NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MARQUISE HILL, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 132 MDA 2015

Appeal from the Judgment of Sentence December 10, 2014
In the Court of Common Pleas of Lackawanna County
Criminal Division at No(s): CP-35-CR-0000751-2014

BEFORE: PANELLA, J., MUNDY, J., and STEVENS, P.J.E.*

MEMORANDUM BY : STEVENS, P.J.E.: **FILED FEBRUARY 01, 2016**

Appellant, Marquise Hill, appeals from the judgment of sentence entered in the Court of Common Pleas of Lackawanna County by the Honorable Vito P. Geroulo on December 10, 2014, following his convictions of robbery, simple assault, recklessly endangering another person and harassment.[1] For the reasons set forth herein, we affirm.

On April 6, 2014, Sarah Muncy completed her shift as a cashier at efuel Gas Station located on Pittston Avenue in Scranton, performed the necessary closing duties, set the alarm, locked the store and got into her car. N.T., 11/10&12/14, at 29-37. As Ms. Muncy sat in the driver's seat, an

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[1] 18 Pa.C.S.A. §§ 3701(a)(1)(ii); 2701(a)(3); 2705; and 2709(a)(1), respectively.

*Former Justice specially assigned to the Superior Court.

individual whom Ms. Muncy would later identify as Appellant opened the driver's side door, pulled her out of her vehicle and pointed a small black handgun at her face. ***Id***. at 38. Appellant pressed Ms. Muncy against the car and with the firearm aimed at her torso ordered her to give him "everything." She informed Appellant she did not have any money with her and repeatedly pled with him not "to do this" as there were cameras in the building and his actions were being filmed. ***Id***. at 39.

Appellant proceeded to check inside Ms. Muncy's vehicle for money. Finding nothing there, Appellant shouted at her and cocked the gun while holding it to her chest as he patted her down to ensure the keys to the store were not in her pockets. Realizing Ms. Muncy was not concealing the keys on her person, Appellant ordered her to retrieve them from her car, and she did so. ***Id***. at 39-43. With Appellant's gun in her back, Ms. Muncy opened the store and intentionally failed to reset the alarm which she knew would cause it to sound shortly. She proceeded to retrieve the cash she had wrapped in a plastic bag and placed in the store's safe earlier. ***Id***. at 44-46. When the alarm activated, Appellant shouted expletives at Ms. Muncy and ran from the store. Ms. Muncy hid inside for fear Appellant would begin shooting at her through the window as he fled. ***Id***. at 48-49. Shortly thereafter, ADT called, and Ms. Muncy informed the operator she had just been robbed at gunpoint and asked that police be sent to the gas station. ***Id***. at 49.

Scranton police officers called within seconds and asked Ms. Muncy to provide a description of the individual and detail what had occurred. Ms. Muncy indicated she was able to provide what she termed a "perfect description" of Appellant and his clothing, because the incident had just happened. ***Id***. at 49. The gas station was well lit which enabled Ms. Muncy to get "a perfect look at his face" as he had "stared right into [her] eyes." ***Id***. at 91. She estimated that he was about six feet tall with dark skin and facial hair. She also observed that Appellant was wearing a black hoodie under a black collared jacket which was zippered up entirely, black pants and dark-colored shoes. She further described his facial hair as a goatee and a mustache. ***Id***. at 46-48, 52. Shortly thereafter, Officers informed Ms. Muncy they had found someone fitting her description, and she agreed to identify the individual. ***Id***. at 53. She recognized Appellant's face immediately, though at that time he was wearing only a while T-shirt, black pants and dark shoes. ***Id***. at 54-55. A few days following the ordeal, she also was able to review video surveillance recorded by cameras at the gas station. ***Id***. at 55-56. Ms. Muncy again "absolutely positively" identified Appellant at trial as the person who had robbed her at gunpoint. ***Id***. at 54-55.

Among the Scranton police officers who testified at trial was Officer Jill Foley. She, along with other officers who had set up a perimeter, responded to a call regarding a robbery at the efuel Gas Station and searched for an

individual described as a dark-skinned male wearing dark clothing last seen running south on Hamm Court. ***Id***. at 105-107. She observed a man wearing a black hoodie with red lettering on the back and dark pants. ***Id***. at 108, 112. The individual began walking faster when he saw Officer Foley. As he did so, he looked in her direction, and she noticed he was dark-skinned.

