DISTRICT OF COLUMBIA COURT OF APPEALS

No. 24-CF-0799
JOGAAK J. MALUAL
Appellant

2024-CF3-00139

v.

UNITED STATES
Appellee

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

BRIEF FOR APPELLANT JOGAAK J. MALUAL

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ISSUE PRESENTED

Whether the government introduced sufficient evidence to support a conviction of assault with significant bodily injury where there was no testimony that medical treatment beyond what one can administer oneself was immediately required to prevent long-term physical damage, possible disability, disfigurement, or severe pain.

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STATEMENT OF THE CASE

1. The Indictment

Appellant Malual was indicted on one count of assault with significant bodily injury in violation of 22 DC Code Sec. 404(a)(2) (2001 ed), and one count of assault with a dangerous weapon in violation of 22 DC Code Sec. 402 (2001 ed.)(R.10). The assault was on a cashier at a carryout restaurant and the weapon was the credit card reader with attached base that customers use to pay at the restaurant.

2. The Preliminary Hearing and Plea Offer

Appellant was held without bond at his presentment in the instant case on February 6, 2024. There were three different preliminary hearing dates set; on the last of those dates, a preliminary hearing was held.

At the first scheduled date, on February 9, 2024, the trial court continued the hearing for the government to put together a plea offer (2/9/2024:5).[1] At that hearing, Appellant Malual complained that his current attorney was acting "as a judge and judge me" (*Id*). Defense counsel explained that his client has "mental health challenges" and expressed a desire to continue working with him (*Id*).

At the February 16, 2024 preliminary hearing date, defense counsel advised the court that he either has to ask for a mental competency screening or withdraw as counsel, since he is not sure Mr. Malual is capable of working with him (2/16/2024:2). Government counsel did not oppose forensic screening for Mr. Malual (*Id* at 3), and advised the court at the bench that "the guardian does believe that the defendant has significant mental health issues" (*Id* at 6). The trial court vacated Attorney Catacalos' appointment (*Id* at 8) and appointed Attorney Alvin Thomas at an ascertainment of counsel date on February 23, 2024 (2/23/2024:7).

Five days later, at the next scheduled preliminary hearing date, the government put the plea offer on the record:

> If the defendant pleads guilty to assault with significant bodily injury in 2024 CF3 1139 and to the information in 2023 CMD 3599, then then government will dismiss: 2023 CMD 3286 and 2023 CMD 4102.[2]

---

[1] Transcripts of proceedings are designated by proceeding date and page number.
[2] At the time of the instant offense, appellant had two pending misdemeanor cases.

> The government will not indict on additional charging arising from the facts in the felony case.
>
> The government reserves stepback pending sentencing; waives applicable sentencing enhancement; reserves allocution but caps to the bottom 1/3 of sentencing guidelines.

(2/28/2024:4-5)

The government specified that the offer was contingent on waiving the preliminary hearing scheduled for that day (*Id* at 5).

The court asked Mr. Malual if he understood what the government said and he replied: "I just heard something like injuries" (*Id*).

Defense counsel then represented to the court:

> So the deal with this case is because we didn't know who was representing Mr. Malual, *that plea offer has not been discussed with Mr. Malual*. However, I did discuss with him in the back that, if he wanted to go forward today, there would be no plea offers extended to him, and he couldn't accept or reject it, and he wants to go forward today. *And this is the first time he's heard that plea offer*, but he indicated to me he wanted to go forward with the hearing.

(*Id*)(emphasis added).

The court then advised Appellant Malual:

> If you want to continue this matter to get an opportunity to really discuss the plea matter with your attorney, the Government would hold -- I'm assuming would hold that plea offer open for you to come back on another day after you've had time to discuss it with your attorney; or, if you decided to waive it -- I mean, I do have to say that.
>
> But if you wanted to -- if you needed time to discuss the plea offer and its ramifications with your attorney, we can continue this matter for another date and give you time to have your attorney have a more robust conversation with you about the consequences.

You're shaking your head no. You don't want to, you don't want to – (*Id* at 6).

