NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TAREL LAMARR DIXON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1449 WDA 2013

Appeal from the Judgment of Sentence Entered January 17, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0011346-2010

BEFORE: BENDER, P.J.E., JENKINS, J., and MUSMANNO, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED AUGUST 21, 2015**

Appellant, Tarel Lamarr Dixon, appeals from the judgment of sentence of life imprisonment, plus a consecutive, aggregate term of 87 to 174 months' incarceration, imposed after he was convicted of first-degree murder, robbery, recklessly endangering another person (REAP), and persons not to possess a firearm. On appeal, Appellant challenges the sufficiency of the evidence to sustain his convictions of robbery, REAP, and persons not to possess a firearm. Appellant also attacks the trial court's admission of certain evidence. After careful review, we reverse in part and affirm in part.

In September of 2010, Appellant was arrested and charged with the above-stated offenses based on the June 16, 2010 shooting death of Edward Baur, Sr. Prior to trial, Appellant filed a motion *in limine* seeking to exclude,

inter alia, a video and audio recording of statements the victim made at the scene of the shooting.

> [The trial] [c]ourt heard Appellant's Pretrial Motions on October 12, 2012. At that hearing, Officer Reyne Kacsuta, a twenty-eight year veteran of the City of Pittsburgh Police Department, testified that she was on duty on June 16, 2010[,] on a call at Stanton and Mellon Streets. Officer Kacsuta heard two or three gunshots and then drove a very short distance on Mellon Street in the direction of the gunfire, and observed the victim, Edward Baur, fall out of his car. She went to Baur's aid and observed that he had been shot. She next observed Officer Andrew Baker, who had arrived before her, talking with Baur. Officer Baker asked the victim who had shot him, and the victim responded[,] "Hays." Officer Kacsuta testified that she did not know where the shooter was [located] at that time. She testified that she heard a child screaming and retrieved the child from the back seat of Baur's car. After ensuring the safety of the child, she attempted to determine if the shooter would return to the scene of the shooting. Officer Kacsuta further testified that a dashboard camera mounted on her police vehicle was recording the scene from the point of her arrival. This video was played for the [c]ourt. After reviewing the evidence, including the video, this [c]ourt denied Appellant's pretrial motion *in limine* and … the case proceeded to trial.
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> At Appellant's jury trial, Officer Andrew Baker of the Pittsburgh Police Department testified that he heard about two to three gunshots and responded within minutes to find Baur, who had been shot. His initial efforts were to render aid and [e]nsure that the shooter was not still a threat. Officer Baker asked Baur who had shot him and Baur said, "Hays shot me." Baur repeated this statement multiple times. Officer Baker testified that he saw a child in the backseat of the Baur's vehicle, and also observed money and drugs in the vehicle. He stated that Officer Martin Kail asked Baur if the last number on the Baur's phone was the person that shot him, and [] Baur answered in the affirmative. Officer Baker also recovered a pill bottle from Baur's pocket.
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> Officer Kail testified that he also heard Baur identify Hays as the shooter. Officer Kail stated that he observed the drugs and money in Baur's vehicle. Officer Kail also testified that Baur

stated he was buying drugs and that the last number in Baur's phone was the individual from whom he had purchased the drugs. Officer Kail further testified that he subsequently asked Baur if the last number in the phone was the actor's number and Baur replied, "Yeah it's in there." Officer Kacsuta reiterated her testimony from the Pretrial Motion Hearing with respect to her response at the scene and to the recording of the incident on her dashboard camera. The video from the dashboard camera was admitted into evidence and shown to the jury.

Detective Scott Evans, of the Pittsburgh Police homicide unit, testified that a cellular telephone was found on the front passenger floor and money and suspected narcotics were also found in the vehicle. Upon further investigation, the Detective determined that the phone belonged to Kimberly Biondo, Bauer's [*sic*] fiancée. Evans also testified that the last text message sent on that cell phone was sent to a phone registered to Sasha Stevenson, Appellant's girlfriend, and Appellant acknowledged sending that message.

Detective Margaret Sherwood testified that the phone found in the vehicle was shared between Biondo and Bauer [*sic*]. Biondo consented to the police downloading the information from the phone. The last text messages sent to the phone were from a phone registered to Sasha Stevenson. Detective Sherwood testified that Stevenson confirmed that she gave the phone to Appellant and identified a picture of Appellant. Sherwood also stated that the last text message sent to Bauer's [*sic*] phone was "Where you at."

