

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

No. 94-P-740

COMMONWEALTH.

Appellee

v.

MICHAEL G. ELBERRY

Defendant-Appellant

ON APPEAL FROM THE  
WORCESTER SUPERIOR COURT

DEFENDANT -APPELLANT'S  
BRIEF AND APPENDIX

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STATEMENT OF ISSUES

1. Did the prosecutor's argument on tailored testimony coupled with the trial court's response violate the defendant's state and federal constitutional rights to a fair trial?
  
2. Did the court's erroneous charge on consciousness of guilt create a substantial risk of a miscarriage of justice?
  
3. Did the trial court's erroneous instructions on the element of intent on the attempted mayhem charge create a substantial risk of a miscarriage of justice?

STATEMENT OF THE CASE

The defendant was complained against in the Worcester District Court on charges of being a disorderly person, assault and battery of Thomas King, assault by means of a dangerous weapon of Thomas King, and assault with intent to maim Thomas King. All of the charges arose from an incident that occurred in the early morning hours of September 29, 1992 in and near the Winners Circle Bar on Shrewsbury Street in Worcester. A probable cause hearing was held before the Honorable Judge Raphaelson on January 20, 1993. Judge Raphaelson found probable cause on the disorderly person charge, but found no probable cause as to the other charges.

Subsequently, a grand jury sitting in Worcester County returned four indictments against the defendant Michael Elberry. Indictment numbered 93-01351 charged Elberry with being a disorderly person. Indictment numbered 93-01352 charged him with assault and battery of Thomas King. Indictment numbered 93-01353 charged him with assault of King by means of a dangerous weapon, a bottle. Indictment numbered 93-01354 charged him with assault of King with intent to maim or

disfigure by attempting to put out or destroy King's eye or eyes. See Indictment, A-7.

The case was tried before the Honorable Judge Toomey and a jury from June 28, 1993 to July 2, 1993. At the conclusion of the Commonwealth's case the court allowed the defendant's motion for a required finding as to the assault by means of a dangerous weapon indictment. The jury returned guilty verdicts on the remaining indictments.

On July 15, 1993 the court sentenced the defendant to confinement at MCI Concord for a period of ten years on the assault with intent to maim indictment. On the two other indictments the defendant was sentenced to concurrent periods of one year of probation from and after the sentence of confinement. The trial court, on defendant's motion, stayed the sentences pending appeal. The defendant timely perfected his appeal to this Court.

STATEMENT OF THE FACTS

The Commonwealth called six witnesses at trial. The prosecutor conceded in his closing argument "that they all saw things a little bit differently." See Tr.5:1233. Five of the six witnesses were part of a group of men that went to the Winners Circle bar regularly and were friends. See Tr.3:749.

Christina Mann testified that on September 28, 1992 she was eighteen years old and worked as a waitress at the Ground Round in Shrewsbury. Tr.1:139, 148. She worked the night of September 28, 1992 and then went to the Winners Circle bar with a co-worker, Alice Arsneault. Tr.1:139-40. About fifteen minutes after she arrived she heard an argument between the bartender and the defendant. Tr.1:140-41. It cooled down, and then there was more yelling; someone told the defendant to sit down. Tr.1:141-42. It started getting louder and she observed the defendant holding a beer bottle by its neck. Tr.1:142. He then hit the pole with the bottle, and she was cut with a bit of flying glass. Tr.1:143-44. She screamed and covered her eye; someone came over and told her it was just a little cut. Tr.1:144. She left with



her friend, and went to a hospital where she received stitches. Tr.1:147.

Thomas King testified that he was a detective with the Westboro Police and worked the 3:00 p.m. to 11:00 p.m. shift on September 28, 1992. Tr.2:186. On his way home he was paged on his beeper and advised to pick up some evidence at the University of Massachusetts. Tr.2:187. After doing so, he went to the Winners Circle where he knew the bartender, Jeff Schlener. Tr.2:187. He arrived about 12:30 a.m. Tr.2:188. He had two vodka drinks. Tr.2:188.