Counsel then asked his client in open court, "you want to go forward?" to which Mr. Malual responded, "yeah, forward" (*Id*).

Represented at that point by Attorney Alvin Thomas, Appellant Malual, an individual with significant mental health issues, went forward with the preliminary hearing and thus gave up his right to the plea offer that had never been presented to him.

The court found probable cause and continued to hold appellant without bond (*Id* at 30-31,33).

3. Arraignment

At the May 6, 2024 arraignment date, a different attorney entered his appearance on behalf of appellant and that attorney, Ferguson Evans, then represented him at trial (5/6/2024:2).

4. Pre-Trial Motion

The trial court held a hearing on the defense motion to suppress identification. At the hearing, MPD Sergeant Dale Vernick, MPD Officer Cynthia Rios, and MPD Detective Oliver Eligado testified to responding to Aladdin's Kitchen Restaurant on February 5, 2024 and into February 6, 2024 to assist with an assault investigation, and to the specifics of a show up identification procedure conducted in the instant case.

The trial court denied the motion, ruling both that the identification procedure was not unduly suggestive and that the identification itself was reliable (5/30/2024:91)

5. Motions for Judgment of Acquittal

Defense counsel made a motion for judgment of acquittal as to both counts and submitted on the evidence (6/6/2024:27). He renewed that motion after he announced that the defense would not put on a case (*Id* at 26). The trial court denied the motion both times (*Id* at 30-33,37).

6. *Boyd* Inquiry

The court inquired of appellant pursuant to *Boyd v. United States,* 586 A.2d 670 (DC 1991), and appellant indicated that he did not wish to testify (*Id* at 33-36)

7. Jury Notes

In the course of their deliberations, the jury sent two notes and the trial court responded to each in writing without objection from the parties. The first note asked "[w]as there any underlying reason why the State didn't ask the witnesses to identify the suspect in the courtroom?" and the second requested a map not in evidence (*Id* at 88-89).

8. Jury Verdict

The jury found appellant guilty on both counts (*Id* at 91-92).

9. Sentence of the Court

On July 31, 2024, the trial court sentenced appellant to 12 months on the assault with significant bodily injury count and 24 months on the assault with a dangerous weapon count, and specified that the sentences be concurrent (7/31/2024:10-11)(R.23).

Trial counsel for appellant filed a timely notice of appeal on August 27, 2024(R.24).

STATEMENT OF FACTS

MPD Sergeant Dale Vernick testified for the government that he was on duty on February 5, 2024 and responded to Aladdin's Kitchen – a DC carryout – around 11:30 p.m. for an assault in progress (6/5/2024:6). He testified that he arrived to a chaotic scene (*Id* at 8). Sergeant Vernick noticed an employee with some kind of towel over his head and droplets of blood on the floor (*Id*). He called for an ambulance and testified that the guy with the towel on his head had a laceration on his head and that there was blood in his hair and on the counter (*Id* at 11).

Sergeant Vernick testified to descriptions given him of the suspect by witnesses: (1) black male, skinny, wearing a red shirt and black pants; and (2) black male, tall, skinny, wearing a red shirt, appeared homeless (*Id* at 11-12). The complainant gave a similar description: black male, skinny, red shirt, black facial hair (*Id* at 18). Sergeant Vernick broadcast a lookout over

the police radio, along with a possible direction of travel (*Id* at 16) and at some point, he learned that one of the officers had someone stopped who "matched the description" (*Id* at 20-21).

Sergeant Vernick testified that he conducted a show up identification with one of the witnesses from the carry-out, Shirani Shapour (*Id* at 21). The suspect was stopped in an alley in the 2400 block of 18th Street, N.W. (*Id* at 22). As they were driving toward where officers had the suspect stopped, Mr. Shapour made a spontaneous statement that he believed the person stopped was the assailant from the carry out; as they got closer to the suspect, Mr. Shapour confirmed the identification (*Id* at 22, 23). Sergeant Vernick made an in-court identification of Appellant Malual as the individual the witness identified in the show up procedure (*Id* at 22-23).