Additionally, Biondo testified that the phone found in the vehicle was shared between her and Bauer [*sic*]. Biondo stated that she was with Baur prior to the shooting and had possession of the phone when a text message was received from a 626 number. Biondo said that she asked Baur who the message was from and Baur responded, "That's my boy Hays." Biondo also testified that Edward Jr., Baur's son, identified Appellant from a photo array. Biondo stated that Edward Jr. identified Appellant as the man he knew as "Hays" and also the person who ran from the car after Bauer [*sic*] was shot.

Sasha Stevenson, Appellant's girlfriend, testified that she gave one of her cell phone numbers, a 626 number, to Appellant. Stevenson testified that police came to her mother's house looking for Appellant on the night of the shooting and she

> originally lied to the police about [to] whom she had given her phone. Stevenson stated that after the police left she went upstairs and asked Appellant why the police were there. Stevenson testified that Appellant did not respond why and instead apologized to her for the police being there. She also testified that the police came back the next day to question her again regarding whom she had given her phone. Stevenson stated that she eventually admitted to police that she had given her phone to Appellant.
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> John Orlando, a friend of Baur's, testified that he and Baur had previously bought drugs from Appellant, whom he referred to by his nickname or street name, "Hays[."] Daniel Slepski, who worked with Baur, also testified that he bought pills from Appellant while he was with Baur.
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> Edward Baur Jr., the victim's child, who was eight years old at the time of trial, testified that he was present in the backseat of the car when his father was shot. He identified Appellant as the shooter. He knew Appellant was a friend of his father's from whom his father bought pills on numerous occasions. Baur Jr. also stated that he went with his father to Appellant's house five times prior to the shooting.
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> Andre Burse, who was involved in drug transactions with Appellant and knew Baur, was unavailable to testify at trial because of a medical condition. However, Burse made videotaped statements at a deposition[,] which were admitted into evidence. Burse stated that Appellant was known as "Hays" and that Baur owed a debt to Appellant. Burse also said that Appellant was angry with Baur because of the money Bauer [*sic*] owed him and Appellant was planning to do something about it. Furthermore, Burse stated that he assured Appellant he would, on Appellant's behalf, retrieve the money Baur owed and that Appellant need not worry about it. However, Burse stated that Appellant told him not to worry about it, that he would handle the matter himself.

Trial Court Opinion (TCO), 7/23/14, at 3-6 (citations to the record omitted).

Based on this evidence, the jury convicted Appellant of first-degree murder, robbery, and REAP. The charge of persons not to possess a firearm was severed and determined in a non-jury trial, at the close of which the

court convicted Appellant of that offense, as well. On January 17, 2013, Appellant was sentenced to life imprisonment, without the possibility of parole, for his first-degree murder conviction. For his conviction of robbery, Appellant received a consecutive term of 75 to 150 months' incarceration. He also received a consecutive term of 12 to 24 months' incarceration for the offense of REAP. No further penalty was imposed for the crime of persons not to possess a firearm. Appellant filed a timely post-sentence motion that was denied by operation of law on August 5, 2013.

Appellant filed a timely notice of appeal, as well as a timely Pa.R.A.P. 1925(b) concise statement of errors complained of appeal. Herein, he presents four issues for our review:

> 1. Whether the Commonwealth failed to prove beyond a reasonable doubt the crime of robbery when the Commonwealth failed to prove that [Appellant] attempted to commit or committed a theft?
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> 2. Whether the Commonwealth failed to prove beyond a reasonable doubt the crime of recklessly endangering another person when the Commonwealth failed to prove the [Appellant's] action of shooting placed or may have placed the victim (a child) in danger of serious bodily injury or death, or that [Appellant] had the requisite *mens rea* to commit the crime?
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> 3. Whether the Commonwealth failed to prove beyond a reasonable doubt the crime of persons not to possess a firearm when the Commonwealth failed to prove that [Appellant] was not a person allowed by law to possess a firearm because of some conviction or otherwise?
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> 4. Whether the trial court abused its discretion in allowing the dying declaration statement of the victim into evidence as well as the video and audio of that statement by a camera mounted on the police car when it violated [Appellant's] right to confront

witnesses pursuant to the Sixth Amendment of the United States Constitution?

Appellant's Brief at 5.

