NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JONATHAN MONTALVO, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1569 MDA 2013

Appeal from the Judgment of Sentence July 23, 2013
In the Court of Common Pleas of Luzerne County
Criminal Division at No.: CP-40-CR-0003581-2011

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

MEMORANDUM BY JENKINS, J. **FILED JULY 01, 2014**

Jonathan Montalvo was arrested for driving while intoxicated and weaving through traffic at 78 miles per hour in a 45 mile-per-hour zone with two passengers in his car, one of whom was an infant. A jury found Montalvo guilty of two counts of recklessly endangering another person ("REAP")[1], one count of endangering the welfare of a child ("EWOC")[2] and

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[1] 18 Pa.C.S. § 2705.

[2] 18 Pa.C.S. § 4304(a)(1).

other offenses[3]. In this direct appeal, Montalvo challenges the sufficiency of the evidence underlying his convictions for REAP and EWOC[4]. We affirm.

The trial court accurately summarized the evidence adduced during trial as follows:

> On July 2, 2011, Trooper Jere Ustonofski, a member of the Pennsylvania State Police, stationed in the Hazleton barracks, was on routine patrol and stationed on State Route 924, .2 miles west of Commerce Drive in Hazle Township, Pennsylvania.
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> Trooper Ustonofski had specialized training in DUI enforcement and field sobriety testing. He is a standardized field sobriety testing instructor and breath test operator, Trooper Ustonofski was familiar with the signs of intoxication, including slurred speech, odor of alcohol, glossy, shiny eyes and field sobriety testing and had investigated hundreds of cases of alcohol related incidents.
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> As Trooper Ustonofski was on duty on July 2, 2011, his marked vehicle was located in the Hazleton Township Fire Department parking lot facing the aforementioned State Route 924. He had a Genesis hand held directional radar device in his possession. He had conducted an internal calibration and a light test of the radar device and, further, had Certificates of Accuracy by the Department of Transportation and Certificates of Calibration indicating that the radar

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[3] Driving under the influence of alcohol ("DUI") (75 Pa.C.S. § 3802) and driving with a suspended license (75 Pa.C.S. § 1543).

[4] Although Montalvo claimed in his Pa.R.A.P. 1925 statement of matters complained on appeal that the evidence was insufficient to sustain his DUI conviction, he does not raise this issue in his appellate brief. Therefore, it is waived. Nor does Montalvo challenge his conviction for driving with a suspended license in this appeal.

device was calibrated and accurate. Moreover, Pennsylvania Bulletin Volume 40, No. 52, pages 7444 to 7446, dated December 25, 2010, indicated that the device used by the Trooper was an approved testing device under the Laws of the Commonwealth of Pennsylvania.

While stationed at the Hazleton Township Fire Department parking lot, Trooper Ustonofski saw a dark colored SUV in the left hand lane traveling southbound on State Route 924 at a high rate of speed. Upon activating his radar device, it was determined that the vehicle was traveling 78 miles per hour in a 45 mile per hour zone. Further, Trooper Ustonofski observed the Defendant swerve from the left lane to the right lane and pass a vehicle that was in the left lane at the aforementioned speed. As the Trooper put his vehicle into drive, he observed the Defendant make an abrupt right turn into the parking lot of a gas station, at which time the driver exited the vehicle and the passenger moved into the driver's seat. The Trooper ordered the Defendant back into the vehicle and upon approaching the vehicle observed 2 open beer cans in the center console and a child in the back seat who was identified as John Corrales, one (1) year old.

The Trooper engaged the Defendant in conversation at which time he detected the odor of an alcoholic beverage on the Defendant's breath. The Trooper then requested the Defendant to exit the vehicle so that he could perform a standardized field sobriety test. The Defendant informed the Trooper that he had consumed 12 beers overnight and had not gone to sleep. Further, he had slurred speech, glossy, shiny, and bloodshot eyes, and exhibited signs of impairment, which the Trooper described as alcohol impairment.

Thereafter, Trooper Ustonofski attempted to perform a field sobriety test consisting of a horizontal gaze nystagmus test upon the Defendant. Immediately after performing the aforementioned test, the

Trooper testified that the Defendant appeared to be skittish. The Trooper told the Defendant to turn around and put his hands behind his back. While the trooper was reaching for his handcuffs, the Defendant fled on foot. The Defendant was ultimately taken into custody. Prior to the Defendant attempting to flee, the Trooper had advised the Defendant he was under arrest for DUI and in custody. Ultimately, to take the Defendant into custody, the Trooper was required to tase the Defendant and handcuff him.

