NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. OMAR FULTON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1487 EDA 2012

Appeal from the Judgment of Sentence May 2, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0005711-2011

BEFORE: BENDER, BOWES, and LAZARUS, JJ.

MEMORANDUM BY BOWES, J.: **FILED MAY 08, 2013**

Omar Fulton appeals from the aggregate judgment of sentence of seven to thirty years imprisonment imposed by the trial court following his convictions for robbery, conspiracy to commit robbery, and burglary. We affirm.

The trial court relayed the facts in the following manner.

> Mr. Leroy Buchanan, occupant at 14 South Salford Street in Philadelphia, testified that on April 4, 2011, at approximately 5:30 p.m., he was at home with his roommate's girlfriend, Donna, when he saw someone knock on his security door. He saw two men that he knew, "Will and Omar," and despite being told by Donna to not open the door, he let them inside. Mr. Buchanan knew Omar as he saw him "basically every day," and he had previously come into Mr. Buchanan's house. Mr. Buchanan also knew who Will was and had seen him "every day" on Salford Street "for over a year." When they entered, "Will went up the steps" but "Omar went to the door to call Fifty (Christopher Williams) to the house". Mr. Buchanan knew who Fifty was "because he stay [sic] across the street."

When Fifty came in, he hit and pushed Mr. Buchanan onto the couch and told him to "shut up, shut the F up and sit down, be quiet," and Omar took out a black gun and put it to Mr. Buchanan's head and repeatedly asked "where's it at". Mr. Buchanan testified this gun "looked like a nine millimeter" and showed by way of hands that it was about nine inches long. Mr. Buchanan had previously told Omar that he received a Social Security disability check. Mr. Buchanan testified that his money was located upstairs in a drawer and that both Omar and Will went upstairs during this robbery. When Mr. Buchanan tried to get up off the couch and get to the door "they pushed him on the wall" and "Fifty told Omar to hit him with the back of the gun." Omar slowly hit him with the gun, so Mr. Buchanan was able to put up his hand to block his face. Omar instructed Mr. Buchanan to go to the kitchen, but Mr. Buchanan instead opened the basement door that is right next to the kitchen door and ended up sliding down to the basement. Omar followed Mr. Buchanan to the basement and continued asking[,] "where is it."

Eventually Donna came downstairs to the basement and informed Mr. Buchanan that the offenders had left. When Mr. Buchanan came up from the basement he saw that his "living room was torn up" as his "couch was turned over" and "pictures was [sic] all over the place". At some point after this, Mr. Buchanan checked upstairs in his drawer and found that $350 was missing. Mr. Buchanan testified that Donna did not call the cops because she "didn't want to be involved" and he could not call the cops because he cannot hear. Mr. Buchanan's girlfriend, Nina, came home about 20 minutes later and, after being told what happened, eventually called the cops despite being hesitant to do so. Mr. Buchanan testified that people who cooperate with the police and testify are called "snitches" in the neighborhood and that he and Nina were concerned because they still had to live there. Mr. Buchanan further explained that Donna moved out the same day of the incident and he did not know her subsequent whereabouts.

Philadelphia Police Officer Scott McLane testified that on April 4, 2011, at approximately 5:53 p.m., he and his partner, Police Officer David Chisholm, were on duty in the 18th district and responded to a radio call for a "robbery in progress at 14 South Salford." From the time they received the call to the time they arrived on the scene was "not even a minute". When they

arrived at the scene they encountered the complainant, Leroy Buchanan, and an unidentified female. Mr. Buchanan was "hysterical, upset, very angry," and "hard to understand," because, as they later learned, Mr. Buchanan is deaf.

