NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TAMIR J. WRIGHT,	:	No. 2935 EDA 2013
Appellant	:	

Appeal from the Judgment of Sentence, September 24, 2013,
in the Court of Common Pleas of Delaware County
Criminal Division at No. CP-23-CR-0002302-2013

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STABILE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 15, 2014**

Appellant, Tamir J. Wright, appeals from the judgment of sentence imposed following a bench trial where he was found guilty of simple assault and resisting arrest. On September 24, 2013, appellant was sentenced to time served to 23 months for simple assault, and two years' consecutive county probation for resisting arrest. We affirm.

The trial court summarized the factual history as follows:

> On Sunday, February 10, 2013 at approximately 10:36 a.m. the Upper Darby Township Police were dispatched to 557 Timberlake Road for the report of a physical domestic dispute in progress. Officer Michael Taylor of the Upper Darby Police Department arrived on location and met with the victim who was yelling, "he ran that way" while pointing south on Timberlake Road. Officer Taylor observed the victim to be very upset, out of breath, bleeding from her lip and had a red and swollen jaw. The victim stated her boyfriend, "Tamir Mann" struck

> her in the head, face and stomach multiple times with a closed fist. The victim stated she then fell to the ground outside of her residence and Tamir kicked her in the face. The victim stated Tamir then dragged her down the street. Eventually she was able to escape. The victim stated her "boyfriend[']s" name was "Tamir Mann" but he also went by the name "Tamir Wright." The victim stated Tamir was wearing a blue hoodie, black work-out pants, and gray shoes. The subject[']s description was relayed by Officer Taylor to assisting police. The victim was transported to Delaware County Memorial Hospital by paramedics for treatment.
>
> A short time later Officer Taylor was checking the area and observed a male matching the assailant's description [in] the area of the 7000 block of Guilford Road. Officer Taylor called out "Tamir" and the male turned and looked at Officer Taylor and stated "What do you want with me?" Wright was advised to stop and reached into his waistband and ran from Officer Taylor. Officer Taylor pursued the male on foot while ordering him to stop and show his hands. The male discarded two objects while he was running from police. Officer Taylor was able to catch up to the male at Church Lane and Guilford Road and with the assistance of Lieutenant Thomas Shari, the two officers were able to take the male to the ground. While on the ground the male was ordered to show his hands which he failed to do and would not release his right arm. After a struggle with police the male was taken into custody. The male was identified as Tamir Wright, the Defendant. The Police retraced their steps and located two pill bottles, both in the name of the victim. The one bottle contained 75 blue pills stamped 03721 which were preliminarily identified as Alprazolam a Scheduled IV narcotic and the other bottle contained 12 white pills stamped PLIVA 433, which were preliminarily identified as Trazodone, which is not controlled substance.

Trial court opinion, 12/20/13 at 1-2.

Appellant presents the following two issues for our consideration:

> 1) Whether the evidence was insufficient to sustain the conviction for Simple Assault since the Commonwealth failed to prove, beyond a reasonable doubt, that Mr. Wright attempted to cause, or intentionally, knowingly or recklessly caused bodily injury to another, where the complainant never testified that she was assaulted?
>
> 2) Whether the evidence was insufficient to sustain the conviction for Resisting Arrest since the Commonwealth failed to prove, beyond a reasonable doubt, that Mr. Wright, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, created a substantial risk of bodily injury to the public servant or anyone else, or employed means justifying or requiring substantial force to overcome the resistance?

Appellant's brief at 5. [1]

Appellant asserts that the evidence was insufficient to support his convictions. We note our standard of review:

> As a general matter, our standard of review of sufficiency claims requires that we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (Pa.2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." ***Commonwealth v.***

[1] In his Rule 1925(b) statement, appellant raised additional issues concerning his request for a continuance and hearsay statements made by the victim that were admitted as excited utterances. Appellant has abandoned these two issues.

> ***Brewer***, 876 A.2d 1029, 1032 (Pa.Super.2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." ***Id.***; ***see also Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa.Super.2000) ("[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence."). Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. ***See Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super.2001).
>
> The Commonwealth may sustain its burden by means of wholly circumstantial evidence. ***See Brewer***, 876 A.2d at 1032. Accordingly, "[t]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence." ***Id.*** (quoting ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038-39 (Pa.Super.2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld. ***See Brewer***, 876 A.2d at 1032.

