NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellant v. SYHEEN HOWARD	: : : : : : : : :	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1649 EDA 2020

Appeal from the Order Entered August 14, 2020
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0006018-2019

BEFORE: LAZARUS, J., NICHOLS, J., and McLAUGHLIN, J.

MEMORANDUM BY NICHOLS, J.: **FILED JUNE 22, 2022**

The Commonwealth appeals from the order granting Appellee Shyeen Howard's motion to quash. The Commonwealth argues that the trial court erred in concluding that the probable cause determination was based solely on inadmissible hearsay and quashing the charges against Appellee. For the reasons that follow, we vacate the trial court's order in part and remand for further proceedings.

By way of background, we note that on August 8, 2019, Appellee was arrested and charged with possession of a firearm by a prohibited person, carrying a firearm without a license, possessing an instrument of crime (PIC), recklessly endangering another person (REAP), and simple assault.[1]

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[1] 18 Pa.C.S. §§ 6105(a)(1), 6106(a)(1), 6106(a)(2), 907(a), 2701(a)(1), and 2705, respectively.

On August 23, 2019, the municipal court conducted a preliminary hearing. ***See*** N.T. Prelim. Hr'g, 8/23/19, at 1-14.[2] Police Officer Steven Brooks was the sole Commonwealth witness. Complainant did not participate.

The trial court summarized the evidence introduced at the preliminary hearing as follows:

> At around 5:00 p.m. on August 8, 2019, [Officer Brooks[3]] responded to a radio call stating that there was a person with a gun at 3318 Malta Street. Upon arrival, Officer Brooks heard a young child and female screaming inside of the property. Police Officer Paniagua[FN1] and Officer Brooks proceeded to knock on the window and a crying young boy, approximately four years old, answered the door. Once the door was opened, Officer [Brooks] observed [Appellee] and [complainant], Sydeeda Santiago, walking down the stairs while yelling at one another. As soon as [complainant] saw Officer [Brooks], he shouted that [Appellee] had a gun upstairs.
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> [FN1] No first name provided.
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> Officer Paniagua detained [Appellee] while Officer [Brooks] followed [complainant] upstairs and observed that she was crying, her clothes were in disarray, [and] she had a bloody mouth, blood around her chest area, and bruising on her arm. Officer Brooks asked [complainant] where the gun was located and [complainant] showed Officer [Brooks] a closet area in the bedroom where she pointed to a black handgun with black duct

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[2] Although the notes of testimony from the preliminary hearing do not appear in the certified record, the Commonwealth has included a copy of the transcript in the reproduced record. Because "their veracity is not in dispute, we rely on the copy contained within the reproduced record." ***See C.L. v. M.P.***, 255 A.3d 514, 519 n.3 (Pa. Super. 2021) (*en banc*) (citation omitted and formatting altered).

[3] In its opinion, the trial court make several references to "Officer Stevens." Based on our examination of the record, it appears that this was a typographical error which was meant to refer to Officer Steven Brooks. We have corrected all mentions accordingly.

> tape around the handle concealed under clothes on top of a cabinet and [in] the closet. After retrieving the handgun, Officer [Brooks] found that it contained five live rounds and returned downstairs to hand the gun to Officer Paniagua.
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> After securing the handgun, Officer [Brooks] returned to [complainant] in the upstairs bedroom and asked her what had happened. [Complainant,] still crying, hyperventilating, and breathing heavily, informed Officer [Brooks] that [Appellee] had punched her in the mouth and threatened her life with the recovered handgun. [Complainant] and [Appellee] had argued about money and a birthday party the day before. Officer [Brooks] observed that [Appellee] seemed angry and had informed him that he had been maced. However, Officer [Brooks] did not witness any physical altercation between [Appellee] and [complainant].

Trial Ct. Op., 7/7/21, at 2-3 (citations omitted, formatting altered).

At the conclusion of the hearing, the following charges were held for court: simple assault, REAP, PIC, and possession of a firearm by a prohibited person.

On August 11, 2020, Appellee filed a pre-trial motion to quash the charges.[4] Therein, Appellee argued that the Commonwealth violated our Supreme Court's holding in ***Commonwealth v. McClelland***, 233 A.3d 717 (Pa. 2020), because it relied solely on inadmissible hearsay to establish the charges at the preliminary hearing.