Shortly after his arrival he saw Schlener having a disagreement with the defendant. Tr.2:188-89. The defendant was cursing. Tr.2:189. He started walking over to the defendant and Mitch DePasquale stopped him. Tr.2:189. The defendant swore at him and asked him to step outside. Tr.2:190. He walked away, told the defendant he wouldn't waste his time, and then sat down. Tr.2:190. The bar then quieted down. Tr.2:190.

Later, the defendant jumped up, yelled something, and smashed a beer bottle. Tr.2:191. He then held the jagged edges in front of him waving it in the direction of Schlener and the rest of the patrons. Tr.2:192. He observed that one

woman had her hand to her face and was bleeding. Tr.2:194. The defendant turned and ran out the door, and he ran after him. Tr.2:195.

The defendant ran about fifty yards, stopped, and turned. Tr.2:197. He told the defendant he had hurt a lady in the bar and that he wasn't going anywhere until the police arrived. Tr.2:199. The defendant then took a few punches at him, all of which he blocked, but one. Tr.2:200. He grabbed the defendant and tried to restrain his arms. Tr.2:201. The defendant got one arm free and jammed his thumb into his left eye. Tr.2:201. Feeling blinded in the eye, King said he knocked the defendant to the ground. Tr.2:202. The defendant jammed his .thumb back into the same eye and kept pushing it in. Tr.2:202. At that point King became aware that people were behind him, and he asked them to hold the defendant until the police arrived. Tr.2:202. He then rolled off the defendant, and found vitreous fluid and blood coming out of his eye. Tr.2:203. Two individuals came by and took him to Memorial Hospital. Tr.2:203. He had a cut on his eyeball. Tr.2:203-04.

Richard Taraskiewicz testified that he observed the defendant giving the bartender a hard

time. Tr. 3:493-94. He was sitting next to King and he made a comment about it to King. Tr.3:494. He then got up and went to the bathroom. Tr.3:494. While in the bathroom he heard King tell the defendant he should leave, and the defendant responded that they should go outside and fight. Tr.3:494. When he got out of the bathroom, King sat next to him again. Tr.3:494.

Some time later, the defendant broke a bottle against the pole and some glass struck a woman. Tr.3:495. The defendant backed out of the bar holding the neck of the bottle to protect himself. Tr.3:495. King and the rest of them then went outside. Tr.3:495. He saw King and the defendant paired off, jogging back and forth. Tr.3:497. They worked their way down to Harpies Auto Parts. Tr.3:497.

The defendant threw the first punch, and then King and the defendant got into a wrestling match. Tr.3:498. They went to the ground. Tr.3:499. Taraskiewicz said he then advanced, and saw the defendant put his finger in King's eye. Tr.3:500. The fight then started to swing in the defendant's favor, and he and others jumped in to stop it. Tr.3:501.

When King got up, he saw blood coming out of King's eye. Tr.3:501. A car pulled up, and the two men in it offered to bring King to the hospital. Tr.3:501. He, Dennis O'Connor, and Mitch DePasquale restrained the defendant by holding him down. Tr.3:501-02.

Jeffrey Schlener testified that he was a bartender and was working at the Winner's Circle at the time of the incident. Tr. 3:579-80. The defendant came in about 12:50 a.m. Tr.3:582. He made a comment to the defendant about his being opinionated and the defendant got mad. Tr.3:584-85. The defendant was swearing at him; King got up, walked over, and told the defendant to leave. Tr.3:585. The defendant told King he should take him outside and beat him up. Tr.3:586. Schlener said he told King to slide over because it appeared that the defendant was calming down, and King went back to his seat. Tr.3:586.

Three or four minutes later he heard a crash, and glass was flying. Tr.3:587. The defendant had taken a beer bottle and smashed it. Tr.3:587. One of the girls got cut and yelled. Tr.3:588. The defendant ran out the door. Tr.3:588.

Schlener said he went and checked on the girl. Tr.3:591. King went out the door, and seconds

later Donnie Wyme, Richard Taraskiewicz, and Dennis O'Conner followed. Tr.3:592-93. When he went out he saw King going to tackle the defendant, and the defendant threw a punch. Tr.3:594. The other three who had left the bar were right around them. Tr.3:594. Wyme came running back to him and told him King hurt his eye. Tr.3:595. He then called the police. Tr.3:595. When the police came the defendant stood up, and he looked a little dazed. Tr.3:597.

