NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellant v. DONTE HILL Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2992 EDA 2011

Appeal from the Judgment of Sentence June 23, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0002983-2009

BEFORE: LAZARUS, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J.: **FILED AUGUST 09, 2013**

Donte Hill appeals the judgment of sentence imposed on June 23, 2011, in the Court of Common Pleas of Philadelphia County. A jury convicted Hill of murder of the first degree and possessing an instrument of crime (PIC).[1] The trial court sentenced Hill to a mandatory sentence of life imprisonment on the murder charge, and a concurrent sentence of one to five years' imprisonment on the PIC charge. In this appeal, Hill challenges: (1) the sufficiency of the evidence, (2) the weight of the evidence, (3) the trial court's ruling allowing police testimony regarding the meaning of the tattoo on Hill's face, (4) the trial court's ruling allowing the victim's dying

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 2502(a), and 907(a), respectively.

declaration into evidence, and (5) the trial court's jury instruction concerning the testimony of Commonwealth witness, Cornell Drummond. Based upon the following, we affirm.

The parties are well acquainted with the facts and procedural history of this case, which are ably set forth in the trial court's opinion and, therefore, we do not recite them here. ***See*** Trial Court Opinion, 1/13/2012, at 1–3.

In response to the issues raised by Hill, the trial court has provided a thorough and well-reasoned discussion explaining why these claims are meritless. ***See id.*** at 4–6 (finding: (1) evidence was sufficient to prove all elements of murder of the first degree and PIC, where (a) the victim, mortally wounded, told police "Tae from the Avenue shot me," (b) Hill stipulated his nickname was "Tae," (c) Detective Joseph Bamberski testified that Hill's tattoo with the letters "LA" was associated with people living in the neighborhood of 56th Street and Lansdowne Avenue, and that Hill lived on 56th Street just one block below Lansdowne Avenue, (d) the description of the shooter's vehicle by the victim in his dying declaration (a "red truck") and Commonwealth witness Monica Caravajal (a "red Jeep") was significant since Commonwealth witness Hakeem Johnson testified that on a day prior to the shooting he had seen Hill driving a red truck, (e) Commonwealth witness Cornell Drummond testified Hill told him he was paid $15,000 to kill the victim and that he had "emptied the whole clip" into the victim, and (f) the medical examiner testified the victim was shot 11 times in his torso, lower extremities and upper extremities; (2) the claim that the verdict was

against the weight of the evidence was meritless as the evidence plainly established that Hill was guilty of the charges of which he was convicted[2]; (3) the testimony of Detective Bamberski that the letters "LA" tattooed on Hill's face denote individuals who live at 56th Street and Lansdowne Avenue was not "pure speculation" and did not suggest some type of gang activity, as the detective's testimony was based on his personal knowledge acquired during his long experience as a police officer and homicide detective, during which time he had seen the same tattoo as was on Hill's face on many occasions, and was proffered to show that the victim had referenced Hill in stating the shooter was "Tae from the Avenue," without any hint that it had any connotation other than the designation of a neighborhood in the city; (4) the admission of the victim's dying declaration that "Tae from the

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[2] Recently, the Pennsylvania Supreme Court reiterated the proper standard of review for a weight claim:

> Appellate review of a weight claim *is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence.* Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (citation omitted) (emphasis added).

Avenue" shot him and left in a "red truck" (a) did not violate Hill's constitutional right to confrontation, and (b) Hill's claim that "[t]he court erred in speculation as to what the dying declaration's words meant when he talked about the avenue" is incomprehensible and not addressed; and (5) Hill's request for a jury instruction that Drummond's testimony should be viewed with "care and caution" was untimely and, even if timely, Hill was not entitled to that instruction where the court gave an instruction regarding Drummond's credibility and a general instruction on the credibility of witnesses). As we agree with the sound analysis expressed by the Honorable Glenn D. Bronson, we adopt the trial judge's reasoning as dispositive of the issues raised in this appeal.

We simply add further comment related to the issue of the admission of the victim's dying declaration. The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant [] had a prior opportunity for cross-examination." ***Crawford v. Washington***, 541 U.S. 36, 53–54 (2004). The United States Supreme Court has described the distinction between "testimonial" statements and "nontestimonial" statements as follows:

> Statements are nontestimonial 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. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006) (footnote omitted). The Supreme Court has further explained that a court should

> determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimony because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.

