COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Berry, 2018 ONCA 86
DATE: 20180131
DOCKET: C60198

Hoy A.C.J.O., Sharpe and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

David Berry

Appellant

Anthony Moustacalis, for the appellant

Nancy Dennison, for the respondent

Heard and released orally: January 24, 2018

On appeal from the conviction entered on December 18, 2014, and the sentence imposed on March 27, 2015 by Justice E.M. Morgan of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant was convicted of aggravated assault. The trial judge rejected the appellant's evidence that the appellant's friend, Mr. McIntyre, and not the appellant, had pushed the complainant.

[2] The appellant appeals his conviction on three grounds. First, he argues that the trial judge improperly drew an adverse inference from his failure to call Mr. McIntyre to testify at trial.

[3] Second, he argues that the trial judge erred by failing to adequately consider the frailties of the eyewitness evidence identifying him, and not Mr. McIntyre as the man who pushed the complainant.

[4] Third, he argues that there was no basis in the evidence to reject his evidence that Mr. McIntyre “face-washed” the complainant in the bar earlier in the evening.

[5] We reject these arguments.

[6] In our view, the trial judge did not draw an adverse inference from the appellant’s failure to call Mr. McIntyre to testify. Rather, the trial judge simply commented that Mr. McIntyre’s absence was “convenient”.

[7] The trial judge was cognizant of defence counsel’s concerns about the eyewitness evidence and, in the context, adequately addressed the frailties in that evidence.

[8] Finally, the trial judge’s rejection of the appellant’s version of what happened in the bar earlier in the evening was amply supported by the record.

[9] The appellant also seeks leave to appeal the sentence imposed. In imposing sentence, the trial judge specifically considered that the appellant pushed, rather

than hit, the complainant. We see no error in principle that would permit us to interfere with the sentence imposed. Moreover, in the circumstances, the sentence imposed was well within the range, particularly considering the severity of the injuries sustained by the complainant.

[10] Accordingly, the appeal is dismissed. Leave to appeal sentence is granted, but the appeal of sentence is dismissed.

"Alexandra Hoy A.C.J.O."
"Robert J. Sharpe J.A."
"Paul Rouleau J.A."