In response, Officer Foley activated the lights on her patrol car and exited the vehicle at which time the individual began to run. ***Id***. at 108, 109, 112. Officer Foley explained she had started pursuing the individual on foot but after losing sight of him she returned to her vehicle and drove around the corner in an attempt to cut him off. ***Id***. at 113. As she rounded the corner, a woman ran to her and told her the man she had been chasing had continued running up the street and was wearing a white T-shirt. ***Id***. at 114.[2] Officer Foley radioed that information to the additional units searching the area and continued her pursuit. ***Id***. at 116. At that time, other responding officers informed Officer Foley that they had stopped a male matching Ms. Muncy's description a few blocks away from where the unidentified woman had approached her. ***Id***. at 116.[3]

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[2] Defense counsel renewed his pre-trial objection to this testimony as inadmissible hearsay, which objection the trial court noted and overruled. ***Id***. at 114.

[3] The testimony of other officers present at the scene revealed that they had recovered a discarded black collared jacket containing a semiautomatic

(Footnote Continued Next Page)

Appellant was charged with one count each of the aforementioned crimes. Following a jury trial, Appellant was convicted of robbery, simple assault and recklessly endangering another person, and the trial court found Appellant guilty of the summary offense of harassment. On December 10, 2014, Appellant was sentenced to an aggregate prison term of twenty-five years to fifty years, and no post-sentence motions were filed.

Appellant filed a timely appeal and raises the following issues for our review:

> 1. The Commonwealth failed to present sufficient evidence to prove, beyond a reasonable doubt, that the Appellant was the perpetrator of each offense charged, specifically robbery (18 Pa.C.S.A. section 3701(a)(1)(ii)); simple assault(18 Pa.C.S.A. section 2701(a)(3)); recklessly endangering another person (18 Pa.C.S.A. section 2705); and harassment (18 Pa.C.S.A. section 2709(a)(1)).
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> 2. Did the trial court err and/or abuse its discretion in admitting a hearsay statement of an unidentified bystander through the testimony of Officer Jill Foley in that it constituted inadmissible hearsay and did not fit within any exception set out in Pa.R.E. 803?

Brief for Appellant at i.

(Footnote Continued) ———————————

firearm in a pocket and a black hoodie with rolled money inside about two blocks away from the gas station. ***Id***. at 120, 171-174. They further observed that Appellant was clad only in a white T-shirt on a night with below freezing temperatures and indicated he had been walking from the City's West Side to the Valley View apartment complex in the City's South Side to see his sister. In addition, despite his scant attire, Appellant was sweating and winded, which suggested to the officers that he had just run some distance. ***Id***. at 157.

Our standard of review in assessing the sufficiency of the evidence is well-settled:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all of 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 that of 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. Helsel, 53 A.3d 906, 917-18 (Pa.Super. 2012) (citation omitted). As such, a challenge to the sufficiency of the evidence properly is directed to the adequacy of the evidence as it relates to the elements of the offenses of which a defendant has been convicted; therefore, a sufficiency of the evidence argument which is founded upon a mere disagreement with the credibility determinations of the fact finder or discrepancies in witness accounts will not warrant the grant of appellate relief, for the fact-finder is free to believe all, part, or none of the evidence adduced at trial and to

determine the weight to be accorded each witness's testimony. ***Commonwealth v. Johnson***, 910 A.2d 60, 65 (Pa.Super. 2006).

Appellant asserts that the evidence was insufficient to establish that he was the perpetrator of the charged crimes. In support of this claim, Appellant notes no forensic DNA or fingerprint evidence links him thereto. Brief for Appellant at 17. He further stresses that the gas station's surveillance system captured very little of what had happened on the evening of April 6, 2014, and that it may have influenced Ms. Muncy's identification of him. Ms. Muncy testified she watched the tape numerous times in the store and on a recording of it she had made with her smartphone; after doing so, she testified at the time of the preliminary hearing that the assailant may have been wearing white shoes as opposed to dark-colored ones as she had described on the night of the incident. Brief for Appellant at 7-8. In addition, Appellant states that Ms. Muncy indicated for the first time at trial that Appellant had been a customer at the gas station numerous times before the robbery. Brief for Appellant at 9 *citing* N.T. 11/10&12/ 14 at 96-97.[4] He further claims the testimony of Officer Christian Gowarty indicating Appellant is African American, missing teeth,

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[4] When asked why she did not provide this information sooner, Ms. Muncy admitted she had not included it in her statement to police, but she indicated she had told the district attorney a few months prior that she had seen Appellant as a customer. ***Id***. at 98-99. She also explained no one ever had asked her if she had seen him in the store before.

has a scar on his nose and tattoos on his right and left arm casts serious doubt upon Ms. Muncy's assertion that she was able to provide a flawless identification of her assailant because she never mentioned these physical characteristics on the night of the robbery. Brief for Appellant at 16-17 ***citing*** N.T. 11/10 and 12/14 at 254-255.