Sergeant Vernick described the object with which the complainant was struck:

> It is a tablet-type device or about the size of iPad mini, with a medal bracket, like, triangular shape at the bottom. It's pretty heavy, so that when customers come in and use the credit card they use it for swiping their credits card. It's basically so it doesn't move, so it's got some weight to it.

(*Id* at 26).

The complainant, **Edvin Everson Lopez Banaca** testified that he was working at Aladdin's Kitchen at 1782 Florida Avenue, N.W. as a cashier on February 5, 2024 (*Id* at 40-41). Mr. Banaca stated that on that night,

between 11 p.m. and midnight, a customer came in and Mr. Banaca tried to take his order; the customer, however, would not place an order, got very rude and started using bad language (*Id* at 41). That customer picked up the machine used to process credit cards and threw it at Mr. Banaca, hitting him in the head (*Id*).

Mr. Banaca testified that he was cut in the top of his head and noticed blood coming from the wound (*Id* at 44); he was hit in the head once (*Id* at 45). He was taken to the hospital and got four or five stitches (*Id* at 44). Mr. Banaca testified that, at some point after he got stitches, he returned to work at the carry-out (*Id* at 54-55).

Yuslin Lopez testified for the government that he was working at Aladdin's Kitchen on February 5, 2024 along with his brother, Edvin Everson Lopez Banaca (*Id* at 58). On that day, Mr. Lopez testified that a person came in "acting crazy and yelling," and when his brother asked the person to leave, the person grabbed a machine used to pay and threw it at his brother's head (*Id*). Mr. Lopez stated that his brother was hit once on the head, then covered his head with a piece of paper (*Id* at 58-59).

Shapour Shirani testified that he too was working at Aladdin's Kitchen on February 5, 2024 when a "strange guy came inside the store and started talking bad and loudly" (*Id* at 67-68). After Edvin, the cashier, told the guy to leave, the guy picked up the credit card machine and threw it at

the cashier's head (*Id* at 68, 69). As a result, his head started bleeding (*Id* at 69). Mr. Shirani testified to going to another location with the police where they had a guy stopped who Mr. Shirani recognized as the same guy from the restaurant who had thrown the credit card machine at the cashier's head (*Id* at 72).

Scott Kurihara testified for the government that he was at Aladdin's Kitchen sometime around midnight on February 5, 2024 getting a meal after work (*Id* at 81-82). While Mr. Kurihara was there, a "gentleman came in and started talking nonsense" (*Id* at 82). Mr. Kurihara witnessed that gentleman throw the credit card machine at the cashier's head (*Id* at 83). After the cashier was hit in the head, there was a lot of commotion and Mr. Kurihara testified to following the assailant out of the restaurant to see where he went (*Id* at 83-84). Mr. Kurihara described the assailant's direction of travel:

> So when I saw him leave the door, I saw him make a right. So I made that right as well. And as I was trying to, kind of, look for him, I looked down the alley that was between CVS and another building and I noticed him running down the alley.

(*Id* at 84).

Mr. Kurihara described the assailant as a black male, skinny, taller than his own 5'9" and wearing a red top; he also noted that the assailant "did not seem to be all there" (*Id* at 84-85).

MPD Officer Cynthia Rios testified that on February 5, 2024, she responded to Aladdin's Kitchen for an assault (6/6/2024:5). After speaking with an official who gave a lookout for the suspect, she began canvassing the area with other officers (*Id* at 6-7). About 10 minutes after the officer responded to Aladdin's Kitchen, they found an individual who matched the lookout description (*Id* at 9-10). After the show up identification procedure, that individual was arrested and the officer made an in-court identification of the person arrested that night (*Id* at 11).

With the testimony of Officer Rios, the government rested, and the defense did not put on a case. As described above, defense counsel's motions for judgment of acquittal were denied, and Appellant Malual chose not to testify.

ARGUMENT

I. THE GOVERNMENT INTRODUCED INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR ASSAULT WITH SIGNIFICANT BODILY INJURY.

A. STANDARD OF REVIEW

This court reviews claims of insufficiency of the evidence *de novo,* applying the same standard as the trial court in ruling on a motion for judgment of acquittal. *Russell v. United States*, 65 A.3d 1172, 1176 (D.C. 2013) (citations omitted).

