 2012] ("Issues raised before or during the adjudicatory hearing shall be deemed preserved for appeal whether or not the party elects to file a post-dispositional motion on those issues."). Furthermore, M.H. included this weight claim in the Pa.R.A.P. 1925(b) statement that he timely filed in compliance with the juvenile court's order.

of the trial court. **Commonwealth v. Widmer**, 560 Pa. 308, 319, 744 A.2d 745, 751-52 (2000); **Commonwealth v. Brown**, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. **Widmer**, 560 A.2d at 319-20, 744 A.2d at 752. Rather, "the role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'" **Id.** at 320, 744 A.2d at 752 (citation omitted). It has often been stated that "a new trial should be awarded 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." **Brown**, 538 Pa. at 435, 648 A.2d at 1189.

An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:

Appellate review of a weight claim is *a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence.* **Brown**, 648 A.2d at 1189. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. **Commonwealth v. Farquharson**, 467 Pa. 50, 354 A.2d 545 (Pa. 1976). One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Widmer, 560 Pa. at 321-22, 744 A.2d at 753 (emphasis added).

This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is unfettered. In describing the limits of a trial court's discretion, we have explained:

The term “discretion” imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused where the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.

Widmer, 560 A.2d at 322, 744 A.2d at 753 (quoting **Coker v. S.M. Flickinger Co.**, 533 Pa. 441, 447, 625 A.2d 1181, 1184-85 (1993)).

Commonwealth v. Clay, ___ A.3d ___, ___ [No. 3 MAP 2012, No. 4 MAP 2012, No. 5 MAP 2012] (Pa. 2013). “This Court applies the same standard for reviewing weight claims in juvenile cases.” **In re R.N.**, 951 A.2d 363, 370 (Pa. Super. 2008) (citation omitted). “In considering weight of the evidence claims, it is not the function of an appellate court to substitute its judgment based on a cold record for that of the judge who conducted the juvenile adjudication hearing.” **Id.** at 370–371 (citation omitted).

As discussed above, in the juvenile court’s opinion, Commonwealth witness Jennifer Heasley identified M.H. as one of the individuals involved in the fight. She specifically testified that another teacher, Steven Gantz, intervened in the fight and “was able to separate [the victim] and [M.H.].” N.T., 11/30/2011 at 42. She explained that Gantz “essentially grabbed [the victim], and at this point of the fight it was [the victim] and [M.H.] and they were essentially punching.” **Id.** at 43. **See also, id.** at 47, 51, 67.

Furthermore, Gantz testified that he saw two of his students, one of whom was M.H., coming down the hallway, and when he asked them to line up, they told him they were going to get a drink, which was further down the hall. He recalled: “[A]t that time I looked down the hallway and I saw Ms. Heasley take off to a run down the hallway, and I knew something was up. There was a mob of students heading down that way and I followed, I started running also. And as I turned the corner, I saw what was the fight.”³ He grabbed the victim and separated him from the other students. After making sure the victim was safe, he returned to his classroom. ***Id.*** at 87–88. Gantz stated that as he lined up his students, he noticed M.H. and the other student who had been accompanying him, “were just shaking and heavily breathing and you see their heart beat[.]” ***Id.*** at 89. He added, “And I could see the sweat coming off of their foreheads.” ***Id.*** at 90. Gantz explained he did not name anyone who was hitting the victim because, when he saw people striking and hitting the victim, his focus was to protect the victim. ***Id.*** at 96–97.

In addition, J.R., a student at the middle school, testified that he saw the fight and observed the victim, his friend, on the ground, surrounded by eight to ten individuals who were hitting the upper part of the victim’s body with their hands and feet. He saw the victim was bleeding from his nose.

³ N.T., 11/30/2011, at 88.

He estimated he was five feet from the victim at the time, and that the victim received more than 10 strikes in the course of the fight. He recognized the victim's attackers because he knew them from school. He identified M.H. as one of the victim's attackers. ***Id.*** at 105–109.

The court, in support of its decision, opined:

[The Court'] findings were based on the eyewitness testimony of two individuals, [J.R.] and Jennifer Heasley. Those individuals both testified to seeing [M.H.] in this matter, along with approximately seven other individuals, kick and punch [the victim] as he was laid out on the ground. Similarly, in regards to [M.H.'s] averment that Mr. Gantz's testimony contradicted other witnesses' statements that [M.H.] had stricken the victim, the Court finds such argument unconvincing. Mr. Gantz specifically testified to observing [M.H.] in an excited state (shaking, breathing heavily, and sweating) upon returning to the classroom. Dr. Fleishman testified that [the victim] had sustained injuries in at least six areas of his body, including the head and back. The Court found the testimony of these individuals credible.

Juvenile Court Opinion, ***supra***, at 5 (unnumbered). Accordingly, the court rejected M.H.'s weight claim.

Our review leads us to conclude that there is no basis upon which to disturb the decision of the juvenile court. While M.H. relies on the victim's inability to identify his attackers, other than his first two assailants, such inability is understandable, given the circumstances of the melee, and does not serve to eliminate M.H. as a participant in the melee. Furthermore, although M.H. relies on Gantz's testimony regarding the location of M.H. in the hallway relative to the timing of Gantz's observation of Heasley and

Gantz's arrival at the scene of the fight, there were two eyewitnesses to the fight, Heasley and J.R., who positively identified M.H. as one of the victim's attackers. Moreover, Gantz described M.H.'s appearance after the fight as "shaking and breathing heavily," with "sweat on [his] forehead[]." ⁴

M.H. also argues that Heasley's testimony contradicts the testimony of Gantz and the victim, contending that "it is simply impossible that [he] could have been engaged in a lengthy physical altercation with the victim," and it "is simply outrageous that one would not remember someone" with whom they were engaged in a fight. ⁵ This argument, however, overlooks J.R.'s testimony that M.H. was one of the victim's assailants. Furthermore, although M.H. contends that J.R.'s testimony was biased and unreliable, his argument in support simply cites J.R.'s testimony that he observed the fight from approximately five feet away, and J.R.'s cross-examination testimony that he observed the fight from behind approximately 15 other students. ⁶ This cited inconsistency, however, is minor, and, in fact, the account of J.R. regarding the incident was consistent with the account of Heasley.

"The trier of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of

⁴ N.T., 11/30/2011, at 89–90.

⁵ M.H.'s Brief at 11, 12.

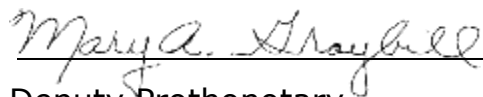
⁶ ***Id.***

the evidence.” ***In the Interest of R.N., supra***, 951 A.2d at 372 n.7 (citations omitted). “Conflicts in the evidence and contradictions in the testimony of any witnesses are for the fact finder to resolve.” ***In the Interest of C.S.***, ___ A.3d ___, ___ [2013 PA Super 45] (Pa. Super. 2013) (citations omitted). Here, the juvenile court, in responding to M.H.’s claims, including the weight claim, explained that it found credible the testimony of, *inter alia*, J.R., Heasley, and Gantz with regard to his observation of M.H. in an excited state upon returning to class. ***See*** Juvenile Court Opinion, ***supra***. The juvenile court’s opinion implicitly indicates that its decision does not shock one’s sense of justice, and our review leads us to conclude that this determination does not constitute an abuse of discretion. Therefore, we affirm.

Dispositional order affirmed.

Colville, J., concurs in the result.

Judgment Entered.


Deputy Prothonotary

Date: 5/21/2013