At the motions hearing on August 14, 2020, the Commonwealth presented additional testimony from Officer Brooks and introduced footage of complainant that was recorded on Officer Brooks' body-worn camera (BWC)

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[4] A pre-trial motion to quash is "the equivalent in Philadelphia practice of a pre-trial writ of *habeas corpus*." ***Commonwealth v. Dantzler***, 135 A.3d 1109, 1111 (Pa. Super. 2016) (*en banc*).

at the time of the incident. N.T. Mot. H'rg, 8/14/20, at 6-14. The footage showed complainant crying with bruising on her arm and blood on her mouth and chest. Further, the footage depicted additional statements by complainant, which were made when she first encountered police, specifically, "Get off of me, get off of me" and "you hit me and my child was right here." ***Id.*** **After** those exclamations were made, complainant stated that Appellee had a gun. ***Id.*** Appellee objected to the admission of the footage as it was hearsay, but the trial court overruled the objection. ***Id.*** at 11, 13-14.

At the conclusion of the hearing, the trial court granted Appellee's motion to quash without specifying its reasoning on the record. ***Id.*** at 21-22. On August 17, 2020, the Commonwealth filed a motion for reconsideration. ***See*** Mot. for Recons., 8/17/20, at 2-19. On August 24, 2020, the Commonwealth timely filed an interlocutory appeal to this Court.[5] ***See*** Notice of Appeal, 8/24/20 (docketed at 1649 EDA 2020).

The Commonwealth subsequently filed a court-ordered Pa.R.A.P. 1925(b) statement, and the trial court issued a Rule 1925(a) opinion addressing the Commonwealth's claims.

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[5] The Commonwealth filed a duplicative notice of appeal on August 26, 2020. ***See*** Notice of Appeal, 8/26/20 (docketed at 1706 EDA 2020). The duplicative appeal was withdrawn and discontinued. ***See*** Praecipe, 1706 EDA 2020, 9/29/20, at 1; Certification of Discontinuance, 1706 EDA 2020, 9/29/20, at 1. On October 8, 2020, the trial court attempted to enter an order granting, in part, the Commonwealth's motion for reconsideration. However, because the thirty-day period to modify the trial court's final order had passed, the October 8, 2020 order was a legal nullity. ***See***, ***e.g.***, 42 Pa.C.S. § 5505.

On appeal, the Commonwealth raises the following issues:

1. Did the lower court err by quashing all charges based on ***McClelland***, where the Commonwealth introduced evidence at the preliminary hearing that would have been admissible at a trial and the record was sufficient to establish a *prima facie* case?

2. To the extent the lower court invokes an alleged confrontation violation in its opinion on appeal — it did not refer to that provision in its ruling on the record — does that right apply at the preliminary hearing stage, and regardless, would it apply here where the statements were non-testimonial?

Commonwealth's Brief at 4 (some formatting altered).

Application of *McClelland*

The Commonwealth first argues that the trial court "erroneously concluded that the Pennsylvania Supreme Court's decision in ***McClelland*** required quashal of charges where at least some, and indeed all, of the alleged hearsay statements presented at the preliminary hearing would be admissible at trial pursuant to an exception to the hearsay rule." Commonwealth's Brief at 15 (citing ***McClelland***, 233 A.3d at 717). In support, the Commonwealth argues that "all of the out-of-court statements by [complainant] that were presented in Officer Brooks' testimony and his BWC recording were admissible under the excited utterance hearsay exception." ***Id.*** Therefore, the Commonwealth contends that the *prima facie* case was based, at least in part, on evidence that was admissible at trial, and ***McClelland*** did not apply. ***Id.*** at 14.

The "question of the evidentiary sufficiency of the Commonwealth's *prima facie* case is one of law." ***Commonwealth v. Perez***, 249 A.3d 1092, 1102 (Pa. 2021) (citations omitted). Therefore, our standard of review is *de novo* and our scope of review is plenary. ***McClelland***, 233 A.3d at 732.

This Court has explained that

> [t]he preliminary hearing is not a trial and serves the principal function of protecting the accused's right against an unlawful arrest and detention. At a preliminary hearing, the Commonwealth bears the burden of proving the *prima facie* case, which is met when it produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. The evidence supporting a *prima facie* case need not establish the defendant's guilt beyond a reasonable doubt, but must only demonstrate that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to proceed to a jury.

