

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
TYLER J. FESTA,	:	
	:	
Appellee	:	No. 899 WDA 2012

Appeal from the Order Entered June 5, 2012,  
In the Court of Common Pleas of Erie County,  
Criminal Division, at No. CP-25-CR-0000469-2012.

BEFORE: DONOHUE, SHOGAN and WECHT, JJ.

MEMORANDUM BY SHOGAN, J.: FILED: May 3, 2013

The Commonwealth appeals from the order granting, in part, Appellee Tyler J. Festa’s pretrial petition for writ of *habeas corpus*. After careful review, we reverse in part and affirm in part.

The trial court summarized the procedural and factual history as follows:

On December 20, 2011, at approximately 7:00 am, [Appellee] was driving northbound on State Highway 97 near Popp’s Mobile Home Park. The mobile home park was on [Appellee’s] right, or to the east of the highway, and there were several children standing at the entrance waiting for their school bus. As [Appellee] approached the mobile home park, a school bus with its amber lights activated was approaching in the southbound lane of the highway. [Appellee’s] car struck minors Ashley Clark and Taz Gianelli as they were crossing the highway to board their school bus. Clark was struck by the right front portion of [Appellee’s] vehicle while Gianelli was struck by the left front portion. *Prelim. Hearing Tr. 48:19-25; 49:1-3*

[hereinafter *P.H. Tr.*]. Clark died as a result of the accident, and Gianelli suffered a broken leg and other injuries. *Brf. in Supp. 1.*

The following additional facts were set forth at the preliminary and habeas corpus hearings. It was very dark outside when the accident occurred; a trooper described it as "pitch black," and a witness who was driving directly behind the school bus did not see [Appellee's] car strike the children because it was "that dark." *P.H. Tr. 60:22, 12:15.* It may have recently rained or been lightly raining at the time of the accident.<sup>1</sup>

<sup>1</sup> When the first trooper arrived on the scene at 7:05 AM, the ground was wet but "there was no precipitation in the area." *P.H. Tr. 61:18, 21.* However, it had been raining at his location on Peach Street at 7:00 AM. *Id. 62:8-10.* Additionally, the witness behind the bus testified that she didn't recall it raining, but if it had been raining, "it wasn't pouring rain. It may have been sprinkling." *Id. 17:13-22.*

[Appellee] had been living with his father in Union City for several weeks prior to the accident. *Id. 36:4-11.* On the morning of December 20th, [Appellee] was on his way to work. *Id. 36:20-25.* [Appellee] was an orderly at Hamot Medical Center and had been working there for less than six months. *Id. 36:12-19, 38:2-3.* [Appellee] was not intoxicated at the time of the accident. *Id. 64:1-3.* [Appellee's] cell phone was on his lap because it was charging and he was using it to play music through his stereo, but he was neither texting nor engaged in a phone conversation. *Id. 34:18-22, 63:18-23.* The posted speed limit on that particular stretch of road was 55 miles per hour, and [Appellee] was traveling between 37 and 45 miles per hour prior to braking. *Id. 62:15-21.*

When interviewed at the scene, [Appellee] indicated that he was supposed to start work at 7:30 and that he would have made it "just on time." *Id. 36:23-25; Habeas Corpus Hearing Tr. 10:7-8* [hereinafter *H.C.H. Tr.*]. [Appellee] stated "he saw the bus and the lights, and it just didn't register in his head at that point," and "he didn't think anything about there being kids on the roadway." *P.H. Tr. 31:18-20, 33:10-11.* [Appellee]

estimated that he saw the bus's lights from "about 200 yards, maybe a little less."<sup>2</sup> *Id.* 68:23-69:22. He indicated that when he saw the children, they were in the middle of the road, "real close to the center yellow line." *Id.* 35:12.

<sup>2</sup> Corporal Michael Fox, the State Police Crash Investigator responsible for reconstructing the accident, conducted a "visibility study" in early January, 2012 at 4:45 AM in order to determine the distance from which the bus's flashing amber lights could be seen. *H.C.H. Tr.* 22:7-11, 24:23-25. Placing a stationary bus at the exact location where the bus stopped on the morning of the accident, Corporal Fox determined that "those lights are seen well beyond 900 feet. Around 900 to 1,000 feet." *Id.* 22:9-11, 25:14-18. On cross-examination, Corporal Fox conceded that [Appellee] "had to be closer than 900 feet when the bus came to a stop. *Id.* 30:15-20. He also indicated that he could see the bus's lights but not the driveway to the mobile home park. *Id.* 33:10-14.