The Court of Appeals, in *United States v. Swinton*, 902 A2d 772, 776, n.6 (DC 2006) articulated the standard of review for legal sufficiency of the evidence as follows:

> In considering whether the evidence in a criminal trial was sufficient to support a conviction, our review is deferential, but it is not a rubber stamp. We view the evidence in the light most favorable to the government, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact. *Rivas v. United States*, 783 A2d 125, 134 (DC 2001)(*en banc*). Nonetheless, we also honor our "obligation to take seriously the requirement that the evidence in a criminal prosecution must be strong enough that a jury behaving rationally really could find it persuasive beyond a reasonable doubt." *Id.* The requirement of proof beyond a reasonable doubt "means more than that there must be some relevant evidence in the record in support of each essential element of the charged offense." *Id.* "Slight evidence is not sufficient evidence; a 'mere modicum' cannot 'rationally support a conviction beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). We draw a line, moreover, between rational inference and mere speculation; gaps in the evidence or the jury's chain of reasoning are not to be filled by conjectures, guesses or assumptions. *Id.* "[I]f the evidence, when viewed in the light most favorable to the government, is such that a reasonable juror *must* have a reasonable doubt as to the existence of any of the essential elements of the crime, then the evidence is insufficient and we must say so." *Id.* (quoting *Curry* [520 A2d 255, 263 (DC 1987)] (emphasis in the original).

B. BACKGROUND

Defense counsel made a motion for judgment of acquittal at the close of the government's case and renewed that motion at the close of all the evidence. Both times the motion was denied.

C. ARGUMENT

As to the definition of significant bodily injury, the jury was instructed, in part, that:

> [S]ignificant bodily injury means an injury that requires hospitalization or immediate medical treatment in order to preserve health and the wellbeing of the individual. Medical treatment is not merely a diagnosis and must be aimed at preventing long-term physical damage and other potentially permanent injuries or abating serious pain.

(6/6/2024:59).

In *Parker v. United States*, 249 A.3d 388, 395-96 (D.C. 2021) this Court stated:

> The professional medical attention required by the statute must be aimed at one of two ends: "preventing long-term physical damage and other potentially permanent injuries" or "abating pain that is severe" rather than "lesser, short-term hurts." *Id.* (internal quotation marks omitted). Thus, the relevant inquiry is not whether "immediate medical attention or hospitalization" occurred, but rather *"whether medical treatment beyond what one can administer himself is immediately required to prevent long-term physical damage, possible disability, disfigurement, or severe pain." In re D.P.*, 122 A.3d 903, 912 (D.C. 2015) (internal quotations omitted)(emphasis added).

Under these standards, no reasonable jury could have found that Mr. Banaca, the complainant in the instant case, suffered significant bodily injury.

Mr. Banaca's testimony that he received 4, or possibly 5, stitches is entirely uncorroborated; the government presented no medical records or testimony from a medical professional or EMT, no photos of the

complainant's cut or the stitches he received. Mr. Banaca did not show the jury any scarring from the cut on his head. There was absolutely no evidence that whatever stitches he may have received were immediately required to prevent long-term physical damage, possible disability, disfigurement, or severe pain. No medical professional testified to Mr. Banaca's injury, the likelihood that his wound would have healed without medical intervention, or the consequences of the wound not receiving stitches, if indeed the wound was stitched. There was no testimony that the cut on Mr. Banaca's head was in close proximity to arteries or organs and thus may have been more serious than it appeared. There was no testimony regarding the size of the complainant's wound – the length, the depth, whether or not one could see bone. And, certainly there was no evidence that Mr. Banaca lost consciousness.

There was no evidence presented that Mr. Banaca suffered pain that was objectively "severe" or prolonged enough to constitute a significant bodily injury. *Quintanilla v. United States,* 62 A.3d 1261, 1264–65 (DC 2013) (evidence that complainant's head was "throbbing" for "a week and a half" and that her finger "was 'almost unusable for about two months' and 'was in a lot of pain'" insufficient to establish significant bodily injury). Indeed, Mr. Banaca did not testify to any pain whatsoever. In body worn

camera footage he can be seen calmly speaking with ambulance attendants and looking at his phone.