Officer McLane and Officer Chisholm approached Mr. Buchanan to attempt to get information about what had happened so [they] could put out "flash information" to other officers about the offenders. Mr. Buchanan communicated that he had been robbed at point of gun by three black males and that they had taken $350 from him. At the scene, Mr. Buchanan described the offenders in detail: the first was named "Omar" and had "light skin, white T-shirt, blue jeans, with a black handgun," the second was "wearing a blue and white T-shirt" and the third was wearing "blue jeans." Mr. Buchanan and his female companion were taken to Southwest Detectives so he could calm down and be able to give a better "description of who the offenders were" so officers could "get a better idea of what exactly happened." Officer McLane testified that in the vehicle on the way to Southwest, Mr. Buchanan said he did "know who the offenders were."

Philadelphia Detective Tyrone Davis testified that on the evening of April 4, 2011, he conducted a formal interview with Mr. Buchanan at Southwest Detectives. Mr. Buchanan was interviewed and gave a statement that included the street names and nicknames of the men who had robbed him, as well as Omar and Will's cell phone numbers. Mr. Buchanan also told Detective Davis that Donna had been present for the robbery, but gave only her first name and said that she did not want to be involved. He was also shown three photo spreads by Detective Davis and picked out Omar Fulton from the first, Fifty from the second, and William Bradley from the third by pointing to each offender, circling their picture, and signing his name under the picture. Detective Davis submitted warrants of arrest to the District Attorney's Office for Christopher Williams, Omar Fulton, and William Bradley.

Mr. Buchanan testified that on April 5, 2011, just before two o'clock in the afternoon, he had his girlfriend call the police because he saw Fifty and Will across the street at 19 South Salford. Philadelphia Police Officer Clifford Gilliam testified that on April 5, 2011, at approximately 1:40 p.m., he and his partner, Officer Laura Maynard, responded to a priority radio call

at 19 South Salford Street. [The] [o]fficers encountered Mr. Buchanan who was "screaming, and saying that he just saw the guys who had robbed him previously". Based on what Mr. Buchanan told Officer Gilliam, multiple responding officers spread out around the house and eventually Sergeant Stanford made the decision to knock on the front door and go into the house. Multiple officers entered the residence at 19 South Salford to conduct a walk-through to see who was in the property. Officer Gilliam went upstairs to the second floor and cleared the property room by room, making sure to look in "anyplace where an actual person could hide." Officer Gilliam found a closed door which he banged on multiple times while yelling "is anyone in here?" When he tried the knob, the door "didn't open right away," and he had to use some force to get into the bathroom. Officer Gilliam testified that he did not hear water running or the toilet flush and, in fact, heard no noise. When officers entered the bathroom they found Christopher Williams in a small space between the tub and the toilet. Mr. Williams was taken downstairs and outside to the front porch at which time Mr. Buchanan identified Mr. Williams as one of the men who had robbed him the day before. Upon identification, Mr. Williams was arrested and transported to Southwest Detectives.

Philadelphia Police Officer Laura Maynard testified that on April 5, 2011, at approximately 1:40 p.m., she responded to a radio call at 19 South Salford Street. Officer Maynard and other responding officers waited for their supervisor to arrive and then she and a sergeant went down to the basement after she "heard a noise down the basement." Officer Maynard saw "a pair of shoes" and what "looked like a person's silhouette, which the knees were bent" underneath the basement stairs. The individual lying down was ordered out and taken into custody. He was then taken outside where Mr. Buchanan was able to identify him as one of the offenders from the robbery the day before. This offender was identified as William Bradley and it was stated that he was not in court during this trial.

Philadelphia Police Officer David Chisholm testified that on April 4, 2011, at approximately 5:50 p.m., he responded to a radio call at 14 South Salford Street along with his partner, Officer Scott McLane. Officer Chisholm also testified that on April 7, 2011, a fellow police officer gave him information about the whereabouts of Omar Fulton and he subsequently went to