Michigan v. Bryant, ___ U.S. ___, ___, 131 S. Ct. 1143, 1162 (2011) (footnote omitted).

Hill argues "there are clearly testimonial aspects to [the victim's] dying declaration since the police repeatedly questioned the decedent about who shot him. This was not volunteered information." Hill's Brief at 37. Hill maintains that "this particular statement of the decedent was not for the purposes of protecting officers from any danger [as t]here was no one else around. … This was a statement that was taken for the purpose of gaining evidence, which was testimonial in nature." ***Id.*** at 38–39. Therefore, Hill contends "his right to confront a witness pursuant to the Sixth and Fourteenth Amendments of the United States Constitution was violated by

the introduction of the dying declaration that resulted [from] questioning." ***Id.*** at 39. We are not persuaded by this argument.

In the present case, when police located the victim, they asked who shot him, and the victim's response was "Get me to the hospital. I'm dying." N.T., 6/21/2011, at 41. Police kept asking the victim who shot him, and, as the victim was being loaded into a police car for transport to the hospital, the victim answered "Tae from the Avenue," and replied to a further question by stating that "He left in a red truck." ***Id.*** Contrary to the argument of Hill, the totality of the circumstances plainly indicates that the primary purpose of the questioning was to enable police to respond to an ongoing emergency. ***See Bryant, supra*** at 1158 (stating that "[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue."). Therefore, we agree with the trial court that the victim's statements to police were nontestimonial, and the Confrontation Clause did not bar the admission of this evidence at trial.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 8/9/2013

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

DONTE HILL

CP-51-CR-0002983-2009

OPINION

BRONSON, J.

January 13, 2012

On June 23, 2011, following a jury trial before this Court, defendant Donte Hill was convicted of one count of murder of the first degree (18 Pa.C.S. § 2502(a)) and one count of possessing an instrument of crime ("PIC") (18 Pa.C.S. § 907(a)).[1] The Court immediately imposed the mandatory sentence of life in prison for the murder charge (18 Pa.C.S. § 1102(a)(1)), and imposed a concurrent sentence of one to five years incarceration for the PIC charge. The Court denied post-sentence motions on October 7, 2011.

Defendant has now appealed from the judgment of sentence entered by the Court on the grounds that: 1) the evidence was insufficient to support the verdict; 2) the verdict was against the weight of the evidence; 3) the Court erred in permitting a detective to testify that the letters "LA," which were tattooed on the defendant's face, denote individuals who live at 56th Street and Lansdowne Avenue, since that testimony was "pure speculation" and tainted the jury by implying gang activity; 4) the Court erred in not charging the jury that witness Cornell Drummond's testimony should be accepted only with "care and caution;" 5) the admission of the decedent's dying declaration violated defendant's rights under the Confrontation Clause; and

[1] This was defendant's second trial for this case. The first trial, which took place before the Honorable Judge Carolyn Temin in August 2010, resulted in a hung jury.

Exhibit "A"

6) "[t]he Court erred in speculation as to what the dying declaration's words meant when he talked about the avenue." Statement of Errors Complained of on Appeal ("Statement of Errors") at ¶¶ 1-7.[2] For the reasons set forth below, defendant's claims are without merit and the judgment of sentence should be affirmed.

I. FACTUAL BACKGROUND

At trial, the Commonwealth presented the testimony of Hakeem Johnson, Monica Caravajal, Cornell Drummond, Dr. Gary Collins, Crime Scene Investigator Karen Auerweck, Philadelphia Police Officers Jason Wentzell, Alexander DeJesus, Edward Nelson, Francesco Campbell and Travis Wolfe, and Philadelphia Detectives Grady Patterson and Joseph Bamberski. Viewed in the light most favorable to the Commonwealth as the verdict winner, their testimony established the following.

On July 20, 2008, Monica Caravajal was awakened in her home at the 4200 block of Parkside Avenue at approximately 1:50 a.m. by the sound of several gunshots. N.T. 6/21/2011 at 145-147. Ms. Caravajal rose from her bed and looked out the window, to the rear lot in back of her house. N.T. 6/21/2011 at 146. She then saw someone get into the driver's side of what appeared to her to be a red Jeep and watched as the person backed the Jeep out of the lot. N.T. 6/21/2011 at 147-148, 155, 161-162.