Commonwealth v. Wroten, 257 A.3d 734, 742 (Pa. Super. 2021) (citations omitted and formatting altered); ***see also*** Pa.R.Crim.P. 542(D) (stating that "[a]t the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is a *prima facie* case that (1) an offense has been committed and (2) the defendant has committed it").

Further, this Court has stated:

> A pre-trial *habeas corpus* motion is the proper means for testing whether the Commonwealth has sufficient evidence to establish a *prima facie* case. To demonstrate that a *prima facie* case exists, the Commonwealth must produce evidence of every material element of the charged offense(s) as well as the defendant's complicity therein. To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and also may submit additional proof.

Dantzler, 135 A.3d at 1111-12 (citations and quotations omitted).

Pursuant to Rule 542(E) of the Pennsylvania Rules of Criminal Procedure

> hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

Pa.R.Crim.P. 542(E); ***see also Commonwealth v. Kuder***, 62 A.3d 1038, 1055 (Pa. Super. 2013) (stating that "[h]earsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement" (citation omitted)).

In ***McClelland***, our Supreme Court held that although Rule 542(E) allows some use of hearsay at the preliminary hearing stage, "[t]he plain language of the rule does not state a *prima facie* case may be established solely on the basis of hearsay." ***McClelland***, 233 A.3d at 735. In reaching that conclusion, the Court reaffirmed its decision in ***Commonwealth ex rel. Buchanan v. Verbonitz***, 581 A.2d 172 (Pa. 1990), which stated that "[f]undamental due process requires that no adjudication be based solely on hearsay evidence." ***McClelland***, 233 A.3d at 736.

Further, the ***McClelland*** Court explained:

> The primary reason for the preliminary hearing is to protect an individual's right against unlawful arrest and detention. The preliminary hearing seeks to prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection. Our precedents make clear the full panoply of trial rights do not apply at a preliminary hearing, but the hearing is

> nevertheless a critical stage of the proceedings, and is intended under Rule 542 to be more than a mere formality. Due process clearly attaches, but due process is a flexible concept, incapable of precise definition. Here, at the hearing afforded [the defendant], the Commonwealth **relied exclusively and only on evidence that could not be presented at a trial**. This is precisely the circumstance and rationale upon which five Justices in ***Verbonitz*** determined [that the defendant's] right to due process was violated.

Id. at 736 (some citations, footnote, and quotations omitted, emphasis added).

While the instant matter was pending, a panel of this Court issued a decision in ***Commonwealth v. Harris***, 269 A.3d 534 (Pa. Super. 2022), *reargument denied* (Mar. 14, 2022). In that case, the Commonwealth argued that it could rely solely on hearsay evidence to establish that the defendant committed the crime, so long as it presented some direct evidence that the crime occurred. ***Harris***, 269 A.3d at 536. The ***Harris*** panel expressly rejected the Commonwealth's contention and concluded that there was "insufficient evidence to establish a *prima facie* case as to each element at the preliminary hearing [because] the Commonwealth relied on hearsay evidence alone to establish that [the defendant] committed the offense." ***Id.***

In reaching that conclusion, the ***Harris*** panel explained:

> Following the [***McClelland***] Court's textual analysis of the rule, we hold that nothing in Rule 542(E) prevents the application of ***Verbonitz*** requiring that all the material elements of the criminal offense need to be proved at a preliminary hearing by non-hearsay evidence. While a preliminary hearing is not a trial and due process is a flexible concept, the hearing is still a critical stage in the proceedings that "is intended under Rule 542 to be more than a mere formality." [***McClelland***], 233 A.3d at 736. The

> preliminary hearing "seeks to prevent a person from being imprisoned or required to enter bail for a crime . . . . **for a crime with which there is no evidence of [the defendant's] connection.**" ***Id.*** (citation omitted) (emphasis added). To interpret it any other way, the rule would violate a defendant's constitutional rights to due process.
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> What Rule 542(E) does permit is that otherwise inadmissible hearsay evidence can be admitted that does not materially go to whether a crime has been committed or that the person committed the crime. Such evidence regarding the value of the property for grading purposes, lab reports and such can be introduced because they do not materially affect the defendant's due process rights. Furthermore, hearsay evidence can be introduced to corroborate direct evidence regarding an element of the crime or crimes charged.

Harris, 269 A.3d at 547-48.