> 6147 Callowhill Street with multiple other officers because there was a warrant out for Mr. Fulton's arrest.
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> Upon arriving at 6147 Callowhill Street, some officers secured the back of the building while other officers, including Officer Chisholm, went around to the front. Officers rang the only doorbell for what appeared to be a duplex and a female opened the door. Officers looked up toward the second floor and saw a man they identified as Omar Fulton leaning out of the second floor apartment door. Officer Chisholm testified that he knew there was a warrant out for Omar Fulton's arrest and that he knew what Mr. Fulton looked like before he went to this location. Officer Gary McNeal knocked on the door of the second floor apartment for multiple minutes but got no response. At this time, Officer Chisholm decided to run around to the back of the building, roughly fifty feet. As Officer Chisholm approached the back side of the building, Officer [Alex] Nicholson and Officer [John] Hightower began yelling "he's coming out the back," and then shone their flashlight on the window and saw Mr. Fulton with one leg, one arm, and his face coming out of the window.
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> Officer Chisholm ran back around to the front and together with Officers McNeal and McLane went into the house and placed Mr. Fulton under arrest. Officer Chisholm testified that while officers were transporting Mr. Fulton, he asked what he was being arrested for, and upon being told he had a warrant for robbery, he said "it doesn't matter. You're not going to find my gun anyways."

Trial Court Opinion, 9/21/12 at 3-9 (internal citations omitted).

Appellant and Christopher Williams proceeded to a joint jury trial. The jury convicted Appellant of the aforementioned charges and the court sentenced him to seven to thirty years incarceration. This timely appeal ensued. The court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the trial court authored its Pa.R.A.P. 1925(a) opinion. The matter is now ready for disposition. Appellant raises the following issue for our

review, "Did the Trial Court commit reversible error when asked by the jury to redefine the crime of Robbery by implying to the jury that the Appellant had in fact entered the complainant's home and suggesting that the complainant would have been in fear of serious bodily injury?" Appellant's brief at 3.

Appellant's sole issue relates to the trial court's jury instructions. We abide by the following principles in analyzing a jury instruction.

> "It is axiomatic that, in reviewing a challenged jury instruction, an appellate court must consider the entire charge as a whole, not merely isolated fragments, to ascertain whether the instruction fairly conveys the legal principles at issue." ***Commonwealth v. Williams***, 557 Pa. 207, 732 A.2d 1167, 1187 (1999). "An instruction will be upheld if it clearly, adequately and accurately reflects the law. The trial court may use its own form of expression to explain difficult legal concepts to the jury, as long as the trial court's instruction accurately conveys the law." ***Commonwealth v. Spotz***, 563 Pa. 269, 759 A.2d 1280, 1287 (2000) (citation omitted).

Commonwealth v. Cook, 952 A.2d 594, 626-627 (Pa. 2008).

Appellant sets forth that, after the trial court instructed the jury, the jurors returned with two questions and a request for the court to define robbery. Specifically, the jury asked, "Is Chris Williams [Appellant's co-defendant] in conspiracy of having a gun?," and "On April 4 when did they go inside the house?" N.T., 3/8/12, at 62. The parties agreed that the court would re-read the definition of robbery and inform the jury that it must rely on its own recollection of the evidence. Appellant first contends that the court's response to the second question was error.

The court, in response to the second question, stated, "We discussed this before we brought you in, and everybody agreed that you just have to rely on your own recollection of the evidence, not because we have any disagreement of when it was, but the basic rule is you have to rely on your recollection of the evidence." N.T., 3/8/12, at 65. Appellant argues that the phrase, "not because we have any disagreement of when it was," implied to the jury that Appellant did enter Mr. Buchanan's home. He submits that he contested the entry into the home and that the instruction incorrectly inferred that defense counsel and the judge were in agreement that the prosecution established this fact.

In addition, Appellant asserts that the trial court provided erroneous and improper examples when re-defining robbery. The court charged the jury the second time on robbery as follows.