At that point in time, the Defendant was transported to the Hazleton State Police barracks and was requested to perform a breath test. The Trooper used the DL-26 PennDOT form, which included the ***O'Connell*** warnings when he requested the Defendant to undergo a breathalyzer test. The Defendant refused to submit to the breathalyzer test. The Defendant was given several opportunities to perform the test and repeatedly refused. The Defendant was ultimately Mirandized after the refusal, at which time the Defendant informed the Trooper that he was on his way to Amazon, a distribution center in the Humboldt Industrial Park, that he had consumed 12 beers during the course of the night, that he had not eaten all night or day, and that he was up all night and all day.

Trooper Ustonofski, based upon the 2 open beer cans in the vehicle, the strong odor of alcoholic beverage emanating from the breath of the Defendant, the admissions made by the Defendant that he drank 12 cans of beer during the course of the preceding evening, the evidence of bloodshot, glossy eyes, the existence of slurred speech and the failure to perform the sobriety test, coupled with the Defendant operating the vehicle at a high rate of speed while swerving between lanes of traffic, rendered the opinion that the Defendant was under the influence of an alcoholic beverage that impaired his ability to safely drive, operate or be in actual physical control of the movement of a motor vehicle.

> As previously noted, present in the vehicle were two (2) additional individuals, Leonard Montalvo's son, John Corrales and the Defendant's brother, Leonard Montalvo.

Trial Court Opinion, pp. 3-7 (citations to trial transcript omitted). We add two details. First, the "dash cam" in Trooper Ustonofski's patrol vehicle recorded the trooper's pursuit of Montalvo's vehicle as it weaved through traffic. N.T., 5/13/13, pp. 68-74, 85-90, 101. The trial court admitted the video into evidence, ***Id***., p. 74, but it is not included in the certified record of this case. Second, the trooper's testimony establishes that Montalvo weaved around two cars at a high rate of speed. Montalvo, the trooper explained, "was in the left lane when I got him on radar. And then he abruptly swerved in front of another vehicle, which I believe was the Honda Civic, and then he eventually passed by that white car on the right." ***Id***., p. 89.

On July 23, 2013, the trial court sentenced Montalvo to 14-60 months' imprisonment for DUI and shorter concurrent sentences for the two counts of REAP, the single count of EWOC and driving with a suspended license. N.T., 7/23/13, pp. 7-8. Montalvo filed a timely appeal to this Court. Both Montalvo and the trial court complied with Pa.R.A.P. 1925.

The lone argument Montalvo raises in his brief on appeal is that the evidence is insufficient to sustain his convictions for REAP and EWOC. Preliminarily, we must consider whether Montalvo waived this argument due to the absence from the certified record of the dash cam video depicting Montalvo's car speeding through traffic. Montalvo, as the appellant, has the

duty to ensure that the certified record is complete for purposes of review. ***Commonwealth v. Reed,*** 971 A.2d 1216, 1219 (Pa.2009). Failure to ensure that the record provides sufficient information to conduct a meaningful review constitutes waiver of the issue sought to be reviewed. ***Commonwealth v. Lopez***, 57 A.3d 74, 82 (Pa.Super.2012).

We will refrain from finding waiver based on our recent decision in ***In Re C.S.***, 63 A.3d 351 (Pa.Super.2013). There, a juvenile adjudicated delinquent for robbing a convenience store argued that the store's surveillance video showed that the adjudication was against the weight of the evidence. The Commonwealth responded that the video confirmed the store manager's version of events. Despite noting that we were unable to view the surveillance video due to its absence from the certified record, ***Id***., 63 A.3d at 358 n. 1, we did not find waiver. We rejected the merits of the juvenile's argument and stated that the surveillance video "apparently confirmed the store clerk's account of events." ***Id***. at 358.

In view of ***C.S.***, the omission of the dash cam video from the certified record in this case does not compel waiver. While we disapprove of Montalvo's failure to ensure that this exhibit is in the certified record, we are still able to review the sufficiency of the evidence based on the testimony in the trial transcript. We therefore proceed to the merits of Montalvo's argument.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super.2011), *appeal denied*, 32 A.3d 1275 (Pa.2011).