"Hearsay is generally inadmissible in legal proceedings unless it falls under a recognized exception." ***McClelland***, 233 A.3d at 735 (citation omitted). One exception is an excited utterance, which is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Pa.R.E. 803(2). This exception applies regardless of whether the declarant is available as a witness. ***Id.*** To qualify as an excited utterance, the declarant must have spontaneously made the statement either while experiencing the startling event, or "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." ***Commonwealth v. Murray***, 83 A.3d 137, 157 (Pa. 2013) (citation omitted).

In applying the excited utterance exception, this Court has held that there is no particular time period after the startling event in which the

statement must occur. ***See Commonwealth v. Wholaver***, 989 A.2d 883, 906-07 (Pa. 2010). Rather, the question is whether the declarant was still under "nervous excitement" at the time the declarant made the utterance. ***Id.*** at 907 (quoting Pa.R.E. 803(2), cmt.). To determine whether a statement qualifies as an excited utterance, "the court must consider, among other things, whether the statement was in narrative form, the elapsed time between the startling event and the declaration, whether the declarant had an opportunity to speak with others and whether, in fact, she did so." ***Commonwealth v. Carmody***, 799 A.2d 143, 147 (Pa. Super. 2002) (citation omitted).

Here, the trial court addressed the sufficiency of the Commonwealth's *prima facie* case as follows:

> At the preliminary hearing, the Commonwealth relied exclusively on hearsay evidence to make out its *prima facie* case. [C]omplainant was not in attendance at the preliminary hearing, had not made a police report or a statement to the police, and refused medical treatment. The Commonwealth then supplemented the record from the preliminary hearing by playing Officer Brooks' body-worn camera footage taken from the time of the incident.
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> Instead, Officer Brooks relayed what [c]omplainant had told him about the events. Officer Brooks testified that upon his arrival at the residence, [c]omplainant immediately yelled that [Appellee] had a gun upstairs.[6]

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[6] Officer Brooks testified at the preliminary hearing that after he opened the door to the house, Appellee and complainant were "yelling at each other." N.T. Prelim. Hr'g at 6. Officer Brooks further testified that complainant then
(Footnote Continued Next Page)

> [C]omplainant's initial statement was an excited utterance. This is displayed by the fact that [c]omplainant spontaneously uttered this statement while she was still under the effect of a startling event. However, subsequent to that statement, police officers separated [Appellee] from [c]omplainant, detained [Appellee], took them to separate parts of the house, and calmed down [c]omplainant enough to begin asking questions. Officer Brooks ultimately asked [c]omplainant for the exact location of the gun and [c]omplainant led him to the location, a closet area, under some clothes, in the bedroom where [Appellee] and complainant had been arguing. Subsequent to this statement, upon even further questioning by police about what happened, [c]omplainant stated [Appellee] had punched her in the mouth and had threatened her life. The police officer questioned [c]omplainant about whether [Appellee] had the gun on him when he threatened [c]omplainant's life, to which [c]omplainant responded in the affirmative.
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> The trial court found that the statement regarding the location of the gun, which was the result of this questioning, and any other statements made by [c]omplainant after her excited utterance that [Appellee] had a gun, was hearsay that did not fall within the excited utterance exception and therefore was inadmissible. Thus, any inadmissible hearsay statements from [c]omplainant which led to the recovery of the gun and also led to the Commonwealth's ability to charge [Appellee] with simple assault and REAP without further evidence or corroboration of [Appellee] possessing a gun or the alleged criminal assault against [c]omplainant should be quashed.

Trial Ct. Op. at 5-6 (formatting altered).

Initially, we note for ease of discussion, that we have categorized complainant's statements into primary and secondary statements. Complainant's primary statements were made immediately after the police

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"immediately yelled out that [Appellee] had a gun upstairs." ***Id.*** Additionally, Officer Brooks testified that "[complainant] was crying. Her clothes were disarrayed. She had a bloody mouth. She had blood around her chest area. She had bruising on her arm." ***Id.*** at 7.

officers arrived when she stated "he hit me" and "there's a gun upstairs." Complainant's secondary statements were made after the confrontation with Appellee ended, when complainant led the officers to the upstairs bedroom.

On this record, we agree with the trial court that complainant's secondary statements were inadmissible hearsay because they were made after the incident, for the purpose of recounting past events, when there was no longer an ongoing emergency. ***See Commonwealth v. Williams***, 103 A.3d 354, 358-59 (Pa. Super. 2014).