At 2 a.m., Philadelphia Police Officers Jason Wentzell and Alexander DeJesus were on duty patrolling when they received a radio call that there were shots fired at the 4200 block of Parkside Avenue. N.T. 6/21/2011 at 30-31, 61-62. Officers Wentzell and DeJesus arrived at 4280 Parkside Avenue, which was the empty lot behind Ms. Caravajal's apartment. N.T.

[2] For ease of disposition, defendant's claims have been reorganized in this opinion as follows: the weight and sufficiency of the evidence claims, combined in Statement of Errors ¶ 1, are addressed separately; and the dying declaration claims set forth in Statement of Errors ¶¶ 5 and 6, have been combined.

6/21/2011 at 31-32. The officers heard a voice cry out, "[h]elp, I'm shot." N.T. 6/21/2011 at 31. Officers Wentzell and DeJesus made their way to the rear of the lot, where they found the victim, Raheem Ellis, lying halfway inside of a parked car. N.T. 6/21/2011 at 36, 40. Mr. Ellis, who had been shot eleven times and was bleeding profusely, told the officers he was dying and asked to be taken to a hospital. N.T. 6/21/2011 at 40-41, 167. At this point, other police officers, including Officer Travis Wolfe, began to arrive. N.T. 6/21/2011 at 40. Paramedics had not yet arrived, so the officers loaded Mr. Ellis into a patrol car to take him to the hospital. N.T. 6/21/2011 at 41. As he was being transported, Mr. Ellis repeatedly stated to officers that he was dying. N.T. 6/21/2011 at 41. Officer Wolfe asked him who shot him, to which he replied "Tae[3] from the Avenue shot me." N.T. 6/21/2011 at 41, 217. Officer Wolfe asked him how "Tae" had left the scene, and Mr. Ellis said that he had left in a red truck. N.T. 6/21/2011 at 219. Mr. Ellis died shortly after the officers transported him to Hahnemann Hospital. N.T. 6/21/2011 at 43, 220-221.

Hakeem Johnson was Mr. Ellis's cousin. N.T. 6/21/2011 at 106. On two or three occasions when Mr. Johnson was visiting Mr. Ellis in his neighborhood, Mr. Ellis pointed out the defendant to him. N.T. 6/21/2011 at 115-116. On one of those occasions, defendant was driving a red truck. 6/21/2011 at 117-118.

Cornell Drummond grew up with the defendant and knew him for nearly all of his life. N.T. 6/22/2011 at 64-65. Within a month of the murder of Mr. Ellis, defendant told Mr. Drummond that defendant was paid $15,000 to kill Mr. Ellis, and that he had "emptied the whole clip" into him. N.T. 6/22/2011 at 66-68, 72-73. During that conversation, defendant lifted up his shirt and showed Mr. Drummond a gun. N.T. 6/22/2011 at 72.

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[3] Throughout the notes of testimony, defendant was frequently referred to as either "Tae" or "Tay." It was stipulated that this was defendant's nickname, short for "Dante." N.T. 6/22/2011 at 116.

II. DISCUSSION

A. Sufficiency of the Evidence

Defendant claims that the evidence in this case was insufficient to support his conviction for first-degree murder. Statement of Errors at ¶ 1. This claim is without merit.

In considering a challenge to the sufficiency of the evidence, the Court must decide whether the evidence at trial, viewed in the light most favorable to the Commonwealth, together with all reasonable inferences therefrom, could enable the fact-finder to find every element of the crimes charged beyond a reasonable doubt. *Commonwealth v. Little*, 879 A.2d 293, 297 (Pa. Super. 2005), *appeal denied*, 890 A.2d 1057 (Pa. 2005). In making this assessment, a reviewing court may not weigh the evidence and substitute its own judgment for that of the fact-finder, who is free to believe all, part, or none of the evidence. *Commonwealth v. Adams*, 882 A.2d 496, 498-99 (Pa. Super. 2005). "[A] mere conflict in the testimony of the witnesses does not render the evidence insufficient." *Commonwealth v. Montini*, 712 A.2d 761, 767-68 (Pa. Super. 1998) (quoting *Commonwealth v. Moore*, 648 A.2d 331, 333 (Pa. Super. 1994), *appeal denied*, 655 A.2d 512 (Pa. 1995)). The Commonwealth may satisfy its burden of proof entirely by circumstantial evidence, and "[i]f the record contains support for the verdict, it may not be disturbed." *Adams*, 882 A.2d at 499 (quoting *Commonwealth v. Burns*, 765 A.2d 1144, 1148 (Pa. Super. 2000), *appeal denied*, 782 A.2d 542 (Pa. 2001)).