Appellant's argument in this regard centers upon a discussion of the fallibility of Ms. Muncy's eyewitness testimony and the potential need for expert testimony in this regard as suggested in ***Commonwealth v. Walker***, 625 Pa. 450, 92 A.3d 766 (2014).[5] Brief for Appellant at 23-32. In so posturing his argument, Appellant essentially does not contest the evidence presented but rather asserts that in light of the alleged inconsistencies in Ms. Muncy's identification of Appellant and the fact that the only evidence connecting him to the crimes was his "mere presence" at or near the scene, "the quantum of proof presented by the Commonwealth is and was so weak and inconclusive that a reasonable jury should not and could not have found [] Appellant guilty of the crimes charged beyond a reasonable doubt." Brief for Appellant at 21, 32.

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[5] Therein our Supreme Court reconsidered and overruled its prior decisions absolutely banning expert testimony in the area of eyewitness identification and in doing so found such testimony will not improperly intrude upon the jury's credibility determinations in criminal cases.

In ***Commonwealth v. Valentine***, 101 A.3d 801 (Pa.Super. 2014), this Court reiterated that when determining the reliability of a challenged identification we:

> should consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his [ ] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. The opportunity of the witness to view the actor at the time of the crime is the key factor in the totality of the circumstances analysis. . . [E]vidence of identification need not be positive and certain to sustain a conviction. Although common items of clothing and general physical characteristics are usually insufficient to support a conviction, such evidence can be used as other circumstances to establish the identity of a perpetrator. Out-of-court identifications are relevant to our review of sufficiency of the evidence claims, particularly when they are given without hesitation shortly after the crime while memories were fresh. Given additional evidentiary circumstances, any indefiniteness and uncertainty in the identification testimony goes to its weight.

Id. at 806 (citations omitted).

Herein, Ms. Muncy testified at trial that she was able to see clearly Appellant's clothing and face during the commission of the crimes, as the area was well illuminated and he stared directly into her eyes. Also, only a short period of time had elapsed between the incident and Ms. Muncy's unequivocal identification of Appellant. Indeed, while she may have misconstrued the color of his shoes and omitted to detail certain physical characteristics of Appellant, she never wavered in her identification of him as her assailant on April 6, 2014, at the preliminary hearing or at trial. Furthermore, additional evidentiary circumstances were present. Appellant's

discarded clothing, firearm, and cash wrapped as Ms. Muncy had described were found a short distance from where the robbery occurred. In addition, officers set up a perimeter in the area in which Appellant had fled and he was detained therein sweating and out of breath though wearing only a T-shirt on a freezing night. In light of this evidence and employing a totality of the circumstances analysis, we find Ms. Muncy's identification of Appellant was reliable.

Appellant additionally argues that he neither threatened Ms. Muncy with serious bodily injury nor intentionally, by physical menace or by recklessly engaging in conduct, put her in fear of bodily injury. The Pennsylvania Crimes Code provides that to be guilty of robbery, in the course of committing a theft, a defendant must "threaten another with or intentionally put …[her] in fear of immediate serious bodily injury." 18 Pa.C.S. § 3701(a)(1)(ii). "Serious bodily injury" is defined as "[b]odily 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." 18 Pa.C.S.A. § 2301. Evidence is deemed sufficient to convict a defendant of robbery if it demonstrates aggressive actions that threaten the victim's safety; where the evidence established a defendant pointed a firearm at the victim causing her to become shocked, nervous and afraid, it is sufficient to prove the defendant threatened the

victim and placed her in fear of serious bodily injury. ***Valentine***, 101 A.3d at 807.

Ms Muncy explained that while she was sitting in her car, Appellant shocked her when he opened the car door and pointed a gun in her face, pulled her from the car by her collar, cocked the gun and stuck it in her back while ordering her to open the store, and called her a f------ bitch when the alarm sounded. N.T., 11/14/14 at 37. Ms. Muncy testified that she believed Appellant was going to shoot her and that she was going to die. ***Id***. at 42, 48, 83. We find that such testimony when viewed in a light most favorable to the Commonwealth as the verdict winner constitutes sufficient evidence for the jury to conclude that Appellant threatened and intentionally placed Ms. Muncy in fear of serious bodily injury.