However, we disagree with the trial court's conclusion that the Commonwealth solely relied on hearsay to establish the charges against Appellee. At the preliminary hearing, the Commonwealth presented direct evidence which included Officer Brooks' testimony. Specifically, Officer Brooks stated that he had to separate Appellee from complainant while both parties were screaming and arguing, that he observed complainant crying, and that he saw blood on complainant's chest and mouth and bruising on her arm.

The Commonwealth also supplemented the record with additional direct evidence at the pre-trial hearing on Appellee's motion to quash. Specifically, the Commonwealth presented additional testimony from Officer Brooks and introduced the BWC footage. The footage depicted complainant crying, and also showed her bruised arms, bloody mouth, and bloody chest. Additionally, the evidence established that complainant and Appellee were the only adults in the house when the police arrived. BWC Recording at 2:01-2:36.

The Commonwealth also introduced, through the BWC recording, additional hearsay statements by complainant. Specifically, the BWC footage revealed that complainant yelled, "Get off of me, get off of me," "you hit me and my child was right here," and "there's a gun upstairs." ***See*** BWC Recording at 2:01-2:36; 2:49. Although these statements were hearsay, they would be admissible under the excited utterance exception because they were made spontaneously while complainant was still under the influence of the inciting event of the violent altercation with Appellee. ***See Wholaver***, 989 A.2d at 907.

Although ***Harris*** prohibits the Commonwealth from relying solely on hearsay to establish a *prima facie* case, admissible hearsay evidence may be introduced "to corroborate direct evidence regarding an element of the crime or crimes charged." ***Harris***, 269 A.3d at 547-48. Here, because the Commonwealth presented direct evidence in addition to admissible hearsay evidence, we may consider whether that evidence established "each of the material elements of the crime charged and establishe[d] probable cause to warrant the belief that the accused committed the offense." ***Wroten***, 257 A.3d at 742 (citation and quotations omitted).

As noted previously, Appellee was charged with simple assault, REAP, PIC, and persons not to possess firearms.

> With respect to the simple assault charge, an individual is guilty of this offense if he "attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." 18 Pa.C.S. § 2701(a)(1). The Commonwealth need not establish the victim actually suffered bodily injury; rather, it is sufficient to support a

> conviction if the Commonwealth establishes an attempt to inflict bodily injury. This intent may be shown by circumstances, which reasonably suggest that a defendant intended to cause injury.
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> "Bodily injury" is defined by statute as "[i]mpairment of physical condition or substantial pain." 18 Pa.C.S. § 2301. Thus, injuries that are "trivial in nature," "noncriminal contact resulting from family stress and rivalries," or a "customary part of modern day living" do not satisfy this element. The existence of substantial pain may be inferred from the circumstances surrounding the use of physical force even in the absence of a significant injury. We have held that an individual who aggressively grabs the arm of another and pushes her against wall causes bodily injury, even though the victim did not require medical attention or miss work as a result and only sustained bruises that lasted a few days. We have likewise held that a punch to the face that broke the victim's glasses and caused pain for several days caused a bodily injury. Similarly, we have found that a deliberate punch with a closed fist resulting in "slight swelling and pain" was a bodily injury.

Wroten, 257 A.3d at 743-44 (some citations and quotations omitted).

In the instant case, Officer Brooks stated that he arrived at the home to discover complainant crying and hysterical as she followed Appellee down the stairs of the house. Trial Ct. Op. at 2-3; BWC at 2:01-2:25. Officer Brooks testified that complainant "was crying. Her clothes were disarrayed. She had a bloody mouth. She had blood around her chest area. She had bruising on her arm." ***See*** N.T. Prelim. Hr'g at 7-8. Additionally, Officer Brooks stated that complainant and Appellee were the only people in the house except for complainant's young son. ***Id.***

The Commonwealth also introduced complainant's statements to Appellee, which included "get off of me, get off of me" and "you hit me and my child was right here." ***See*** BWC Recording at 2:01-2:36. After

complainant told police that Appellee "[had] a gun upstairs," police recovered a firearm from the residence. ***See*** BWC Recording at 2:49.

On this record, we conclude that the Commonwealth presented sufficient evidence to establish a *prima facie* case for simple assault. The record reflects that after complainant stated that Appellee had hit her, Officer Brooks observed that complainant had bruising on her arms and blood on both her mouth and her chest. This evidence demonstrates that Appellee had attempted to cause or intentionally, knowingly or recklessly caused bodily injury to complainant. ***See***, ***e.g.***, ***Wroten***, 257 A.3d at 742-44; ***Harris***, 269 A.3d at 547-48. Similarly, the Commonwealth established probable cause to warrant the belief that Appellee had committed the offense, based on both complainant's statement and the fact that no other adults were present in the home at the time of the assault. ***Id.*** Accordingly, the trial court erred in quashing this charge. ***See Wroten***, 257 A.3d at 742.