The REAP statute, 18 Pa.C.S.A. § 2705, prescribes: "A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." Driving under the influence of intoxicating substances "does not create legal recklessness *per se* but must be accompanied with other tangible indicia of unsafe driving to a degree that creates a substantial risk of injury which is consciously disregarded." ***Commonwealth v. Mastromatteo,*** 719 A.2d 1081, 1082 (Pa.Super.1998).

Thus, there is insufficient evidence of REAP (1) when the defendant drives while intoxicated with her young son in the car but drives very slowly and crosses the center line several times without coming close to other vehicles, ***Mastromatteo***, 719 A.2d at 1084; and (2) when the defendant is involved in a motor vehicle accident while intoxicated, injuring his three young daughters in the vehicle, where he merely uses "poor judgment in negotiating a left hand turn" instead of driving in a reckless manner. ***Commonwealth v. Hutchins***, 42 A.3d 302, 312 (Pa.Super.2012).

Conversely, we have found sufficient evidence of REAP (1) when the defendant drove one quarter mile in the wrong direction on an off-ramp while intoxicated, since this "tangible indicia of unsafe driving" sufficiently established the *mens rea* for REAP, ***Commonwealth v. Sullivan***, 864 A.2d 1246, 1250 (Pa.Super.2004), and (2) when the defendant weaved in and out of the roadway and other drivers for several miles, had a blood alcohol level of 0.21, and ultimately lost control of his car, striking the center barrier with enough force to blow out his front tire. ***Commonwealth v. Jeter***, 937 A.2d 466, 469 (Pa.Super.2007).

The evidence in the present case is similar to the evidence of REAP found sufficient in ***Sullivan*** and ***Jeter***. As in these decisions, Montalvo was not merely driving while intoxicated. He was driving *dangerously* while intoxicated by swerving past one vehicle at 78 miles per hour, 33 miles per hour over the speed limit, and barreling another vehicle while in the right-

hand, non-passing lane. This "tangible indicia of unsafe driving" warranted guilty verdicts on two counts of REAP, since there were two passengers in Montalvo's car (one of whom was only one year old).

The EWOC statute, 18 Pa.C.S. § 4304, provides in relevant part:

> (1) A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.
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> * * *
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> (3) As used in this subsection, the term 'person supervising the welfare of a child' means a person other than a parent or guardian that provides care, education, training or control of a child.

Id. Pennsylvania courts have established a three-part test that must be satisfied to prove EWOC:

> 1) [T]he accused [was] aware of his/her duty to protect the child;
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> 2) [T]he accused [was] aware that the child [was] in circumstances that could threaten the child's physical or psychological welfare; and
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> 3) [T]he accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.

Commonwealth v. Bryant, 57 A.3d 191, 197 (Pa.Super.1998). The purpose of the EWOC statute is to "prohibit a broad range of conduct in order to safeguard the welfare and security of our children." ***Id***. at 198

(citation omitted). Furthermore, "[t]he common sense of the community should be considered when interpreting the language of the statute." ***Id***.

Montalvo contends that the EWOC statute does not apply to him because he was not supervising the welfare of the one-year-old child in his car. We disagree for the reasons cogently presented by the trial court:

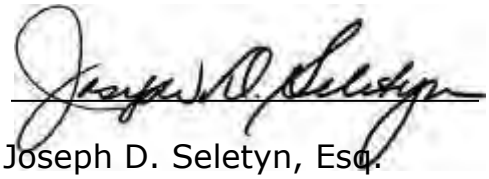
> [I]t is clear that [Montalvo] was the uncle of the one (1) year old child who was seated in the rear of his vehicle when he was operating his vehicle 33 miles per hour in excess of the speed limit, while driving under the influence of alcohol, and swerving in and out of traffic. While [Montalvo] was clearly not the parent or guardian of the child, the fact finder could clearly find that as he was operating his vehicle with the child in the vehicle and as such, as an operator, had a duty to protect this minor passenger to the best of his ability. Further. . .he had a supervisory role over that child for the time his nephew was in the vehicle[,] and operating the vehicle under the circumstances set forth above clearly endanger[ed] the welfare of the child. Defendant was or should have realized that his reckless actions as a driver could threaten the child's safety as a passenger and as such failed to protect the child's welfare at that time. For that reason the Court finds that the evidence presented by the Commonwealth was sufficient for the jury to find that the Defendant owed a duty of care to said child and violated that duty.

Trial Court Opinion, p. 13.

For these reasons, we conclude that the evidence was sufficient to sustain Montalvo's convictions for REAP and EWOC.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014