Appellant's first three issues challenge the sufficiency of the evidence to sustain his convictions.

> In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. ***Commonwealth v. Hartzell***, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno, supra*** at 136.

Commonwealth v. Koch, 39 A.3d 996, 1001 (Pa. Super. 2011).

We will begin by addressing Appellant's challenges to the sufficiency of the evidence to sustain his convictions for robbery and persons not to possess a firearm. First, "[a] person is guilty of robbery if, in the course of committing a theft, he: (i) inflicts serious bodily injury upon another[.]" 18 Pa.C.S. § 3701(a)(1)(i). Section 3701 also directs that "[a]n act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft or in flight after the attempt or commission." 18 Pa.C.S. § 3701(a)(2). "A person is guilty of theft if he unlawfully takes or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa.C.S. § 3921(a). Moreover, "in order for a person to be guilty of attempted theft[,] the Commonwealth must prove that, with intent to commit a theft, the person did 'any act which constitutes a substantial

step toward the commission of that crime.'" Appellant's Brief at 14 (quoting 18 Pa.C.S. § 901).

In concluding that the evidence was sufficient to support Appellant's conviction of robbery, the trial court first acknowledged that there was no evidence that Appellant actually *committed* a theft. TCO at 7 (stating "no evidence was presented of anything taken"). However, the court found that the following evidence demonstrated that Appellant *attempted* to commit a theft:

> The circumstantial evidence strongly suggests that Appellant and Baur were involved in a drug transaction. Money and drugs were strewn about the vehicle and pills were found in Baur's pocket. The money was stained with blood, and the shooting occurred in an area where both Bauer [*sic*] and Appellant were seen talking. Furthermore, according to the testimony of Andre Burse, Bauer [*sic*] owed a debt to Appellant. It was reasonable for a fact-finder to conclude that, based on the totality of the circumstances, Appellant had attempted to commit a theft to settle the debt that he believed Bauer [*sic*] owed to him.

Id.

We agree with the court that the evidence supported an inference that Appellant and Baur were engaged in a drug transaction at the time of the shooting. However, the facts supporting that inference, *i.e.*, blood-stained money strewn about the vehicle, the pills in Baur's pocket, and the fact that the two men were seen talking in the area where the shooting occurred, do not prove that Appellant was attempting to steal from Baur. Indeed, the

money and pills left in Baur's vehicle and pocket suggest that Appellant was *not* attempting to commit a theft.

The only other evidence cited by the court in support of Appellant's robbery conviction is the testimony of Andre Burse. While Burse stated that Baur owed a debt to Appellant, that fact, alone, is not sufficient to infer that Appellant was attempting to steal from Baur. This is especially true where Burse's testimony could equally be interpreted as indicating that Appellant was going to harm Baur, rather than steal what Baur owed him. For instance, Burse testified that Baur owed money to several people, and that Appellant told Burse that somebody was "going to take [Baur] out because he owed them." N.T. Andre Burse's Deposition Testimony, 5/30/12, at 14 (Docket Entry 54). Additionally, Burse testified that Appellant told him Baur was "going to pay[,]" which Burse interpreted as indicating that Appellant was going to hurt Baur. ***Id.*** at 23 (Burse stating "I remember [Appellant] making a statement that 'the p**** owe, he owe, and he's going to pay." [Burse] said, "Man, I don't want to see nobody get hurt."). Appellant contends, and we agree, that "Burse's testimony does not evidence [Appellant's] intent to commit a robbery, nor that a robbery occurred, but rather that [Appellant] intended to harm Baur due to the unpaid debt [Baur] owed." Appellant's Brief at 16.

In sum, after reviewing the record, we conclude that the evidence presented at trial proved that Appellant was angry with Baur over an unpaid debt, and that during a drug transaction, Appellant shot and killed Baur.

However, there was insufficient evidence to prove, beyond a reasonable doubt, that Appellant was committing, or attempting to commit, a theft during this incident. Consequently, Appellant's conviction for robbery must be reversed.