"The evidence is sufficient to establish first-degree murder where the Commonwealth proves that (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with the specific intent to kill." *Commonwealth v. Edwards*, 903 A.2d 1139, 1146 (Pa. 2006) (quoting 18 Pa.C.S. § 2502(d)). The specific intent to kill can be inferred "from the manner in which the homicide was committed, such as, multiple gunshot wounds." *Commonwealth v. Hughes*, 865 A.2d 761, 793 (Pa. 2004).

Here, there was ample evidence from which a reasonable juror could conclude that defendant killed Mr. Ellis and that he acted with the specific intent to kill. Officer Wolfe testified that as Mr. Ellis lay mortally wounded, he told Officer Wolfe that "Tae from the Avenue shot me." N.T. 6/21/2011 at 41, 217. Defendant stipulated that his nickname was "Tae." N.T. 6/22/2011 at 116. With regard to Mr. Ellis's reference to "the Avenue," Detective Bamberski testified that the tattoo of the letters "LA" on defendant's face was associated with people who live in the neighborhood of 56th Street and Lansdowne Avenue. N.T. 6/22/2011 at 41-42. He also testified that defendant actually lived on 56th Street just one block south of Lansdowne Avenue. N.T. 6/22/2011 at 39. A description of the shooter's vehicle was given both by Mr. Ellis, in his dying declaration, and by Ms. Caravajal. Mr. Ellis stated that the shooter had left in a "red truck" and Ms. Caravajal testified that she saw a "red Jeep" leaving the scene of the shooting immediately after she had heard gunshots. N.T. 6/21/2011 at N.T. 6/21/2011 at 41, 147, 207, 219. This was significant since Mr. Johnson, on a day prior to the shooting, had seen defendant driving a red truck. N.T. 6/21/2011 at 117-118. There was also compelling evidence that defendant bragged about the killing. According to Mr. Drummond, defendant told him that he was paid $15,000 to kill Mr. Ellis, and that he had "emptied the whole clip" into him. N.T. 6/22/2011 at 66-68, 72-73. Finally, the medical examiner testified that Mr. Ellis was shot eleven times in his torso, lower extremities, and upper extremities. N.T. 6/21/2011 at 167. All of this was compelling evidence that defendant intentionally killed Mr. Ellis and was guilty of first degree murder.

B. Weight of the Evidence

Defendant next claims that the verdict in this case was against the weight of the evidence. Statement of Errors at ¶ 1. This claim is without merit.

It is well-established that a new trial may only be granted by the trial court where "the verdict was so contrary to the weight of the evidence as to shock one's sense of justice." *Commonwealth v. Hunter*, 554 A.2d 550, 555 (Pa. Super. 1989). Moreover, credibility determinations are solely within the province of the fact-finder, and "an appellate court may not reweigh the evidence and substitute its judgment for that of the finder of fact." *Commonwealth v. Gibson*, 720 A.2d 473, 480 (Pa. 1998), *cert. denied*, 528 U.S. 852 (1999). In considering a claim that the trial court erred in refusing to find that a verdict was against the weight of the evidence, "appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." *Commonwealth v. Champney*, 832 A.2d 403, 408 (Pa. 2003), *cert denied*, 542 U.S. 939 (2004).

The evidence outlined above plainly established that defendant was guilty of the charges of which he was convicted. Because the evidence fully supported the verdict, the Court did not abuse its discretion in denying defendant's motion for a new trial.

C. "LA" Tattoo

Defendant next claims that the Court erred by allowing Detective Joseph Bamberski to testify that the letters "LA," which defendant had tattooed on his face, denote individuals who live at 56th Street and Lansdowne Avenue. Defendant claims that this testimony was "pure speculation" and tainted the jury "because it might suggest some kind of gang type activity." Statement of Errors at ¶ 2. This claim is without merit.

Rather than being speculative, Detective Bamberski's testimony regarding the "LA" tattoo was premised upon personal knowledge acquired during his long experience as a police officer and homicide detective in Philadelphia. In particular, Detective Bamberski testified that he had been a police officer for 30 years, with 16 years of experience in the homicide division.

N.T. 6/22/2011 at 30. He testified that during his time in the Police Department, he had seen the same tattoo that was on the face of the defendant on many occasions, and that in his experience, the tattoo was associated with people who live in the neighborhood of 56th Street and Lansdowne Avenue. N.T. 6/22/2011 at 41-43. There is no support in the record for defendant's claim that Detective Bamberski's testimony was in any way speculative.

