

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

GEMINI HOWARD

Appellant

No. 1589 WDA 2015

Appeal from the Judgment of Sentence September 9, 2015
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0001612-2014

BEFORE: LAZARUS, J., OLSON, J., and PLATT, J.*

MEMORANDUM BY LAZARUS, J.:

FILED NOVEMBER 15, 2016

Gemini Howard appeals from the judgment of sentence entered in the Court of Common Pleas of Allegheny County after the court, in a non-jury trial, found her guilty of two counts of recklessly endangering another person (REAP)¹ and one count of criminal mischief.² Upon careful review, we affirm.

The Honorable Beth A. Lazzara summarized the facts of this case as follows:

On October 4, 2013, at approximately 9:00 p.m., [Howard] went to an apartment building located at 422 Forest Avenue in search

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 2705.

² 18 Pa.C.S.A. § 3304(a)(2).

of her husband, Anthony Pearson. [Howard] began pounding on the front window of the building, which drew the attention of sixteen (16) year old Jace White, who lived in Unit 1 of the building. Ms. White was at home with [Pearson] and her mother's boyfriend, Antwon, when she "heard someone banging on the interior window outside" of the building. Ms. White recognized the person banging on the window as [Howard]. Ms. White informed Mr. Pearson that his wife was outside banging on the window, but Mr. Pearson told Ms. White that he did not wish to speak with his wife at that time. Ms. White then returned to the kitchen, where she had been cooking.

Ms. White continued to hear the banging on the building window, up until the point that she heard the window break. Ms. White then heard pounding on the front door of her apartment unit. At that point, she told Mr. Pearson that he needed to go outside and speak with [Howard], whom she surmised was the person banging on the door. Mr. Pearson walked outside of the apartment to speak with his wife, and Ms. White believed that the situation had been resolved. However, Ms. White subsequently walked outside of her apartment and immediately smelled a substance that was not supposed to be in the entryway area. She recognized the smell as the scent of lighter fluid. As she walked out of her apartment, Ms. White also saw [Howard] with lighter fluid in her hand, spraying the fluid in the main hallway that separated the front door of the building and the door to her apartment (the entry area). Ms. White believed that the lighter fluid came from a "mini grill" that Ms. White's mother used, and it had been located by the front door of the apartment. Ms. White also saw that there was lighter fluid on toys that were in the hallway, and fluid on the front door of the apartment. [Howard] told Ms. White that she wanted to speak with her husband, and Ms. White told [Howard] that they needed to handle their issues on their own time. Ms. White told [Howard] to exit the building, and the police subsequently were dispatched after receiving a "report of a disorderly person [] at the residence."

Officer James Niglio of the Bellevue Borough Police Department arrived at the residence at around 9:30 p.m. that evening. Upon his arrival, he immediately noticed that the "side panel window . . . was busted out right in direct connection where the doorknob was." As Officer Niglio entered the building, he smelled lighter fluid in the foyer. He observed that there was charcoal in the area and that the can of lighter fluid was tipped

over in the hallway. Officer Niglio believed that the fluid had been poured on the floor because the smell of the fluid was so strong. He was clear that the smell was stronger than what would normally be emanating from the lighter fluid container.

Officer Niglio spoke with Ms. White and Mr. Pearson. Ms. White was "frantic" and "scared," and she informed the officer that [Howard] had come to the apartment "to get her husband back." Ms. White also told the officer that [Howard] "had attempted to spray lighter fluid towards her" and that [Howard] "had her hand in her pocket." This caused Ms. White to fear that [Howard] "possibly had a lighter or something in her pocket" because [Howard] "would not take her hand out of her pocket." Officer Niglio also had occasion to speak with [Howard] over the phone because [Howard] had called Ms. White's phone repeatedly. Officer Niglio asked [Howard] to come to the police station so that they could sort everything out, but [Howard] declined[.]

Trial Court Opinion, 3/30/16, at 3-5 (citations to record omitted).

Howard was subsequently charged with one count each of burglary, criminal mischief and endangering the welfare of children, as well as two counts each of simple assault and REAP. A non-jury trial was held before Judge Lazzara on September 9, 2015, after which Howard was found guilty of two counts of REAP and one count of criminal mischief. Howard proceeded directly to sentencing, at which time the court imposed a two-year probationary term for REAP as to victim Jace White, with no further penalty on the other charges. This timely appeal follows, in which Howard raises one issue for our review:

The Commonwealth presented no evidence that [Howard] possessed the actual present ability to inflict harm, therefore did it submit insufficient evidence to maintain the conviction of [REAP]?

Brief of Appellant, at 4.

We begin by noting our standard of review in this matter:

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. 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. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty. 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.

[Moreover, t]he Commonwealth may sustain its burden by means of wholly circumstantial evidence. Accordingly, the 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. 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.

Commonwealth v. Rahman, 75 A.3d 497, 500–01 (Pa. Super. 2013) (internal citations and quotation marks omitted).

Pursuant to section 2705 of the Crimes Code, 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." 18 Pa.C.S.A. § 2705. Recklessly endangering another person is a crime directed against reckless conduct entailing a serious risk to life or limb out of proportion to any utility the conduct might have.

Commonwealth v. Vogelsong, 90 A.3d 717, 719 (Pa. Super. 2014). This

Court has held that actual present ability to inflict harm must be shown in order to support a conviction under section 2705. **Commonwealth v. Gouse**, 429 A.2d 1129, 1131 (Pa. Super. 1981). Thus, the mere apparent ability to inflict harm is not sufficient for a conviction for REAP. **Id.**

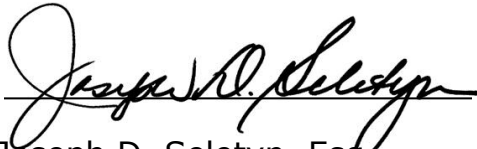
Howard argues that, although she may have created the apprehension of danger by spraying lighter fluid, the Commonwealth did not present any evidence that she created an actual danger or had the “actual present ability to inflict harm.” Howard likens the facts of this matter to those in **Gouse**, *supra*, and **Commonwealth v. Trowbridge**, 395 A.2d 1337 (Pa. Super. 1978). In both cases, this Court found that REAP was not established where the defendant pointed an unloaded gun at another person, because the element of “actual danger” was not present. Likewise, Howard asserts that, “without any testimony regarding threats, lighters, or matches,” the evidence presented by the Commonwealth cannot support a REAP conviction because the act of spraying lighter fluid, alone, did not create an actual danger. We disagree.

Viewed in the light most favorable to the Commonwealth, the facts demonstrate that Howard committed REAP by creating an actual danger of harm by dousing the common area of a multi-unit dwelling with a liquid, the *sole purpose of which is to facilitate the ignition of fire*. Unlike an unloaded gun, which poses no threat, either actual or potential, when aimed at another person, the surfaces Howard doused in lighter fluid could readily have ignited in flames with the addition of a mere stray cigarette ash or

electrical spark, causing serious injury or death to anyone present on the premises. Although there may have been no evidence that Howard, herself, possessed the means by which to ignite the lighter fluid, “[i]t is not [the defendant] herself that must be proven to have the present ability to cause death or serious bodily injury to another, it is her actions.” **Vogelsong**, 90 A.3d at 721. The risk created by Howard’s act was clearly out of proportion to any utility her conduct might have had. **See id.** Accordingly, we conclude that the evidence was sufficient to establish that Howard created an actual danger of harm and, as such, to sustain her conviction for REAP.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/15/2016