Next, we will address Appellant's claim that the evidence was insufficient to sustain his persons not to possess a firearm conviction. To prove a defendant is guilty of this offense, the Commonwealth must establish that he was previously convicted of a crime of violence set forth in section 6105(b). ***See*** 18 Pa.C.S. § 6105(a), (b). Here, at the preliminary hearing, Appellant stipulated that he was convicted of an offense set forth in section 6105(b). However, as both the trial court and Commonwealth concede, no evidence of Appellant's prior, disqualifying offense was introduced during his non-jury trial on this charge. ***See*** TCO at 10; Commonwealth's Brief at 19. Consequently, we agree with Appellant that there was insufficient evidence admitted at trial to support his conviction for the offense of persons not to possess a firearm. ***See Koch***, 39 A.3d at 1001 (stating our standard of review requires that we "determine whether the evidence *admitted at trial*, … [is] sufficient to support all elements of the offense") (emphasis added); ***Commonwealth v. Payne***, 463 A.2d 451, 456 (Pa. Super. 1983) ("Evidence of a prior conviction of a crime of violence [as enumerated in section 6105(b)] is both proper and *necessary* when a defendant is tried on charges stemming from an alleged violation of [section] 6105.") (emphasis in original).

Appellant's third sufficiency-of-the-evidence challenge regards his conviction for the offense of REAP.

> A person commits the crime of recklessly endangering another person if he engages in conduct which places or may place another person in danger of death or serious bodily injury. 18 Pa.C.S.A. § 2705. Our law defines "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." ***Id.*** § 2301; ***Commonwealth v. Rochon***, 398 Pa.Super. 494, 581 A.2d 239, 243 (1990). To sustain a conviction under section 2705, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so. ***In re Maloney***, 431 Pa.Super. 321, 636 A.2d 671, 674 (1994). Danger, not merely the apprehension of danger, must be created. ***Id.*** The *mens rea* for recklessly endangering another person is "a conscious disregard of a known risk of death or great bodily harm to another person." ***Commonwealth v. Peer***, 454 Pa. Super. 109, 684 A.2d 1077, 1080 (1996). Brandishing a loaded firearm during the commission of a crime provides a sufficient basis on which a factfinder may conclude that a defendant proceeded with conscious disregard for the safety of others, and that he had the present ability to inflict great bodily harm or death. ***Id.*** at 1080–1081.

Commonwealth v. Hopkins, 747 A.2d 910, 915-916 (Pa. Super. 2000).

In the present case, Appellant was convicted of recklessly endangering Edward Baur, Jr., the child in the backseat of Baur's car when the shooting occurred. Appellant maintains that there was no evidence to prove that he knew, or should have known the child was in the car, and that, consequently, the Commonwealth failed to prove Appellant consciously disregarded a known risk. Appellant also claims that the Commonwealth failed to establish that he placed the child in danger of serious bodily injury

because there was no proof that Appellant "ever threatened [the child] or waved the loaded firearm around to create a substantial risk" to the child. Appellant's Brief at 19.

Appellant's arguments are unconvincing. We reiterate that "[b]randishing a loaded firearm during the commission of a crime provides a sufficient basis on which a factfinder may conclude that a defendant proceeded with conscious disregard for the safety of others, and that he had the present ability to inflict great bodily harm or death." ***Hopkins***, 747 A.2d at 916. Here, Appellant not only *brandished* a gun during the commission of a crime, but he *repeatedly fired it* just outside the vehicle in which the child was sitting. ***See Commonwealth v. Hartzell***, 988 A.2d 141, 144 (Pa. Super. 2009) (citing ***Hopkins*** to support a conclusion that "the actual discharging of a weapon numerous times in the vicinity of others constitutes a sufficient danger to satisfy the REAP statute"). Moreover, Appellant's close proximity to the vehicle, and the fact that Baur had brought his son to at least five other drug transactions with Appellant, was sufficient to permit the jury to infer that Appellant knew, or should have known, that the child was in the car. The totality of this evidence is sufficient to sustain Appellant's REAP conviction.

Accordingly, for the reasons stated *supra*, we reverse both Appellant's conviction for robbery, as well as his conviction for persons not to possess a firearm, and vacate his judgments of sentence for those offenses. However,

we affirm his conviction of REAP and his judgment of sentence for that crime.

In Appellant's fourth and final issue, he maintains that the trial court abused its discretion by admitting the video recording from the dashboard camera mounted on Officer Kacsuta's police vehicle. Appellant contends that the admission of this video evidence, which recorded statements Baur made to police at the scene, violated his Sixth Amendment right to confront witnesses against him. Appellant's assertion presents an issue of law and, thus, "[o]ur scope of review is plenary and our standard of review is *de novo*." ***Commonwealth v. Williams***, 103 A.3d 354, 358 (Pa. Super. 2014).