Appellant also argues that the evidence was insufficient to convict him of simple assault which required a showing that he had attempted by physical menace to put Ms. Muncy in fear of immediate, serious bodily injury as defined in 18 Pa.C.S.A. § 2701(a)(3). Again, viewing the evidence in a light most favorable to the Commonwealth, we find it sufficiency established Appellant attempted to place Ms. Muncy in in fear of immediate, serious bodily injury when he pointed a gun at her face, torso and back and ordered her to hand over cash. These actions constitute a simple assault. ***See Commonwealth v. Reynolds***, 835 A.2d 720 (Pa.Super. 2003).

Next, Appellant claims the evidence was insufficient to sustain his conviction of recklessly endangering another person in that the Commonwealth failed to prove he engaged in conduct which placed or may have placed Ms. Muncy in danger of death or serious bodily injury as defined in 18 Pa.C.S.A. § 2705. For the reasons stated ***supra***, we find the Commonwealth has met this burden, and this claim is without merit.

Finally, Appellant avers the evidence did not establish he committed harassment, which would require the Commonwealth to establish that he possessed the intent to harass, annoy, or alarm Ms. Muncy or attempt to or threaten to strike, shove, kick or otherwise subject her to physical contact in violation of 18 Pa.C.S. § 2709(a)(1). This Court has found that where a defendant grabs a victim and forcers her to another location against her will, he subjects her to physical contact and commits harassment. ***See Commonwealth v. Blackman***, 909 A.2d 315 (Pa.Super. 2006); ***Commonwealth v. Emler***, 903 A.2d 1273 (Pa.Super. 2006). We find Ms. Muncy's testimony that Appellant forcibly pulled her from her vehicle by the collar and held a gun to her while ordering her to unlock the store sufficiently proves the elements of harassment.

In his second issue, Appellant posits the trial court abused its discretion by admitting the hearsay statement of an unidentified bystander as an excited utterance through Officer Foley's testimony. Specifically, Appellant claims the statement constituted hearsay because it was

submitted "to prove the truth of the matter asserted in or implied by the statement itself." Brief for Appellant at 33. Appellant reasons that because the record fails to establish the unidentified woman actually observed the individual change his clothing or that she spoke while she was excited or following a startling event, the trial court should have excluded her statement, as it constituted neither an excited utterance nor a present sense impression.

In reviewing this issue, we note that the admissibility of evidence rests within the sound discretion of the trial court, and such a decision will be reversed only upon a showing that the trial court abused its discretion. An abuse of discretion is not merely an error of judgment but rather an overriding or misapplication of the law or an exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality as shown by the evidence of record. ***Commonwealth v. Gray***, 867 A.2d 560, 569 (Pa.Super. 2005).

The excited utterance exception applies to a "statement relating to a startling event or condition, made while the declarant was under the stress of the excitement that the event or condition caused." Pa.R.E. 803(2). There is no requirement that the statement describe or explain the startling event or condition, but it does have to relate to it. Comment to Pa.R.E. 803(2). The crucial question is whether the nervous excitement "persists as a substantial factor in provoking the utterance." ***Id***.

It is well-settled that excited utterances fall under the common law concept of *res gestae.* ***See Commonwealth v. Pronkoskie***, 477 Pa. 132, 383 A.2d 858, 860 (1978). Our Supreme Court recently discussed this concept as follows:

> *Res gestae* statements, such as excited utterances, present sense impressions, and expressions of present bodily conditions are normally excepted out of the hearsay rule, because the reliability of such statements are established by the statement being made contemporaneous with a provoking event. ***Id.*** While the excited utterance exception has been codified as part of our rules of evidence since 1998, ***see*** Pa.R.E. 803(2), the common law definition of an excited utterance remains applicable, and has been often cited by this Court:
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> > [A] spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.... Thus, it must be shown first, that [the declarant] had witnessed an event sufficiently startling and so close in point of time as to render her reflective thought processes inoperable and, second, that her declarations were a spontaneous reaction to that startling event. ***Commonwealth v. Sherwood***, 603 Pa. 92, 982 A.2d 483, 495–96 (2009) (quoting ***Commonwealth v. Stokes***, 532 Pa. 242, 615 A.2d 704, 712 (1992).
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> The circumstances surrounding the statements may be sufficient to establish the existence of a sufficiently startling event. ***See Commonwealth v. Counterman***, 553 Pa. 370, 719 A.2d 284, 299 (1998) (statement by children, who ultimately perished in a house fire, that their father was lighting a fire inside the house was admissible when, minutes later, the house became ablaze); ***Commonwealth v. Sanford***, 397 Pa. Super. 581, 580 A.2d 784, 788 (1990) (finding the excited utterance exception

> applicable where the testimony of the child's mother and physician circumstantially established the event evincing that the child perceived "some unexpected or shocking occurrence").