Similarly, the record belies defendant's claim that the testimony about the "LA" tattoo implied that defendant was involved with gang activity. The testimony was proffered to establish that when the decedent, Mr. Ellis, told police that he had been shot by "Tae from the Avenue," he was referring to defendant, who lived on 56th Street near Lansdowne Avenue. That defendant had his neighborhood designation tattooed on his face was highly probative evidence that he was known by Mr. Ellis to be from "the Avenue." Because the identity of the shooter was the primary issue in the case, this was critically important evidence. There is no hint anywhere in the record that the tattoo designated any gang or gang activity, or that it had any connotation other than the designation of a neighborhood in the city. N.T. 6/22/2011 at 41-43. Accordingly, defendant's claim in wholly without merit.

D. Jury Instruction Regarding Witness Cornell Drummond

Defendant next claims that the Court erred in not charging the jury that witness Cornell Drummond's testimony should be accepted with "care and caution" since he received substantial benefits in connection with his own criminal cases in exchange for testifying against the defendant. Statement of Errors at ¶¶ 3-4. This claim is without merit.

Under Rule 647 of the Pennsylvania Rules of Criminal Procedure, requests for jury instructions "shall be submitted within a reasonable time before the closing arguments...." The Rule further provides that "[b]efore closing arguments, the trial judge shall inform the parties on

the record of the judge's rulings on all written requests...." Pa. R. Crim. P. 647. Here, at a charging conference held during the trial, the Court advised defense counsel that it intended to give an instruction to the jury regarding witness Drummond that would direct the jury to consider Mr. Drummond's open case and his cooperation agreement with the Commonwealth in evaluating the credibility of Mr. Drummond's testimony. N.T. 6/21/2011 at 253-254. The language of that charge, which the Court read to the attorneys, did not include an instruction that the testimony be received with "care and caution." Nevertheless, defense counsel, after hearing the proposed charge, stated, "That's exactly what I want." N.T. 6/21/2011 at 253-254. During the conference, the Court advised counsel, consistent with Rule 647, that the Court "will take any suggestions for charges any time up to closing." N.T. 6/21/2011 at 248. Nevertheless, defense counsel waited until after both he and the prosecutor had completed their closing arguments to request a different charge regarding Mr. Drummond. N.T. 6/22/2011 at 185. This request was, therefore, properly denied as untimely.

Moreover, even if the request had been timely made, it still would have been properly rejected. It is true that when an *accomplice* testifies at trial, the defendant is entitled to an instruction that the accomplice is "a corrupt and polluted source" and that the accomplice's testimony "should be considered with caution." *Commonwealth v. Hanible*, 30 A.3d 426, 462 (Pa. 2011). It is undisputed, however, that Mr. Drummond was not an accomplice of the defendant. Mr. Drummond, who knew both defendant and the decedent, was called as a witness to recount alleged incriminating statements that the defendant made to him after the day that the decedent, Mr. Ellis, was shot and killed. Mr. Drummond also testified that the defendant showed him a gun sometime after the killing. N.T. 6/22/2011 at 64-76. Nowhere in the record is there any suggestion of any involvement in the murder by Mr. Drummond.

While it is true that Mr. Drummond had an open criminal case and a cooperation agreement with the Commonwealth, that did not entitle defendant to an instruction that Mr. Drummond's testimony be received with "care and caution." The Court's general instructions to the jury to consider the potential bias or interest of any witness was all that was required. *See Commonwealth v. Slyman*, 483 A.2d 519, 529 (Pa. Super. 1984) (no special instruction beyond standard bias and interest charge is required regarding informants); *see also* Advisory Committee Note to Pa. SSJI 4.06 (Crim 2d Ed. 2005) (cautionary instruction regarding informants with penal or pecuniary interest in testifying favorably for the Commonwealth not required if jury charge includes general instruction on bias and interest).

Accordingly, the instruction given by the Court, directing the jury to consider Mr. Drummond's open criminal case and cooperation agreement in evaluating his credibility, *see* N.T. 6/23/2011 at 18-19, combined with the Court's general instruction to the jury on the credibility of witnesses, *see* N.T. 6/23/2011 at 13-15, was more than the law requires. No relief is due.