Mitchell DePasquale testified that he was a nursing assistant and had been employed as a door man at the Winners Circle. Tr.3:678-79. He had about four or five beers that night. Tr.3:697. He heard a yelling match between the defendant and King. Tr.3:697. King walked around the bar toward the defendant. Tr.3:700. DePasquale said he then stood in front of King and told him to go back to his seat. Tr.3:701.

About fifteen minutes later he heard a beer bottle break, and saw the defendant standing next to the bar screaming something. Tr.3:703-04. He observed a woman holding her face, and the defendant headed out of the bar. Tr.3:706. He paid attention to the woman for the next few

minutes. Tr.3:707-08. He then ran outside.  
Tr.3:708.

He saw King and the defendant in a wrestling match fifty yards up the street. Tr.3:709. They were in a bear hug, they separated, they spoke, and then they wrestled to the ground. Tr.3:711. King got up and walked away. Tr.3:712. DePasquale said he then helped restrain the defendant until the police arrive. Tr.3:714. He observed that King had blood pouring from his eye. Tr.3:715.

Dennis O'Connor testified that he was a radiographic technologist. Tr.3:747. He was at the Winners Circle when the defendant came in and started an argument with the bartender. Tr.3:748. King got up, approached the defendant, and asked him to calm down. Tr.3:749-50. Some time later the defendant smashed a beer bottle against a pole, and everyone stood up. Tr.3:750, 752. One of the women had her hand over her head, and the defendant left the bar. Tr.3:753. King followed him out, and then others left. Tr.3:754. He saw King and the defendant facing each other in the street having a heated argument. Tr.3:755-56. They tussled and wrestled to the ground. Tr.3:756. He sprinted up the street and when he got to where they were, King was holding his eye. Tr.3:756.

There was blood coming out of his eye. Tr.3:756. He and two others restrained the defendant. Tr.3:756-57.

The defense called four witnesses.

John Hayes testified that he was twenty-two years old and was employed in the carpet cleaning business. Tr.4:858. On the night in question he was with his best friend Mark Pinkham and they decided to go to the Winners Circle for last call. Tr.4:903-04. As they were driving down Shrewsbury Street he saw one person on the ground with perhaps three people holding him down. Tr.4:906-07.

When Pinkham parked in front of the bar the doorman ran up and spoke to him. Tr.4:909. The doorman then helped a person who had his hand over his left eye into the car. Tr.4:910, 912. Hayes said he told the person to keep his hands out of his eye, that it would make it worse. Tr.4:913. They then drove to the hospital. Tr.4:915. The person seemed intoxicated. Tr.4:917. The person told them he thought he got poked in the eye. Tr.4:918. The person was not bleeding. Tr.4:935.

Gerald Perma testified that he was a Worcester Police Officer. Tr.4:967. On the night in question he was working the 11:00 p.m. to 7:00 a.m. shift. Tr. 4:969. He received a call at about

1:47 a.m. and responded to the Winners Circle. Tr.4:969. He observed the defendant on the ground with several people around him. Tr.4:974. Other officers arrived at the same time, and the defendant was handcuffed. Tr.4:976. He had conversation with Schlener. Tr.4:976. The defendant had some scratches and bruises. Tr.4:988. He interviewed King; King wasn't drunk and his eye was bleeding. Tr.4:995.

The defendant testified that he was forty-two years old, married, and lived in Worcester. Tr.4:1007. He said that he owned Mulcahy's Barroom in Worcester for nine years, and had been out of business about three months on the night of the incident. Tr.4:1008. Prior to owning the bar he had worked as a CPA. Tr.4:1009.

The defendant said that he arrived at the Winners Circle at about 1:30 a.m. Tr.4:1012. He lived around the corner. Tr.4:1024. Schlener made fun of him for ordering the cheap beer. Tr.4:1026. Shortly thereafter Schlener pointed out that the defendant's bar was closed in a ridiculing fashion. Tr.4:1029-30.

