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Ex. R

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT DEPARTMENT  
CRIMINAL ACTION NO: WOCR93-00135-4  
(ASSAULT WITH INTENT TO MAIM)

COMMONWEALTH OF MASSACHUSETTS	)	
	)	
VS.	)	MOTION AFTER DISCHARGE
	)	OF JURY
MICHAEL G. ELBERY,	)	
Defendant	)	

The defendant, Michael G. Elbery, respectfully moves, pursuant to Mass. Rules of Criminal Procedure 25(b)(2), that this Honorable Court set aside the jury verdict of guilty and order the entry of a finding of not guilty.

As reasons therefore, the evidence as presented to the jury was insufficient, as a matter of both fact and law, to have sustained a conviction on this indictment against the defendant. Specifically, the Commonwealth failed to prove that Mr. Elbery harbored the specific intent to maim or disfigure Mr. King in the context of the confrontation that took place on Shrewsbury Street in the early morning hours on September 29, 1992.

In analyzing that evidence, the defendant asks this Court to consider the following analysis:

✓ 7-15-1993.....; Filed In Court .....

✓ DENIED,  
DF. Looney  
7/24/93

Attest *Shirley V. Brennan*  
Assistant Clerk

The following facts were uncontested and uncontroverted. There was no question that when the defendant entered the Winner's Circle in the early morning of September 29, 1992, he did not harbor any animus toward the alleged victim, Thomas King. In point of fact, Mr. King and Mr. Elbery did not know each other on the morning in question and had never been in each other's company and had had no past dealings, or relationship prior to the incident. It was also clear from the evidence that Jeffrey Schlener, the bartender, instigated the verbal confrontation with Mr. Elbery. As the Court may recall, Mr. Schlener went further in expressing that he was primarily responsible for the verbal altercation and was sorry then, and at the time of trial, for the remarks he made toward the defendant. It was also uncontroverted that Mr. King voluntarily and without provocation confronted Mr. Elbery. Neither Mr. Schlener, nor anyone else in the Winner's Circle, asked Mr. King to interfere. No witness testified that they were disturbed by the arguing between Mr. Schlener and Mr. Elbery with the exception of Mr. King. Focusing exclusively on King's testimony, it was also uncontroverted that Mr. Elbery, subsequent to the bottle breaking, hastily left the bar and did not take any action consistent with provoking or continuing a verbal and/or physical confrontation with Thomas King. The only logical conclusion to be drawn from Mr. Elbery's actions in leaving the bar, was that he feared physical harm if he

remained. The Commonwealth's evidence further proved that Mr. Elbery was chased out of the Winner's Circle onto Shrewsbury Street by Thomas King and by others (estimated to be between 5-8 people) approximately one hundred (100) yards to the area of Harpie's Auto Parts. Mr. King admitted to the chase and further admitted that his reasons for doing so included "holding" Mr. Elbery for the Worcester Police Department. Putting aside for the moment the issue of whether or not Mr. King had any right to "apprehend" or "arrest" Mr. Elbery, there is no doubt that Mr. King voluntarily pursued or chased the defendant. Had Mr. King not taken those actions, there obviously would have been no confrontation with Mr. Elbery. Up to this point when Mr. Elbery was confronted by Mr. King, there was no evidence that Mr. Elbery harbored any intent to harm Mr. King let alone formed the specific intent to permanently disfigure or maim him.

Regarding the physical confrontation between Mr. King and Mr. Elbery on Shrewsbury Street, the evidence clearly established that Mr. King made remarks to Mr. Elbery consistent with Mr. King's intention to hold him for the Worcester Police. Putting aside, for the sake of this argument, Mr. Elbery's version of what happened out on Shrewsbury Street that caused him to be confronted directly and physically by Mr. King, it is clear that Mr. King was the aggressor in chasing down and confronting Mr. Elbery. All of the Commonwealth witnesses, with