> The first element is that the defendant threatened the victim with serious bodily injury, or, practically the same thing, intentionally put the victim in fear of immediate serious bodily injury.
>
> So how serious was the threat? How much fear did the defendant or an accomplice or a coconspirator put into Mr. Buchanan? It's the fear of serious bodily injury, fear that if he doesn't do what he's being told to do he could get shot, which sometimes kills people. And when they don't die, they still lose the use of an arm or a leg or a kidney, temporarily or permanently. That's serious bodily injury. It's to distinguish this crime of robbery from something else that might still be a crime but where the threat is not so great.
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> And the second element is that this threat takes place during the course of committing a theft. That's what makes it a robbery. If you didn't have the theft part, it would just be an

> assault. But when you combine the assault with the act of committing a theft, that becomes a robbery. And you know that. You know what a robbery is. Put your hands up. Give me your money while I point a gun at you.

N.T., 3/8/12, at 66-67.

Appellant submits that the questions utilized by the court "essentially told [the jury] that Mr. Buchanan was threatened by the defendants, and that even though he did not suffer injury, he still could have feared being shot and injured." Appellant's brief at 14. He continues that the court's statement, "You know what a robbery is. Put your hands up. Give me your money while I point a gun at you[,]" N.T., 3/8/12, at 67, was "based almost completely on the facts of Appellant's case, and when read as a whole, it must be assumed that the jury was urged to convict Appellant[.]" Appellant's brief at 14. According to Appellant, the court's examples "gave a strong indication of its personal belief in Appellant's guilt." ***Id***. at 15.

The Commonwealth responds that Appellant's "interpretation is entirely divorced from context, and even then rests on a slender reed." Commonwealth's brief at 9. As to Appellant's initial argument, the Commonwealth highlights that the court instructed the jury that the jury was required to rely on its own recollection of the evidence. It also points out that the court repeatedly informed the jury that its verdict must be based on the jurors' recollection of the evidence and submits that the court's instruction did not erroneously mandate the jury to conclude that Appellant and his co-defendants entered the victim's home.

With respect to Appellant's secondary position, the Commonwealth counters that Appellant's position is waived because he did not object to the additional instruction on that ground. As to the merits, the Commonwealth maintains that the recharge was similar to the unobjected-to original instruction, and correctly set forth the law. Phrased differently, robbery can be established if it is proven that a person pointed a gun at someone and demanded that the victim give the assailant money.

We find that reading the jury instructions as a whole, Appellant is not entitled to relief. In response to the jury question about when Appellant and his cohorts entered the home, which indicated that the jury already decided that Appellant entered the victim's residence even before the court reinstructed the jury, the court reiterated that the jury's recollection of the evidence controlled. The court's passing reference that it could not provide a direct answer "not because we have any disagreement of when it was[,]" N.T., 3/8/12 at 65, did not impermissibly instruct the jury that it had to conclude that Appellant entered the house. Rather, it merely explained that it was irrelevant as to what the parties or the court believed was the testimony and that it was the jury's memory that counted.

In regards to Appellant's second argument, we note that Appellant's concise statement challenged the original jury instruction's reference to pointing a gun and not the re-instruction. Thus, the issue could be construed as waived on that ground. Additionally, we are in agreement with the Commonwealth that Appellant himself did not object to the court's

examples in the second instruction at issue on the basis he now argues. Nonetheless, we conclude that Appellant's argument does not entitle him to relief since it is well-established that a court may provide examples and the example herein was not erroneous. ***See Commonwealth v. Hobson***, 398 A.2d 1364, 1368 (Pa. 1979) (opining, "Appellant does not argue that this example was incorrect in portraying murder of the third degree, but, rather, argues that it closely approximates the facts of this case so as to be prejudicial. We do not agree that appellant was prejudiced."). Stating that pointing a gun at someone and demanding money may meet the elements of a robbery is not error since this is an accurate statement of the law. In addition, the instruction and example, where the facts of the case are analogous to the example, does not, without more, give rise to an impermissible direction to the jury to convict. ***Id***. The jury still was required to determine if the facts alleged were proven beyond a reasonable doubt, *i.e.*, did Appellant threaten the victim with a gun during the course of a theft.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/8/2013