The defendant responded in kind and Schlener got upset and turned red. Tr.4:1032. Schlener then had a conversation with King. Tr.4:1032-33.



King and two other men got up, and King was yelling that he was going to give the defendant a beating. Tr.4:1033, 1035. As King and the others got close, the defendant got off his bar stool. Tr.4:1036. A heated yelling match followed. Tr.4:1038. The defendant told King if he wanted to fight they should go outside and fight one on one. Tr.4:1038.

Some other patrons got between them and got King out of the area, but one of the other men who had come over with King grabbed the defendant and pushed him backwards. Tr.4:1039. The bottle broke while he was wrestling with that man. Tr.4:1039-40. When he freed himself, he got out of the bar. Tr.4:1040. He ran towards his house with people following right behind him. Tr.4:1043.

He was football tackled, and then several people got on top of him. Tr.4:1049. He used his hands and legs to try and escape, but within a minute he was completely subdued. Tr.4:1050. Taraskiewicz had his boot on his neck and was applying pressure. Tr.4:1052-53. King came over and gouged his right eye with his finger. Tr.4:1056.

After he was arrested, the police took him to the hospital. Tr.4:1059. After he was released

from custody he went back to the hospital.  
Tr.4:1062.

Jeannette Elberry testified that she was a teacher in the Worcester Public Schools and was married to the defendant. Tr.5:1157-58. On September 29, 1992 at about 2:00 p.m. she went to the courthouse, and then left with the defendant. Tr. 5:1159-60. She observed injuries on him that included an elbow injury, facial bruising, and a heel mark on his neck. Tr.5:1160. Later that evening she took pictures of the injuries. Tr.5:1161.

## ARGUMENT

### I. THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL WERE VIOLATED BY THE PROSECUTOR'S ARGUMENT ON TAILORED TESTIMONY AND THE TRIAL COURT'S RESPONSE.

The sequestration order in the case at bar precipitated some controversy, with the fore-person of the jury informing the trial court through a court officer that two jurors believed that a key defense witness had listened to the testimony of other witnesses. See Tr.4:860-62. After hearings and inquiry one juror was actually excused. See Tr.4:862-901. In his closing argument the prosecutor, pandering to the jury's heightened concern about sequestration, decided to revisit that theme.

"Did any of them rehearse their testimony? Did any of them go over their testimony with any one else? Did any of them have the opportunity? Did any of the witnesses have the opportunity to see exactly how every other witness testified in this case and then tailor their testimony to that evidence? Some of you are shaking your heads. One person did, one witness did, one witness saw every other person testify, the defendant (pointing).

And then he takes the stand and then he tells you this story." Tr.5:1234.

The defendant objected to this portion of the prosecutor's argument. Tr.5:1243. The trial judge denied a mistrial, see Tr.5:1244, and gave a

"curative" instruction, see Tr.5:1259. However, while the curative instruction did inform the jury that the defendant had a right to be present at his trial, it also informed the jury that the thrust of the prosecutor's argument was correct, inviting the jury to consider this factor in assessing credibility.

A defendant's presence at his own felony trial in this Commonwealth represents a mix of constitutional rights and obligations. The defendant has a state and federal constitutional right to be present at critical stages of his case such as the trial. See Taylor v. United States, 414 U.S. 17 (1973); Commonwealth v. Robichaud, 358 Mass. 300, 302 (1970).. It is equally clear that a defendant released on recognizance can only waive this right in a felony case at his own peril. See Rule 18(a)(2) of the M.R. Crim. P. (permitting waiver in misdemeanor cases); G.L.c. 276, §82A (making bail jumping a crime); Illinois v. Allen, 397 U.S. 337 (1970) (waiver by obstreperous conduct). The defendant in the case at bar did not simply choose to be present, he was required to be.

The order of presentation of evidence during the course of the trial also represents a mix of constitutional rights and obligations. The

defendant in the case at bar did not choose to put on his case after the Commonwealth put on its case; he had no choice in the matter. Our system requires the Commonwealth to proceed first, see for example Rules 24 and 25 of the M.R. Crim. P., a requirement dictated by the basic constitutional principles that are the foundation of the American model of criminal justice - the presumption of innocence, the right to remain silent, and the burden of proof.