Certainly, there was no evidence regarding how long Mr. Banaca was at the hospital and whether or not there was any period of recuperation. He testified that he returned to work after the incident (6/5/2024:54-55) and did not testify to any ongoing issues as a result of his wound – no dizziness, headaches, or difficulty with brain function – or to medication that he may have had to take. He did not testify to any follow up appointments.

This Court has explained:

> . . . the statute does not extend to injuries that, "although seemingly significant enough to invite medical assistance, do not actually 'require' it, meaning the victim would not suffer additional harm by failing to receive professional diagnosis and treatment."

Wilson v. United States, 140 A.3d 1212, 1216 (D.C. 2016)(citing *Quintanilla* at 1265).

The *Wilson* Court reversed appellant's conviction for assault with significant bodily injury in a case where one responding officer witness testified that:

> . . . when he arrived on the scene, Mr. Abubakar "appeared to be in visible pain" and "was bleeding from his face" and "gushing blood." Officer McGrail said he noticed "blood dripping on the sweater that [Mr. Abubakar] was wearing," and described this bleeding as "profuse[ ]"—ranking it a six on a scale of one through ten. When he asked Mr. Abubakar what happened, Mr. Abubakar

> "moaned instead of responding." Officer McGrail testified that "you could just tell by his face that he was in pain." After the paramedics escorted Mr. Abubakar to the ambulance, he was treated there "for quite a while," possibly as long as half an hour.

Wilson at 1215.

> The second officer . . . testified that when he arrived on the scene, Mr. Abubakar "had cuts all over his face," "blood dripping down from his face onto his clothes," and "blood coming out of the injuries just pouring down his face." Mr. Abubakar "couldn't really talk that well," and "[a]t one point, his jaw wouldn't move."

(Id).

The *Wilson* Court noted that:

> The government presented no testimony from doctors or paramedics, but it did introduce into evidence a series of photographs taken when Mr. Abubakar was in the hospital. The photographs depict Mr. Abubakar in a hospital bed with lacerations and dried blood on his face, a brace around his neck, a cuff on his arm, and electrodes attached to his chest.

(Id).

In reversing appellant's conviction for assault with significant bodily injury, the *Wilson* Court noted that:

> the government did not elicit testimony from any paramedics or treating physicians, who could have explained whether Mr. Abubakar's injuries "required [medical treatment] to prevent 'long term physical damage, possible disability, disfigurement, or severe pain.'" (quoting *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010).

Wilson at 1218.

This Court addressed a situation where the complainant received stitches to her ear. The Court, in finding that the government met its burden to prove significant bodily injury, wrote:

> Stover testified that because of the assault, she had a laceration to her ear, a braise on her forearm, and a scratch on the back of her right shoulder. Foster observed that Stover's ear was "very swollen," and "torn in two," and that she could not hear out of that ear. Stover testified that on June 26, "right after the incident," she went to Greater Southeast Hospital, where she received four to six stitches in her ear and medication for her ear and for headaches that she suffered. Stover showed the court the scar that remained on her ear after the assault, and the court admitted into evidence photographs of the injury. Stover further testified that she experienced headaches for a couple of days after the incident. A week after the incident, she returned to the hospital to have the stitches removed.

In re R.S. at 857.

The complainant in the instant case, unlike the complainant in *In re: R.S.*, did not testify to suffering headaches or to difficulty hearing; he did not testify to any scarring at all, certainly not to scarring that lasted long past the incident. The jury saw video of him standing holding a towel on his head and a photo of droplets of blood on the floor. And, unlike the complainant in *Wilson*, there was no evidence at all of Mr. Banaca's being hospitalized for treatment.