E. Admission of Dying Declaration

Police Officers DeJesus and Wolfe were the first officers on the scene after Mr. Ellis was shot. Mr. Ellis said to the officers, "[h]elp me, help me, I'm dying." N.T. 6/21/2011 at 40. En route to the hospital, shortly before Mr. Ellis died, the officers asked him who shot him. Mr. Ellis responded that "Tae from the Avenue shot me," and that he had left in a "red truck." N.T. 6/21/2011 at 41, 217, 219. This evidence was admitted as a dying declaration pursuant to Rule 804(b)(2) of the Rules of Evidence, which provides an exception to the hearsay rule for "[a] statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death."

Pa.R.E. 804(b)(2). Defendant now claims that the admission of these statements violated defendant's constitutional right of confrontation. Statement of Errors at ¶¶ 5-6. This claim is without merit.

Since the decision of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 68 (2004), "testimonial" out-of-court statements from a declarant who does not testify at trial, even when falling within a well-established exception to the hearsay rule, will be barred from evidence by the Sixth Amendment's Confrontation Clause unless the witness was unavailable to testify and was previously subject to cross-examination. *See Commonwealth v. Abrue,* 11 A.3d 484, 488 (Pa. Super. 2010), *appeal denied,* 21 A.3d 1189 (Pa. 2011). In *Crawford,* however, the Supreme Court stated that there may be an exception to this rule for testimonial dying declarations. *Crawford,* 541 U.S. at 56 n.6. While no Pennsylvania appellate court has yet addressed this issue, other states that have addressed it appear to have uniformly held that testimonial dying declarations are not subject to the bar of the Confrontation Clause. *See, e.g., People v. D'Arcy,* 226 P.3d 949, 973 (Cal. 2010); *State v. Calhoun*, 657 S.E.2d 424, 427 (N.C. App. 2008), *appeal denied*, 621 S.E.2d 651 (N.C. 2008); *Cobb v. State*, 16 So. 3d 207, 212 (Fla. Dist. Ct. App. 2009), *appeal denied*, 37 So. 3d 846 (Fla. 2010); *People v. Graham*, 910 N.E.2d 1263, 1270 (Ill. App. Ct. 2009), *appeal denied*, 920 N.E.2d 1076 (Ill. 2009). In the case at bar, the Court need not reach this issue, since the relevant statements are plainly not testimonial and for that reason are not barred by the Confrontation Clause.

The Supreme Court of the United States has set forth the test for determining whether a statement is testimonial or non-testimonial, as follows:

> Statements are non-testimonial 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. They are testimonial when the

> circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 827 (2006). Accordingly, "[a] statement is *non-testimonial* 'if it is made with the purpose of enabling police to meet an ongoing emergency.'" *Abrue,* 11 A.3d at 491 (emphasis in original). Questioning by police in an attempt to "establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon," is properly directed toward meeting an ongoing emergency, and therefore, any statements made in response to such questions would not be testimonial. *See Davis,* 547 U.S. at 827.

Here, the statement at issue was given by Mr. Ellis who, moments before police arrived, had been mortally wounded by an assailant who was armed with a firearm, willing to shoot an unarmed man, and still at large. The questioning by police consisted solely of asking Mr. Ellis who had shot him and how that person had left the scene of the crime. N.T. 6/21/2011 at 41. Undoubtedly, these questions were designed to identify the shooter to protect the police and the public from encountering an armed and dangerous criminal. Therefore, Mr. Ellis's statements to the police, in which he identified his assailant as "Tae from the Avenue," and stated that the assailant fled in a "red truck," were not testimonial. Accordingly, the admission of these statements could not have violated defendant's right of confrontation.

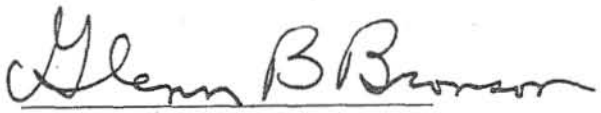
F. Speculation Regarding the Meaning of the Dying Declaration

Defendant's final claim on appeal, set forth in its entirety, is as follows: "The Court erred in speculation as to what the dying declaration's words meant when he talked about the avenue." Statement of Errors at ¶ 7. The Court finds this claim, as stated, to be incomprehensible, and therefore is unable to address it in this opinion.

III. CONCLUSION

For all of the foregoing reasons, the Court's judgment of sentence should be affirmed.

BY THE COURT:



GLENN B. BRONSON, J.