Appellant avers that Baur's statements on the videotape were testimonial and, thus, they were inadmissible because Appellant did not have a prior opportunity to cross-examine Baur. In support, Appellant relies on ***Crawford v. Washington***, 541 U.S. 36, 68 (2004), which held that the Confrontation Clause prohibits out-of-court testimonial statements by witnesses, regardless of whether the statements are deemed reliable by the trial court, unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness.

However, statements are nontestimonial - and, therefore, admissible – "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***Davis v.***

Washington, 547 U.S. 813, 822 (2006). In the present case, Appellant essentially concedes that Baur's initial statements to police were made during the course of an ongoing emergency. The following emphasized portions of Appellant's argument demonstrate this point:

> At the beginning of the clip the police are heard commenting that they heard shots fired close by. After the police cruiser with the dashboard camera arrives at the victim's location, one officer is already on scene and asks Baur where the shooting took place. Baur clearly states, "Up the street." The officer on scene next asks Baur who shot him and Baur responds, "Hays." Approximately forty-five seconds later the officer in charge of the scene directs police officers to check down the street for the shooter.
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> *After the initial search of the area for the shooter, it is clear from the video that the officers are no longer acting as if an "on-going emergency" is happening*. Only one minute after the officer in charge of the scene directed officers down the street to search for the shooter, no less than five police officers are visible surrounding the victim from the dashboard camera. *At this point the police questioning of Baur takes a turn toward establishing who the shooter is in relation to Baur rather than physically locating the shooter*. The officers are heard asking Baur[,] "How do you know him?" and[,] "Where did you meet him?" Furthermore, after an officer inspects the interior of Baur's car and finds narcotics inside, he questions Baur as to the motive of the meeting, inquiring[,] "You buying dope man? You got dope in the car." *As time goes on in the video, it becomes more and more apparent that there is no concern that an active shooter will return to the scene.* At one point there are approximately eight police officers surrounding Baur and bombarding him with questions about the shooter.

Appellant's Brief at 27-28 (citations to the record omitted; emphasis added).

The above-emphasized portions of Appellant's argument acknowledge that Baur's initial statements to police that the shooting occurred "up the street" and that "Hays" was the shooter were made when the interrogating

officers' primary purpose was to assist in an ongoing emergency. ***See Davis***, 547 U.S. at 822. Accordingly, those statements by Baur were nontestimonial and properly admitted by the court. ***Id.*** While Appellant goes on to present a cogent argument that the 'ongoing emergency' ceased "[a]fter the initial search of the area for the shooter," Appellant does not identify any statements made by Baur during *that portion* of the video recording that were improperly admitted. Instead, he only identifies questions the officers asked of Baur. Accordingly, Appellant has failed to establish what, if any, statements by Baur were admitted in violation of the Confrontation Clause.[1]

In sum, we reverse Appellant's conviction for robbery and vacate his sentence for that offense. We also reverse Appellant's conviction for persons not to possess a firearm, for which no penalty was imposed. We affirm Appellant's conviction and sentence for REAP, as well as his unchallenged conviction and sentence for first-degree murder.

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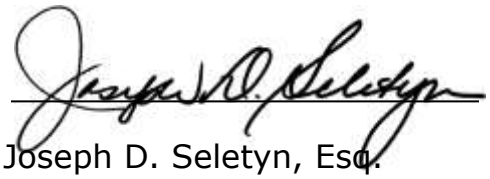
[1] We also note that even if the video recording, as a whole, was improperly admitted, that error would be harmless. Appellant does not challenge the admission of Officer Baker's testimony that Baur stated "Hays" was the shooter. Therefore, the admission of the video recording of Baur repeatedly making this same statement to Officer Baker and other responding officers was merely cumulative of Officer Baker's testimony. ***See Commonwealth v. Bond***, 652 A.2d 308, 314 (Pa. 1995) (concluding that every infringement of a defendant's right of confrontation does not constitute reversible error and may constitute harmless error); ***see also Commonwealth v. Romero***, 722 A.2d 1014, 1019 (Pa. 1999) ("[T]his Court has considered an error to be harmless where the improperly admitted evidence is merely cumulative of substantially similar, properly admitted evidence.") (citation omitted).

Judgment of sentence reversed in part, affirmed in part. Jurisdiction relinquished.

Judgment Entered.



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Date: 8/21/2015