As one might expect with a head wound, there was testimony about blood as a result of the wound. Government counsel used the word "blood" or "bleeding" in his closing argument eleven times, giving a performance

worthy of Macbeth ("Out, damned spot! Out I say!").[3] But, despite government counsel's obsession with blood, the amount of blood is not a factor this Court has considered absent other indicia of significant bodily injury, and "not every blow to the head in the course of an assault necessarily constitutes significant bodily injury," *Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015)(citation omitted). This Court should not condone the government's reliance on hyperbole alone to try and prove significant bodily injury beyond a reasonable doubt (contrary to the government's assertion in its opening statement, the complainant's head was not "split open" by any stretch of the imagination)(6/3/2024:114).

The Court in *Commonwealth v. Einhorn*, 2005 Phila. Ct. Com. Pl. LEXIS 368 (2005) documented at length and credited the testimony of an expert witness regarding wounds to the head and the amount of bleeding one might expect:

> This is what we call a laceration. Frequently people incorrectly refer to them as cuts. If you get struck or punched or hit with an object and your skin opens up, especially with boxers, we refer to that as being cut. In technical terms, a cut is something you do with a knife. These would be lacerations, which are by definition the splitting open of the tissue by virtue of impact to it. And because it breaks the tissue it doesn't cut in cleanly. It also exposes blood vessels and also causes bleeding. I guess the other consideration that I don't want to neglect here is the location of the tissues and the specific nature of them. We are talking here about facial soft tissues and scalp soft tissues. And,

[3] Shakespeare's Macbeth, Act 5, Scene 1

> again, these are areas of tissue that are, as we say in medical jargon, very well vascularized.[4]
>
> In plain English what that means is they have substantial blood supply to them. And not only within medical experience but I think it is also well within lay experience, people recognize that if you have a split of your scalp, if you have a deep facial injury, if you have a nasal injury such as a break of a bone, those things tend to bleed quite extensively. And so it is a common experience among people to see someone -- if I can put it in plain, ordinary terms – whose head has been split open, meaning a simple scalp laceration, even in the absence of this kind of fracture and sinus injury, where the bleeding is extensive, frequently scary to people not medically trained or experienced. It appears as if there is a huge amount of bleeding.

(*Commonwealth v. Einhorn* at 105-107)

Even assuming that Mr. Banaca did receive stitches in the instant case, "the fact that medical treatment occurred does not mean that medical treatment was required." *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015)(quoting *In re R.S.* at 859). The relevant inquiry is an objective one; it is not whether a person in fact receives immediate medical attention but whether medical treatment beyond what one can administer himself is immediately required to prevent "long-term physical damage, possible disability, disfigurement, or severe pain." *Teneyck* at 909 (quoting *In re R.S.* at 859).

For example, the complainant in *Parker* testified that he thought X-rays were taken at the hospital, but this Court found it significant that "no

[4] vascular: pertaining to blood vessels or indicative of a copious blood supply. https://medical-dictionary.thefreedictionary.com/vascular

evidence was presented that X-rays were actually taken, or what it was about his injuries that would have prompted a doctor to order X-rays." *Parker* at 396. The *Parker* Court also noted that:

> While [the complainant] received medicine for his pain, a brace, and crutches after going to the hospital, the government failed to elicit any testimony from [him] about his need for prompt medical attention, and did not call either the paramedics who arrived on the scene or his treating physician to fill that gap in his testimony.

(Id).

There was absolutely no testimony or evidence that medical treatment beyond what one can administer oneself was immediately required to prevent "long-term physical damage, possible disability, disfigurement, or severe pain." The complainant's injuries were not even remotely as significant as ones contemplated by the statute, and jurors would have to engage in mere speculation to find that the statutory elements were met in this case, since there was neither evidence nor testimony to support a finding of guilt. Because there was insufficient evidence of significant bodily injury, appellant's conviction on that count must be reversed.

CONCLUSION

Based on the foregoing, Appellant Malual respectfully requests that this Honorable Court reverse his conviction for assault with significant

bodily injury.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13TH day of Nov. 2024, a copy of the foregoing brief was served on the Court and delivered to the Office of the U.S. Attorney for the District of Columbia, Appellate Division, 601 D Street, NW, Washington, D.C. 20530 via the DCCA E-File System.

Nancy E. Allen