Commonwealth v. Murray, 623 Pa. 506, 539-40, 83 A.3d 137, 157-58 (2013). In addition, with respect to the excited utterances of an unidentified bystander, an additional proof requirement is necessary before his or her statements will be deemed admissible pursuant to the res gestae exception. In this regard, the party seeking the admission of the out-of-court statement must demonstrate by the use of other corroborating evidence that the declarant actually viewed the event of which she spoke. ***Commonwealth v. Hood***, 872 A.2d 175, 183-84 (2005).

We find that in the matter *sub judice*, the circumstances surrounding the unidentified bystander's statement are sufficient to establish she spoke while under the stress and excitement of a sufficiently startling event. Officer Foley testified that she was responding to a call that a gas station employee had just been robbed at gunpoint by a dark-skinned individual with facial hair wearing dark clothing when she began her pursuit of someone fitting that description. Also at that time, other officers had arrived in the vicinity with the lights and sirens of their vehicles activated. It was with this backdrop that the unidentified woman indicated she had observed the individual whom officers were attempting to detain running down the alley wearing a white T-shirt. While the record is not clear as to whether she observed Appellant remove his jackets, it establishes that she saw the

direction in which he ran, and relayed this information to Officer Foley. This declaration was reliable in that the woman uttered it a short time after observing an individual running down the alley with an officer in pursuit.

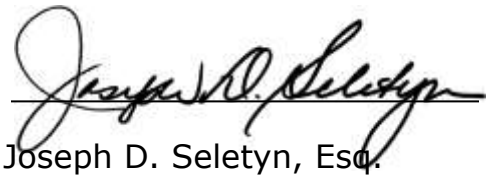
Witnessing a police chase certainly constitutes a startling event and an indication to a pursuing officer as to the direction in which a suspect is headed only seconds after he passed is a spontaneous reaction thereto. In addition, the woman's words were supported by corroborating evidence, for just moments after she spoke to Officer Foley, Appellant, winded, sweating and wearing only a white T-shirt, was apprehended by officers. Officers returned to the area from which Appellant had been running and recovered a black hoodie with red lettering on the back from a trash can. When it was picked up, money spilled from its pockets. Also recovered were the overcoat and handgun. Finally, Ms. Muncy unequivocally identified Appellant within a short time of the robbery. Her identification was not based upon his attire, but rather Ms. Muncy indicated she "recognized his face immediately." N.T., 11/10&12/14, at 54.

As noted ***supra***, this Court will not reverse a trial court's evidentiary ruling absent an abuse of that court's discretion. Given the circumstances surrounding the woman's statement, we find the trial court did not err in

admitting the statement under the excited utterance exception.[6] ***See Murray***, 83 A.3d at 158. For the foregoing reasons, we affirm.

Judgment of sentence ***affirmed***.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016

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[6] While the trial court in its 1925(a) opinion indicated it properly had admitted the woman's statement as an excited utterance at trial, it also cited to ***Commonwealth v. Rolan***, 964 A.2d 398 (Pa.Super. 2008) wherein this Court determined that the statement of an anonymous 911 caller informing police officers a man was seen entering a building with a rifle was admissible as both an excited utterance and as a present sense impression. The present sense impression exception, regardless of the availability of the declarant to testify at trial, allows the admission of "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter ...." Pa.R.E. 803(1). Moreover, Rule 803(1) restricts the present sense exception to statements made while the declarant is "perceiving" the event; as such, corroborative proof that the declarant actually viewed the event naturally flows to this exception as well. ***See Commonwealth v. Hood***, 872 A.2d 175, 183-84 (Pa.Super. 2005). Notwithstanding, in light of the foregoing discussion, we find that under either exception, the evidence adduced at trial contained sufficient "other corroborating evidence" to justify the admission of the unidentified woman's statement.