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Commonwealth v. Sideri

Appeals Court of Massachusetts

January 29, 2014, Entered

13-P-327

Reporter

2014 Mass. App. Unpub. LEXIS 102; 84 Mass. App. Ct. 1131; 2 N.E.3d 201; 2014 WL 297787

COMMONWEALTH vs. ERIC SIDERI.

Notice: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS [RULE 1:28](#) ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, [RULE 1:28](#) DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO [RULE 1:28](#), ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

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Core Terms

assault and battery, lesser included offense, dangerous weapon, assault, convict, consistent statement, battery, charges, acquit

Judges: [*1] Katzmann, Grainger & Sikora, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO [RULE 1:28](#)

The defendant, along with a codefendant,¹ was tried by a Superior Court jury on six indictments. The jury found the defendant guilty of assault and battery by means of a dangerous weapon (using a baseball bat), [G. L. c. 265, § 15A\(b\)](#); unauthorized use of a motor vehicle, [G. L. c. 90, § 24\(2\)\(a\)](#); and assault and battery, [G. L. c. 265, § 13A\(a\)](#). The jury acquitted him on all the remaining charges. The defendant now appeals from his convictions. We reverse the conviction of assault and battery by means of a dangerous weapon and affirm the remaining judgments.

Discussion. 1. Lesser included offenses. The defendant argues that the judge erred in removing the lesser included offense of assault and battery from the jury's consideration on the charge of assault and battery by means of a dangerous weapon. We agree that the evidence required the court to instruct the jury on the lesser included offense. An instruction on a lesser included offense is proper where the evidence "presents a rational basis for acquitting the defendant of the crime charged and convicting him of the [*2] lesser included offense." [Commonwealth v. Drewnowski, 44 Mass. App. Ct. 687, 692, 694 N.E.2d 1301 \(1998\)](#), quoting from [Commonwealth v. Thayer, 418 Mass. 130, 132, 634 N.E.2d 576 \(1994\)](#). In contrast, where there is no evidence that a jury

¹ The codefendant was acquitted on all charges.

could convict the defendant of the lesser included offense, an instruction on the lesser included offense is in error. *Commonwealth v. Porro*, 458 Mass. 526, 537, 939 N.E.2d 1157 (2010). When evidence is sufficiently in dispute so that the jury could consistently find the defendant innocent of the greater offense but guilty of the lesser included offense, a requested instruction on the lesser included offense must be given. See *Commonwealth v. Egerton*, 396 Mass. 499, 504, 487 N.E.2d 481 (1986); *Commonwealth v. Mills*, 54 Mass. App. Ct. 552, 554, 766 N.E.2d 547 (2002).

The Commonwealth argued at trial that the defendant committed three separate assault and battery offenses: (1) assault and battery with a handgun, (2) assault and battery with a baseball bat, and (3) assault and battery. The judge gave a lesser included offense instruction on the dangerous weapon charges. The jury then inquired about the difference between assault and battery as a lesser included offense and the separate indictment for assault and battery. In response, [*3] and over the defendant's objection, the judge removed from the jury's consideration the assault and battery lesser included offenses. There was evidence, however, that there was an altercation with multiple punches and no weapons. The jury had a rational basis for convicting the defendant of the lesser included offense. See *Drewnowski*, supra. The defendant testified that he used his fists in the altercation with the victim. He also testified he had not touched a baseball bat in twenty-five years. Furthermore, an expert witness testified that the victim's injuries could have been caused by a fist, a table, or a fall. The testimony gave the jury a rational basis to believe the altercation constituted an assault and battery but not one using a dangerous weapon. Removing the lesser included offense from the jury's consideration thus was error.

Because the defendant objected to the removal of the instruction, we review for prejudicial error.