In the case at bar the prosecutor's argument was an improper comment on both the defendant's trial obligations and constitutional rights.

The defendant was obligated to be present at his trial and to allow the Commonwealth to present its case first. A prosecutor's argument that the jury should draw inferences against a defendant who did nothing but behave properly in the courtroom is improper. Commonwealth v. Young, 399 Mass. 527, 530 (1987). Before arguing that something a defendant did in the courtroom, other than testify, gives rise to an adverse inference, the prosecutor must first obtain the trial judge's approval. Id., at 532. Here, the prosector did not seek the trial court's approval.

The defendant also had a constitutional right to be present, and a constitutional right to remain silent until the defense determined that he should testify. See Brooks v. Tennessee, 406 U.S. 605 (1972). A prosecutor may not comment on the defendant's state or federal constitutional right to remain silent. See Commonwealth v. Kowalski, 33 Mass. App. Ct. 49, 54 (1992).

In the case at bar, the jury was confronted with a classic credibility issue between the Commonwealth's witnesses and the defendant; and, the prosecutor's improper argument reflected on the defendant's credibility. Thus this case cannot be distinguished from Commonwealth v. Person, 400 Mass. 136 (1987), where similar objected to comments resulted in reversal.

II. THE TRIAL COURT'S CHARGE ON CONSCIOUSNESS OF GUILT CREATED A SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE.

At least two of the three charges remaining against the defendant when the case went to the jury concerned activity alleged to have occurred after the defendant left the bar. As to the third, the disorderly charge, a review of the record does not clarify exactly what conduct the Commonwealth believed constituted the crime alleged.

In his charge to the jury the trial judge visited the issue of the defendant's "flight" from the bar.

Let me instruct you that you have heard evidence here suggesting that the defendant may have fled from the Winners Circle from fear or to avoid apprehension for the offense for which he is now on trial. If the Commonwealth has proved that the defendant did - don't forget this is your call, all of these fact questions are your call. If the Commonwealth has proved that the defendant did flee from the restaurant in order to avoid apprehension for the offense for which he is now on trial or for any particular offense for that matter, you are permitted to consider whether such action indicate feelings of guilt by the defendant, and whether, in turn, such feelings of guilt might tend to show actual guilt on the charges. You are not required to draw such inferences, you don't have to, you are not compelled to by the law." Tr.5:1267.

It is inappropriate to give a charge on consciousness of guilt based on flight if there is no evidence of flight. See Commonwealth v. Brown, 414 Mass. 123, 126-27 (1993). The effect of erroneously admitted evidence or argument on consciousness of guilt cannot be overestimated, see Commonwealth v. Cobb, 374 Mass. 514, 521 (1978), and an erroneous jury charge has the same prejudicial impact. Here, the trial court turned the crime-flight-guilt equation inside out; flight-crime-guilt is not an equation recognized by the criminal jurisprudence of this Commonwealth.

The defendant failed to object to this charge. The defendant asserts that this issue must be addressed on appeal since (1) counsel's failure to save his rights denied him his state and federal constitutional rights to the effective assistance of counsel, see Commonwealth v. Saferian, 366 Mass. 89 (1974), and Strickland v. Washington, 466 U.S. 668 (1984); and (2) the instructions given raise serious questions as to the accuracy of the verdict, see Commonwealth v. Freeman, 352 Mass. 556 (1967). Under both tests, the prejudice inquiry focuses on the extent to which confidence in the outcome has been undermined by the error. The defendant asserts that given trial counsel's presentation, a reasonably competent attorney would have saved his rights to the charge discussed above. The defendant further asserts that he was seriously prejudiced by trial counsel's failure to do so.

III. THE TRIAL COURT'S INSTRUCTIONS ON ASSAULT WITH INTENT TO MAIM OR DISFIGURE WERE ERRONEOUS AND CREATED A SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE.