With regard to REAP,

> [a] person commits REAP under Section 2705 of the Crimes Code "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. § 2705 (emphasis added). Thus, to sustain a conviction for REAP, the Commonwealth must prove that the defendant (1) possessed a *mens rea* [of] recklessness, (2) committed a wrongful deed or guilty act (*actus reus*), and (3) created by such wrongful deed the danger of death or serious bodily injury to another person. The reckless mental state required for a REAP conviction has been defined as a conscious disregard of a known risk of death or great bodily harm to another person. REAP requires the creation of danger, so the Commonwealth must prove the existence of an actual present ability to inflict harm to another.

Commonwealth v. Bostian, 232 A.3d 898, 909 (Pa. Super. 2020), *appeal denied,* 244 A.3d 3 (Pa. 2021) (formatting altered, some quotations and citations omitted). 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. § 2301.

Based on our review of the record, we agree with the trial court's conclusion that the Commonwealth failed to establish a *prima facie* case for REAP. Specifically, the Commonwealth did not present evidence that Appellee engaged in conduct that placed complainant in danger of death or serious bodily injury. Accordingly, the trial court properly quashed the REAP charge. ***See Wroten***, 257 A.3d at 742.

With regard to the firearms offense, Section 6105(a)(1) states:

> A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.

18 Pa.C.S. § 6105(a)(1). Possession can be established "by proving actual possession, constructive possession, or joint constructive possession." ***Commonwealth v. Parrish***, 191 A.3d 31, 36 (Pa. Super. 2018) (citation omitted). "Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not."

Commonwealth v. McClellan, 178 A.3d 874, 878 (Pa. Super. 2018) (citation omitted).

This Court has explained:

> Where a defendant is not in actual possession of the prohibited items, the Commonwealth must establish that the defendant had constructive possession to support the conviction. Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. We have defined constructive possession as conscious dominion, meaning that the defendant has the power to control the contraband and the intent to exercise that control. To aid application, we have held that constructive possession may be established by the totality of the circumstances.
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> It is well established that, as with any other element of a crime, constructive possession may be proven by circumstantial evidence. In other words, the Commonwealth must establish facts from which the trier of fact can reasonably infer that the defendant exercised dominion and control over the contraband at issue.

Parrish, 191 A.3d at 36-37 (citations omitted and formatting altered).

Here, Officer Brooks testified that upon opening the door of the house, complainant exclaimed that Appellee "had a gun upstairs." N.T. Prelim. Hr'g, 8/23/19, at 6. Officer Brooks recovered a gun from a closet in the upstairs bedroom. ***Id.*** at 7. Additionally, at the preliminary hearing, the Commonwealth introduced Appellee's secure court summaries establishing that he had two prior felony convictions for possession with intent to deliver and robbery[7] and is not eligible to possess a firearm. ***Id.*** at 12.

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[7] 35 P.S. § 780-113(a)(30) and 18 Pa.C.S. § 3701, respectively.

Based on our review of the record, we conclude that the Commonwealth presented sufficient evidence to establish a *prima facie* case for unlawful firearms possession. ***See Wroten***, 257 A.3d at 742. Specifically, there was evidence that Appellee constructively possessed the firearm, as complainant stated that Appellee "had a gun upstairs," and a gun was later recovered by police from the upstairs bedroom. Therefore, the trier of fact could find it more likely than not that Appellee exercised dominion and control over the firearm. ***See Parrish***, 191 A.3d at 36-37. Further, the Commonwealth established that Appellee had prior felony convictions that made him ineligible to possess a firearm. ***See*** 18 Pa.C.S. § 6105(a), (b), (c).

