

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

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

COMMONWEALTH OF MASSACHUSETTS)	
)	
VS.)	<u>MOTION FOR A REQUIRED FINDING</u>
)	<u>OF NOT GUILTY AT THE CLOSE OF</u>
MICHAEL G. ELBERY,)	<u>THE COMMONWEALTH'S CASE</u>
Defendant)	

The defendant moves, pursuant to Mass. R. Crim. P. 25, that this Honorable Court enter a finding of not guilty in the above-numbered indictment at the close of the Commonwealth's case.

As reasons therefore, the evidence as presented by the Commonwealth is insufficient, as a matter of both fact and law, to sustain a conviction on this indictment against the defendant.

Specifically, the Commonwealth has failed to produce sufficient evidence that Mr. Elbery harbored the specific intent to disfigure Mr. King in the context of the confrontation that took place on Shrewsbury Street in the early morning of September 29, 1992.

"To maim" has been defined by the Supreme Judicial Court as the crippling or mutilating of a person in any way or inflicting upon a person any injury which deprives him of the use of any limb or member of the body or renders that person lame or defective in bodily vigor. Commonwealth v. Farrell, 322 Mass. 606, 78 N.E.2d 697 (1948). A person may be convicted of mayhem only on proof of the specific intent to maim or disfigure and that, of course, may be established inferentially. See Commonwealth v. Hogan, 379 Mass. 190, 396 N.E.2d (1979). It is not enough for the Commonwealth to prove specific intent simply on the basis of the number of blows struck against the alleged victim. Commonwealth v. Hogan, 379 Mass. 190, 396 N.E.2d 978 (1979). The Court in Commonwealth v. Davis, 10 Mass. App. 190, 406 N.E.2d 417 (1980) ruled that "the mental state required for conviction of mayhem or assault with intent to maim is satisfied by direct or inferential proof that the assault was intentional, unjustified, and made with the reasonable appreciation on the assailant's part that a disabling or disfiguring injury would result".

In the case at bar, in addition to the issues of self defense, there has been no evidence that Mr. Elbery acted violently against Mr. King until such time as Mr. King had, in effect, apprehended the defendant and put Mr. Elbery in immediate fear of bodily harm. In addition, the evidence is such that others, known by Mr. Elbery to be friendly to Mr. King, were likewise in hot pursuit and posed a reasonable risk of injury to Mr. Elbery. No weapon was used by Mr. Elbery to repel Mr. King and the fact that Mr. King may have suffered an injury to his eye is not sufficient to show the reckless and specific intent for maiming.

An additional factor which has been presented through the presentation of the Commonwealth's case is that Mr. Elbery was intoxicated at the time of the confrontation with Mr. King on Shrewsbury Street. Voluntary intoxication is relevant to the issue of the defendant's ability to form a specific intent to maim necessary to find the defendant guilty of that indictment. See Commonwealth v. Shine, 398 Mass. 641, 500 N.E.2d 1299 (1986).

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
Dated: July 1, 1993.