The alleged victim Thomas King testified that the defendant jammed his thumb into his left eye and kept pushing it in. From this evidence the



jury could arguably conclude that the defendant had the intent to put out or destroy King's eye. However, King's claim was a matter of great dispute at trial. His hospital record, introduced as Exhibit 18, indicated a superficial injury, although King described it as a cut on his eyeball.

King and other Commonwealth witnesses claimed the eye was bleeding; but John Hayes, who helped take King to the hospital said that the eye was not bleeding. No witness described the touching of King's eye as King did; Hayes said that King told him he had been poked in the eye.

G.L.c. 265, §15 criminalizes an assault with intent to maim or disfigure "in any way described in the preceding section." The preceding section, the mayhem statute, has two branches. See Commonwealth v. Robinson, 26 Mass. App. Ct. 441, 445 (1988). The first branch specifically enumerates acts of mayhem; the second branch provides a more general category of injuries when committed with a dangerous weapon, substance, or chemical. See G.L.c. 265, §14. Since no dangerous weapon was used in the case at bar, the Commonwealth was required to prove a "way described" in the first branch of the mayhem statute. The Commonwealth chose "puts out or

destroys an eye", and indicated accordingly in its indictment. See Indictment, A-7.

As a general rule a crime must be proved as charged. See Commonwealth v. Grasso, 375 Mass. 138, 139 (1978). This proposition is clearly violated when the variance between the jury instructions or proof and the indictment concerns an element of the offense. See and compare, Stirone v. United States, 361 U.S. 212, 218-19 (1960), and Commonwealth v. Hobbs, 385 Mass. 863, 869-71 (1982). If the defendant did not intend to put out or destroy King's eye, he was not guilty as charged. But the trial court totally eliminated this element from the jury's consideration. The trial court instructed as follows:

"Here the defendant must have specifically intended to maim or disfigure Thomas King. The word maim has no technical meaning, and should be construed in its plain and ordinary sense. It has been defined more wildly [sic] as meaning to disable, to wound, or cause bodily disfigurement to the body." Tr.5:1281.

No mention was ever made of the Commonwealth's allegation that the defendant intended to put out or destroy King's eye, as if that allegation was mere surplusage. Thus on the instructions given, the jury was free to conclude that the defendant was guilty of assault with intent to maim if the

defendant specifically intended to wound King in the eye or any other part of King's body. Thus for example, if the jury believed that the defendant poked King in the eye intending to cause a superficial laceration, the injury that actually occurred, it was obligated to convict. The charge given seriously prejudiced the defendant's rights to fair trial on this indictment. The defendant failed to object to this charge. For the identical reasons discussed in Section II, *supra*, incorporated here by reference, this issue should be addressed.

CONCLUSION

For the foregoing reasons the defendant's convictions should be reversed, and the case remanded to the Superior Court for a new trial.

Respectfully submitted,  
By his attorney,

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ADDENDUM

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII of the Declaration of Rights provides:

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

M.G.L.c. 265, §14 provides:

Whoever, with malicious intent to maim or disfigure, cuts out or maims the tongue, puts out or destroys an eye, cuts or tears off and ear, cuts, slits or mutilates the nose or lip, or cuts off or disables a limb or member, of another person, and whoever is privy to such intent, or is present and aids in the commission of such crime, or whoever, with intent to maim or disfigure, assaults another person with a dangerous weapon substance or chemical, and by such assault disfigures cripples or inflicts serious or permanent physical injury upon such person, and whoever is privy to such intent, or is present and aids in the

commission of such crime, shall be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

M.G.L.c. 265, §15 provides:

Whoever assaults another with intent to commit murder, or to maim or disfigure his person in any way described in the preceding section, shall be punished by imprisonment in the states prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

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COMMONWEALTH OF MASSACHUSETTS  
 WORCESTER SUPERIOR COURT  
 CRIMINAL DOCKET