Commonwealth v. Lynch, 72 A.3d 706, 707-708 (Pa.Super. 2013), quoting ***Commonwealth v. Stays***, 70 A.3d 1256, 1266 (Pa.Super. 2013).

Appellant notes that his simple assault conviction was under 18 Pa.C.S.A. § 2701(a)(1):

> **§ 2701. Simple assault**
>
> **(a) Offense defined.**--A person is guilty of assault if he:
>
> (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;

18 Pa.C.S.A. § 2701(a)(1).

Appellant further observes that for this statute, the Commonwealth must prove, beyond a reasonable doubt, that the accused attempted to cause, or intentionally, knowingly, or recklessly caused bodily injury to another. ***Id.*** Bodily injury is defined as "impairment of physical condition or substantial pain." ***See*** 18 Pa.C.S.A. § 2301. It is appellant's position there was no testimony from the complainant that she suffered substantial pain or impairment of a physical condition. (Appellant's brief at 5.) Appellant further contends no medical records were produced at trial, and as such, it was not proven that he caused injury to another person. Appellant also claims the Commonwealth failed to prove that he even attempted to cause bodily injury.

The record indicates that the victim was subpoenaed by the Commonwealth. (Notes of testimony, 7/31/13 at 4.) On the morning of the trial, the Commonwealth received a voicemail from the victim indicating she had a medical emergency and would be unable to come to court. (***Id.***) While the defendant sought a continuance, the Commonwealth indicated it could go forward without her. (***Id.*** at 6.) The trial court noted the victim

was the Commonwealth's witness and that any continuance would postpone the case to October. (***Id.*** at 5.) The case proceeded without the victim being present in the courtroom.

Viewing the evidence in the light most favorable to the Commonwealth, the evidence at trial indicated the victim was injured even though she was not in the courtroom during the trial. Police Officer Michael Taylor was the only person to testify at trial. Officer Taylor testified that he observed blood coming from the victim's lip, and she had a red and swollen jaw which indicated a recent assault. Officer Taylor repeated what the victim told him regarding the assault that appellant had struck her in the head, face, and stomach multiple times with a closed fist. The victim also told Officer Taylor she had fallen to the ground and appellant kicked her in the face. It is reasonable to conclude the victim would be bleeding and have a red and swollen jaw after being struck several times.

While there was no direct testimony by the victim at trial, her hearsay statements to Officer Taylor were admitted under the "excited utterances" exception to the hearsay rule.[2] Because appellant has chosen not to pursue his contention that the trial court erred when it admitted the victim's hearsay statements, we need go no further.

[2] ***See*** Pa.R.E. 803(2) (A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.). Thus, statements made in the heat of the moment as excited utterances are considered to be true and reliable.

Finally, we note that when Officer Taylor located appellant, he fled. Generally speaking, when a crime has been committed and a person thinks he is or may be accused of committing it and he flees or conceals himself, such flight or concealment is a circumstance tending to prove consciousness of guilt. Such flight or concealment does not necessarily show consciousness of guilt in every case; however, it is circumstantial evidence. ***Commonwealth v. Bruce***, 717 A.2d 1033 (Pa.Super. 1998). ***See Commonwealth v. Housman***, 986 A.2d 822, 831 (Pa. 2009), ***cert. denied***, ___ U.S. ___, 131 S.Ct. 199 (2010) (indicating flight may constitute circumstantial evidence of consciousness of guilt).

Next, appellant argues the evidence was insufficient to convict him of resisting arrest. The Crimes Code defines the crime of resisting arrest as follows:

> **§ 5104. Resisting arrest or other law enforcement**
>
> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa.C.S.A. § 5104.

Instantly, according to appellant, he merely locked his arms in a rigid manner. Appellant contends that, at most, his actions were an attempt to wiggle away from the officers and were not an act of aggression. Appellant

relies on ***Commonwealth v. Eberhardt***, 450 A.2d 651 (Pa.Super. 1982), and ***Commonwealth v. Rainey***, 426 A.2d 1148 (Pa.Super. 1981), to support his claim of insufficiency. Before discussing these two cases, we note that the ***Eberhardt*** case specifically noted that appellant was charged on only the first clause of Section 5104 (substantial risk of bodily injury to public servant). ***Rainey*** also focused on this clause.