Finally, with regard to PIC, Section 907 states, "[a] person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally." 18 Pa.C.S. § 907(a). The same evidence introduced to support the firearms possession charge also supports the PIC charge, as the trier of fact could find it more likely than not that Appellee possessed a firearm as a person prohibited from doing so, and that, accordingly, he possessed the firearm with the intent to employ it criminally. ***Id.***

In sum, we conclude that neither ***McClelland*** nor ***Harris*** are implicated in this case, as the Commonwealth presented both direct and hearsay evidence to support the charges against Appellee. We further conclude that, viewing the evidence in a light most favorable to the Commonwealth, and being mindful of the standard of proof to establish a *prima facie* case as

discussed herein, the trial court committed an error of law in quashing the charges of simple assault, persons not to possess firearms, and PIC. Accordingly, we reverse the order quashing those charges and affirm the trial court's order quashing the REAP charge.

Confrontation Clause

The Commonwealth also argues that the trial court erred by "ruling, for the first time in its opinion on appeal,[8] that [Appellee's] confrontation clause rights had been violated at the preliminary hearing." Commonwealth's Brief at 23-26. In support, the Commonwealth contends that the Confrontation Clause does not apply at the preliminary hearing stage. ***Id.*** Further, the Commonwealth asserts that, even if the Confrontation Clause did apply at the preliminary hearing, it would not apply to complainant's statements because they were not testimonial in nature. ***Id.*** at 26.

It is well settled that the Confrontation Clause applies solely to statements that are testimonial in nature. ***Commonwealth v. Williams***, 103 A.3d 354, 358-59 (Pa. Super. 2014). Statements are nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police

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[8] Contrary to the Commonwealth's characterization, this issue was not raised for the first time on appeal. At the hearing on the motion to quash, the trial court asked: "But what about ***McClelland***'s ruling as it relates to due process and the right to confrontation pursuant to ***Crawford***?" N.T. Mot. Hr'g, 8/14/20, at 19. Counsel for both parties proffered argument regarding the Confrontation Clause. ***Id.*** at 19-21. At the conclusion of the hearing, the trial court quashed all charges without providing any explicit rationale on the record for its decision. ***Id.***

assistance to meet an ongoing emergency." ***Id.*** at 359 (citation omitted). Statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***Id.*** (citation omitted).

Moreover, this Court has explained:

> The existence of an ongoing emergency is important because it indicates that the declarant's purpose in speaking was to help resolve a dangerous situation rather than prove past events. The zone of potential victims and the type of weapon involved inform the inquiry. . . . [D]omestic violence cases . . . often have a narrower zone of potential victims.
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> The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

Id. at 360-61 (citations omitted and formatting altered).

In the instant case, the trial court concluded that some of complainant's statements to Officer Brooks were testimonial in nature. Trial Ct. Op. at 6-8. As discussed herein, the primary statements captured by the BWC included "[g]et off of me" and "you hit me," and "there's a gun upstairs." Complainant's secondary statements to Officer Brooks in the upstairs bedroom were made

in response to Officer Brooks' questions about the location of the gun and the details of the assault.

The trial court's analysis focused on complainant's secondary statements. Because those statements were made after the incident, for the purpose of recounting past events when there was no longer an ongoing emergency, we agree with the trial court that the secondary statements were testimonial in nature and therefore constituted inadmissible hearsay. ***See*** Trial Ct. Op. at 6-9.

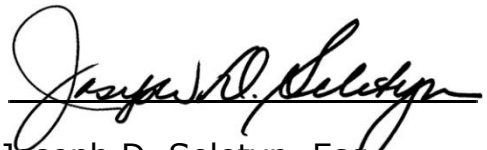
However, the record reveals different circumstances around complainant's primary statements. As noted previously, complainant told the police officers that Appellee struck her and that he had a gun upstairs when police first arrived at the scene. At that time, the police observed that complainant was emotionally upset and was also injured and bleeding. Trial Ct. Op. at 2-3; BWC at 2:01-2:36. Officer Brooks testified that complainant and Appellee were still yelling at one another when he arrived and that he had physically separated Appellee from complainant. ***See*** N.T. Prelim. Hr'g at 7-8. Accordingly, the record establishes that complainant's primary statements were made while she was experiencing the "nervous excitement" of the violent altercation with Appellee and that "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***See Williams***, 103 A.3d at 359-61. Because complainant's initial statements to police were not testimonial in nature, the Confrontation Clause is not applicable. Accordingly, Appellee is not entitled to

relief on that basis, and the trial court erred in determining that the Confrontation Clause applied.

For these reasons, we reverse the trial court's order quashing the charges of simple assault, persons not to possess firearms, and PIC, and affirm the order as to REAP.

Order affirmed in part and vacated in part. Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/22/2022