WOCR93-00135

As of 03/22/94

Commonwealth v Elberry, Michael G

ENTRY DATE	03/04/93	CASE STATUS	dappen	Disposd:	appeal pending	
STATUS DATE	07/15/93	SESSION	1	Crim 1	(204 Worcester)	
RETURN DATE	03/17/93	CASE ORIGIN	I	Indictment		
LEAD CASE		JURY TRIAL		PUBLIC VIEW	y	
Tracking Information •						
TRIAL DLN DATE	03/17/94	DE-		DLN STATUS DATE	03/05/9	
CUSTODY STATUS		DANGER WEAPON		ILLEGAL SUBST		
PRIOR RECORD		SOCIAL RISK				
NUM	OFFENSE	CODE	INDICTMENT	LOCATION	STATUS	DATE
001	09/29/92	272:053.]	WODA93-00135	Worcester	dguve	07/02/93
	Disorderly person					
002	09/29/92	265:013A.2	WODA93-00135	Worcester	dguve	07/02/93
	Assault & battery					
003	09/29/92	265:015B:b	WODA93-00135	Worcester	dnotgufi	07/01/93
	Assault, dangerous weapon					
004	09/29/92	265:015.1>	WODA93-00135	Worcester	dguve	07/02/93
	Assault, intent to maim					

Plaintiff  
 Commonwealth  
 Active 03/04/93

Defendant  
 Michael G Elberry  
 370 Oak Street  
 Shrewsbury MA 01545  
 DOB: 02/08/52  
 SSN: 016-42-4647  
 Active 03/04/93 Notify

\* \* \* D O C K E T \* \* \*

DATE	PAPER ENTRY
03/04/93	1.0 Indictment returned
03/05/93	Summons for arraignment issued
03/17/93	Plea of not guilty - tame bail - \$500.00 w/out Prej.(Travers,
03/17/93	Bail satisfied: \$500. BBI2261, Surety: Jeannette Elberry 370 St, Shrewsbury, Ma. Bail returned 7/15/93, Check #130, (\$500) BB*2261
03/17/93	Committee for Public Counsel Services appointed

COMMONWEALTH OF MASSACHUSETTS  
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\* \* \* D O C K E T

DATE	PAPER	ENTRY
03/31/93	2.0	Pre-trial conference report, filed in court and Approved(Travera,J.)
06/28/93	3.0	Deft files Motion to Sequester Witnesses, filed and ALLOWED by Agreement(Toomey,J.)
06/28/93	3.5	Deft files Proposed Questions to Prospective Jurors, filed - S Action on Motion(Toomey,J.)
06/29/93		Mittimus without bail issued - Bail Revoked(Toomey,J.)B/W issu
07/01/93	4.0	Deft files (RE: Off. #1,2, & 4) Motion for a Required Finding Not Guilty at the Close of the Commonwealth's Case, filed and DENIED (Toomey,J.)
07/01/93	5.0	Deft files (RE: Off. #3) Motion for a Required Finding of Not Guilty at the Close of the Commonwealth's Case, filed and ALLOWED(Toomey,J.)
07/01/93		RB offense 3: Not guilty finding(Toomey,J.)
07/02/93		Motion (P#4) denied - Renewed at Conclusion of Case & Denied(Toomey)
07/02/93	6.0	Deft files Proposed Jury Instructions, filed and DENIED(Toomey,J.)
07/02/93		Mittimus without bail issued (Toomey,J.)B/W issued
07/02/93	7.0	RE offense It Guilty verdict
07/02/93		Sentence stayed until 07/12/93 (Toomey,J.)
07/02/93	8.0	RE offense 2: Guilty verdict
07/02/93	9.0	RE offense 4: Guilty verdict
07/15/93	10.0	Deft files Motion After Discharge of Jury (RE: Off. #1), filec in court.
07/15/93	11.0	Deft files Motion after Discharge of Jury (RE: Off. #2), filec in court.
07/15/93	12.0	Deft files Motion after Discharge of Jury(RE: Off. #4), filed court.
07/15/93	13.0	Deft files Motion for Stay of Sentence, filed in court and ALLOWED \$7,500.00 Cash(Toomey,J.)
07/15/93		Re offense lit Placed on Probation 1 yr. from and after #93-0135-4 (Toomey,J.)
07/15/93		Re offense #2: Placed on Probation 1 yr., to run concurrent w: #93-0135-1 and to take effect from and after #93-0135-4(Toomey,J.)
07/15/93		Re offense #3: Defendant Discharged(Toomey,J.)
07/15/93		Re offense #4: Bail set at \$7,500.00 Cash with conditions tha deft, have no contact with victim and no entry into any pouri estab. (Toomey,J.)
07/15/93		Bail satisfied: \$7,500.00 Cash - Surety: Jeanette M.