"An error is not prejudicial if it 'did not influence the jury, or had but very slight effect'; however, if we cannot find 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment [*4] was not substantially swayed by the error,' then it is prejudicial." *Commonwealth v. Cruz*, 445 Mass. 589, 591, 839 N.E.2d 324 (2005), quoting from *Commonwealth v. Flebotte*, 417 Mass. 348, 353, 630 N.E.2d 265 (1994). We conclude that the error was prejudicial. The defendant concedes that he hit the victim with his fist; yet the jury were forced to either convict him of an assault with a dangerous weapon or acquit him. See *Commonwealth v. Woodward*, 427 Mass. 659, 664-665, 694 N.E.2d 1277 (1998). The jury might have found only an assault and battery, without a dangerous weapon. The defendant's acquittal on the charge of assault and battery with a gun suggests the jury may not have fully credited the victim's testimony. The jury may have been reluctant to acquit the defendant of the assault and battery with a dangerous weapon charge given that he conceded hitting the victim. Without the lesser included offense instruction, the jury may have convicted the defendant of the crime as charged even if unsupported by the evidence. See *Woodward*, supra. We reverse the conviction of assault and battery by means of a dangerous weapon.

2. Prior consistent statements. The defendant argues that testimony of four witnesses regarding the victim's recounting [*5] of the incident were not admissible as prior consistent statements because the victim made them after he had a motive to fabricate and had lied twice. See *Commonwealth v. King*, 445 Mass. 217, 241, 834 N.E.2d 1175 (2005), cert. denied, 546 U.S. 1216, 126 S. Ct. 1433, 164 L. Ed. 2d 136 (2006). Because defense counsel failed to object at trial, we review to determine whether admission of the evidence was error and, if so, whether the error created a substantial risk of a miscarriage of

justice.² See [Commonwealth v. Freeman, 352 Mass. 556, 563-564, 227 N.E.2d 3 \(1967\)](#).

Because we determine that it was not an abuse of discretion for the judge to admit the testimony as prior [*6] consistent statements, there was no substantial risk of a miscarriage of justice. See [Commonwealth v. Bougas, 59 Mass. App. Ct. 368, 374, 795 N.E.2d 1230 \(2003\)](#). A trial judge has broad discretion to determine whether circumstances justify admission of prior consistent statements, and we only reverse such a decision when it is clear the ruling is outside the proper boundaries of discretion. *Ibid.* Here, the defendant argues the victim had a motive to lie prior to the incident and prior to making the statements. The trial judge is in the best position to decide whether the victim had formed a motive to lie at the time

alleged. As the judge did not exceed the proper boundaries of discretion, the admission of these four statements does not merit reversal.³

Conclusion. The judgment on the indictment charging assault and battery by means of a dangerous weapon is reversed and the verdict is set aside. The judgments [*7] on the indictments charging assault and battery and unauthorized use of a motor vehicle are affirmed. The case is remanded for such further action as the Commonwealth may choose to pursue or for such resentencing as the judge may undertake.

So ordered.

By the Court (Katzmann, Grainger & Sikora, JJ.),

Entered: January 29, 2014.

² At trial, defense counsel objected to the "cumulative effect" of the statements of one witness. That objection differs from the prior consistent statement claim raised on appeal. "[A] defendant 'is not permitted to raise an issue before the trial court on a specific ground, and then to present that issue to this court on a different ground.'" [Commonwealth v. Rivera, 425 Mass. 633, 636-637, 682 N.E.2d 636 \(1997\)](#), quoting from [Commonwealth v. Tyree, 387 Mass. 191, 213, 439 N.E.2d 263 \(1982\)](#), cert. denied, [459 U.S. 1175, 103 S. Ct. 825, 74 L. Ed. 2d 1021 \(1983\)](#). We review the admission of these statements for a substantial risk of a miscarriage of justice.

³ To the extent that we do not address separately each of the defendant's contentions, "they 'have not been overlooked. We find nothing in them that requires discussion.'" [Department of Rev. v. Ryan R., 62 Mass. App. Ct. 380, 389, 816 N.E.2d 1020 \(2004\)](#), quoting from [Commonwealth v. Domanski, 332 Mass. 66, 78, 123 N.E.2d 368 \(1954\)](#).