In ***Rainey***, while the arresting officer was attempting to put the appellant into a police van, the appellant "began to shake himself violently, to wiggle and squirm in an attempt to free himself of the officer's grasp." ***Rainey,*** 426 A.2d at 1149. However, at no time during the incident did the appellant push, strike, or kick any of the officers involved. ***Id.*** We reversed the appellant's conviction for resisting arrest, concluding that his "actions in attempting to escape were no more than efforts 'to shake off the policeman's detaining arm.'" ***Id.*** at 1150.

Similarly, in ***Eberhardt***, as police officers were attempting to place the appellant under arrest, a scuffle ensued, during which "much furniture was overturned and one of the officers sustained a bruise on his forearm." ***Eberhardt,*** 450 A.2d at 652. Citing ***Rainey***, ***supra***, we reversed the appellant's conviction for resisting arrest, finding that the "appellant's actions were only attempts to escape and not an aggressive assertion of physical force by appellant against the officers." ***Id.*** at 653.

In ***Commonwealth v. Miller***, 475 A.2d 145 (Pa.Super. 1984), this court referenced ***Eberhardt*** and ***Rainey*** when it stated, "there is dictum in several prior decisions of this Court from which it can be inferred that we deem it an essential element of the crime of resisting arrest that the actor strike or kick the arresting officer." ***Id.*** at 146. However, the court continued, and held "such an interpretation of the statute is contrary to the express language hereof. We decline to follow that dictum in the instant case." ***Id.*** Continuing, the ***Miller*** court held that while generally it is not criminal to merely flee an arrest, "the statute, it is clear, does not require the aggressive use of force such as striking and kicking of the officer" in order for there to be a charge of resisting arrest.

In the present case, the record indicates appellant did more than attempt to wiggle away from the officers.

> The Commonwealth: Now again, Officer Taylor, once you caught up with the Defendant, if we could go into describe again, approximately how long did it take you to place the Defendant into custody?
>
> Officer Taylor: Once we caught up with him, it was -- he didn't want to give his hands. They were both underneath his body.
>
> Q. What was he doing, specifically?
>
> A. Just not wanting to place his hands behind his back, like refusing, resisting. I advised him, you know, you're that [sic] under arrest, put your hands behind your back, and he wouldn't give us his hands, so we were basically struggling to get them from underneath his body and we had to pry them out.

> Q. And again, when you say we, who was the other individual or individuals involved?
>
> A. It was myself and Lieutenant Sharp.
>
> Q. Okay. And did you have to physically move the Defendant's hand from under his body?
>
> A. Yes, we had to pry them out with our arms and place him so that we could put handcuffs on him.
>
> Q. Okay. Was that yourself or Officer Sharp?
>
> A. It was both of us. I was trying to get one hand and he was trying to get the other hand.
>
> Q. And approximately how long did it take to place the Defendant in handcuffs?
>
> A. Maybe 10 to 15 seconds.

Notes of testimony, 7/31/13 at 35.

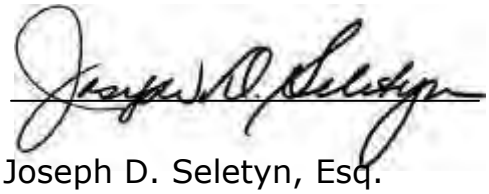
The statutory language of Section 5104 criminalizes resistance behavior that requires substantial force to surmount. Here, the fact that it took two police officers 10 to 15 seconds to place handcuffs on appellant meets the statutory language of resistance behavior that took substantial force to surmount. ***See Commonwealth v. Thompson***, 922 A.2d 926, 928 (Pa.Super. 2007) (appellant guilty of resisting arrest where she would not allow police officer to handcuff her and refused order to put her hands behind her back; officer's efforts to restrain her left him exhausted); ***Commonwealth v. Schwenk***, 777 A.2d 1149, 1154-1155 (Pa.Super. 2001) (resisting arrest conviction sustained where appellant struggled and resisted

attempts of two police officers to place him in handcuffs, requiring force to subdue him), ***appeal denied***, 788 A.2d 375 (Pa. 2001).

Thus, viewing the evidence in the light most favorable to the Commonwealth, appellant's actions were sufficient to sustain his conviction for resisting arrest.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014