COMMONWEALTH OF MASSACHUSETTS  
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\* \* \* D O C K E T \* \* \*

DATE	PAPER	ENTRY
07/15/93		Davis-Elbery, 370 Oak Street, Shrewsbury, BB#2431. Sentence imposed:(RE: Off. #4) - 10 yrs. M.C.I. Concord, Credit 13 days Chapter 279 Section 33A(Toomey,J.)
07/15/93		Victim-witness fee \$50.00 to be paid while incarcerated
07/15/93		Sentence stayed pending appeal(Toomey,J.)
07/15/93	14.0	Notice of appeal, filed in court.
07/22/93		Motion (P#10) denied (Toomey,J.)
07/22/93		Motion (P#11) denied (Toomey,J.)
07/22/93		Motion (P#12) denied (Toomey,J.)
07/15/93		Court Reporter Ronald Francescone is hereby notified to prepare one copy of the transcript of the evidence of 6/28/93 thru 7/2/93.
07/15/93		Court Reporter Jane Esposito is hereby notified to prepare one copy of the transcript of the evidence of 7/15/93 (Sentencing).
09/07/93	15.0	Deft files Motion to Revise and Revoke, filed.
12/30/93		Transcript received - 1 volume from Jane Esposito(Sentencing)
02/09/94		Transcript received - 5 volumes from Ronald Francescone
02/23/94	16.0	Motion to Withdraw and Affidavit in Support, filed.
03/02/94		Motion (P#16) allowed - See 3/1/94 entry of 2/28/94 letter from the defendant(Toomey,J.)

93 0135-1

Commonwealth of Massachusetts

WORCESTER, SS.

Superior Court Department of the Trial Court, holden at Worcester,
within and for the County of Worcester, for the transaction of criminal business, on
the First Monday of March
in the year of our Lord one thousand nine hundred and ninety-three

The Jurors for the Commonwealth aforesaid, on their Oath Present

THAT Michael G. Elberry

of Worcester in said County of Worcester,
on the twenty-ninth day of September in the year of
our Lord one thousand nine hundred and ninety-two
at Worcester in said County of Worcester,

was a disorderly person,

A true bill.

[Handwritten signature]

District Attorney.

Foreman.

[Handwritten signature]

Commonwealth of Massachusetts

WORCESTER, SS.

Superior Court Department of the Trial Court, holden at Worcester,

within and for the County of Worcester, for the transaction of criminal business, on

the First Monday of March

in the year of our Lord one thousand nine hundred and

ninety-three

The Jurors for the Commonwealth aforesaid, on their Oath Present

THAT Michael G. Elberry

of Worcester in said County of Worcester,  
on the twenty-ninth day of September in the year of  
our Lord one thousand nine hundred and ninety-two  
at Worcester in said County of Worcester,

did assault and beat Thomas King,

A true bill

District Attorney.

Foreman.

Commonwealth of Massachusetts

WORCESTER, SS.

Superior Court Department of the Trial Court, holden at Worcester,
within and for the County of Worcester, for the transaction of criminal business, on
me First Monday of March
in the year of our Lord one thousand nine hundred and ninety-three

The Jurors for the Commonwealth aforesaid, on their Oath Present

THAT Michael G. Elberry

of in said County of Worcester,
twenty-ninth September
on the day of in the year Of
our Lord one thousand nine hundred and ninety-two
at Worcester in said County of Worcester,

did assault Thomas King with malicious intent to maim or
disfigure, to wit: did attempt to put out or destroy the eye or
eyes of the said Thomas King in violation of M.G.L. Chapter
265, Section 15.

A true bill.

//W District Attorney.

Foreman.
[Signature]