the exception of Thomas King, testified that the eye injury was not directly observed by any of them but that it occurred within the context and at the time both men were rolling around (wrestling) on the sidewalk and pavement and under circumstances which covered a very short (matter of seconds) period of time. Several of the Commonwealth witnesses in fact testified that at various times during the brief struggle on the ground, Mr. King had the upper hand in that he was on top of Mr. Elbery. The only person to testify that the eye injury occurred initially while both Mr. Elbery and Mr. King were standing, was Mr. King. In looking at that testimony, the question is whether or not any credibility ought to be attached to it in light of the testimony of the other witnesses and the medical evidence produced by the Commonwealth. Mr. King testified that while standing, and at a time after which he told Mr. Elbery he wasn't going anywhere until the Worcester Police arrived, it was Mr. Elbery that threw a punch that resulted in the initiation of a physical confrontation between King and Elbery. It was in the context of that initial physical confrontation, according to King, that Mr. Elbery put his thumb into and behind Mr. King's left eye and attempted to gouge it out. King further went on to indicate that after both men went to the ground, Mr. Elbery again gouged Mr. King's eye with his thumb. Applying the principals of common sense, had a man of Mr. Elbery's physical size used force to push his thumb into and behind Mr. King's eye, it should be

clear that one would expect Mr. King to have suffered either the loss of his eye or a very serious injury to it. In point of fact, however, according to the medical evidence produced by the Commonwealth in the form of Mr. King's medical record (Exhibit 18 at trial) Mr. King required very little treatment. The treatment administered was completed within one and one half hours at the Emergency Room of Memorial Hospital. The report of that treatment and diagnosis (Exhibit 18) indicated that Mr. King suffered a "superficial abrasion of the eye."

x The Court should also consider all of these issues mentioned above in the context of self defense and with the knowledge that no weapon was employed during this entire incident and that the Commonwealth's own evidence suggests, corroborated by Mr. Elbery's medical record (Exhibit 23), that Mr. Elbery was under the influence of alcohol, a factor which should have been considered on the question of whether or not Mr. Elbery had formed the specific intent to maim or permanently disfigure Mr. King.

x Based upon all of the above considerations, the defendant requests that this Court reverse the decision of the jury on the above entitled indictment and enter a finding of not guilty. Upon these facts, to allow the defendant's conviction to stand, would be an enormous miscarriage of justice. The jury sat and listened to highly controversial and inconsistent evidence for four (4) trial days. They spent another day listening to

opening and closing remarks of counsel and instructions delivered to them by the Court. Their deliberations, however, took less than one (1) hour. The inference is certainly there that the jury did not make its decision based on a deliberate, careful, emotionless analysis of the facts and application of the law. The law, as recited by the Court, regarding the indictment of assault with intent to maim should have compelled a rational, unbiased trier of fact to conclude that there was insufficient evidence, beyond a reasonable doubt, to sustain a conviction.

In asking this Court to apply its broad discretion granted to it by Rule 25(b)(2), the defendant is asking for not only a reconsideration of the Court's actions regarding the Motions for Required Findings, but also to act within the broader discretion allowed by the aforementioned Rule. As the Court is well aware, Rule 25(b)(2) empowers the trial judge to act when he or she believes that a lesser or different verdict is more consonant with the interest of justice. See Commonwealth v. Gauden, 383 Mass. 543, 420 N.E. 2d 905 (1981). In Gauden, the Court stated "the trial judge acting under Rule 25(b)(2), should be guided by the same considerations that have guided this Court (SJC) in the exercise of its powers and duties under section 33 E to reduce the verdict." The trial Court, therefore, is not limited to acting within the same restrictions as it must in considering a motion for required finding of not guilty. See Commonwealth v.

Millyan, 399 Mass. 171, 503 N.E. 2d 934 (1987); Commonwealth v. Keough, 385 Mass. 314, 431 N.E. 2d 915 (1982).

In considering this motion, the defendant asks this Court to further consider the legal arguments made which are contained within his Motion for a Required Finding of Not Guilty, a copy of which is attached and made a part of this motion.

MICHAEL G. ELBERY  
BY HIS ATTORNEY

  
Louis P. Aloise, Esquire  
SHUMWAY, GIGUERE, BYRNE, FOX  
& ALOISE, P.C.  
19 Cedar Street  
Worcester, MA 01609  
(508) 756-2323  
B.B.O. No.: 016040  
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