[Appellee] was only 33 feet from Clark when he applied his brakes. *H.C.H. Tr.* 21:18-23. [Appellee's] speed at the time he impacted Clark was 30-35 miles per hour; at the time he impacted Gianelli, his speed was 29-34 miles per hour. *P.H. Tr.* 63:2-7. There were two skid marks at the scene. *Id.* 47:24. The skid mark on the right side was 77 feet; the skid mark on the left was 57 feet. *Id.* 48:2-3. [Appellee's] car came to rest 111 feet north of the bus. *Id.* 50:4-9.

A video camera positioned at the mobile home park's entrance recorded the accident. *Id.* 40:22-25. The video is black and white. *Id.* 45:15-18. The date stamp indicating 12/20/2011 is correct; however, the time stamp on the video is incorrect. *Id.* 42:2-12. Based on a review of this video and testimony from the hearings, the Court sets forth the following timeline:

- 8:24:31:<sup>3</sup> the first child starts moving towards the road;

- 8:24:33: the rest of the group of children move towards the road;
- 8:24:35.91: the strobing of the bus's flashing amber lights can be seen (*H.C.H. Tr. 20:20-21*);<sup>4</sup>
- 8:24:39: the first child passes the white fog line and steps into the road;
- 8:24:40: the second child steps across the white fog line;
- 8:24:42: the bus enters the video frame (*Id. 21:1-2*);
- 8:24:43: nearly all of the students have stepped across the white fog line and are in the road;<sup>5</sup>
- 8:24:46: the bus comes to a complete stop (*Id. 21:7-8*);
- 8:24:46: some of the children see [Appellee's] car approaching and begin to back up, but Clark and Gianelli continue forward;<sup>6</sup>
- 8:24:48.35: [Appellee's] car "begins a skid," approximately twelve and one half seconds after the amber lights of the bus were activated (*Id. 21:13-14, 21:24-22:2*);
- 8:24:48.82: [Appellee's] car makes contact with Clark (*Id. 21:15-17*);
- 8:24:52: the bus's hazard (side) lights activate (*P.H. Tr. 46:23-47:1*);
- 8:24:59: the bus's red lights activate, "12.83 seconds after the bus comes to a stop" (*Id. 46.19-22, 58.9-10*).<sup>7</sup>

<sup>3</sup> The times are based on the timestamp in the video, but, as previously noted, the timestamp does not correctly correspond to the actual time of day that the accident occurred.

<sup>4</sup> The flashing amber lights are seen indirectly in the video: "We first start to see the lights flashing in the

video when you look over top of the children and you see a haze and you look into the treeline, you can see a flashing, a strobing, and the lens of the camera is adjusting to that flashing light." *P.H. Tr. 45:6-11.*

<sup>5</sup> At the habeas hearing, both Trooper Knott and Corporal Fox testified that the children were not in the road when the bus came into view. *H.C.H. 9:5-19; 21:1-5.* Having reviewed the video, the Court does not agree with these statements and further notes that the relevant inquiry is whether Clark and Gianelli were in the road when they were impacted by [Appellee's] car. It is obvious to the Court that Clark and Gianelli were in the middle of the road at the time [Appellee's] car came into contact with them.

<sup>6</sup> The Court notes that its conclusion that Clark and Gianelli were in the middle of the road when struck by [Appellee's] car is also supported by the Commonwealth's evidence. Trooper Knott, the first officer to arrive at the scene, indicated in his police report that Clark and Gianelli violated the "jaywalking statute" (**75 Pa.C.S. § 3543**) because they did not yield the right of way to [Appellee's] vehicle and were not crossing at a crosswalk. *H.C.H. 14:22-18:6.* Additionally, the Commonwealth's witness to the accident testified that [Appellee's] vehicle, as it attempted to stop, "was all over its lane. It did stay in its lane, but it was all over its lane." *P.H. Tr. 12:9-10.* Furthermore, Trooper Knott also testified that Gianelli was impacted by the left front portion of [Appellee's] vehicle and Clark by the right front portion. *Id. 48:19-25; 49: 1-3.* If Clark and Gianelli had not been in the middle of the road, that would mean [Appellee's] car would have been almost completely off the roadway when it impacted them, and if that were the case, several other children would likely have been struck as well.

<sup>7</sup> Despite the black and white nature of the video, investigators were able to determine which lights—amber or red—were flashing based on both the

location of the flashing lights (the amber lights are "on the top row" of lights) and when the stop sign attached to the side of the bus begins to extend, as the red lights and stop sign activate simultaneously.  
*P.H. Tr. 46:5-9.*

Trial Court Opinion, 6/5/12, at 1-4.

Appellee was charged with: homicide by vehicle; involuntary manslaughter; simple assault; recklessly endangering another person; meeting or overtaking a school bus; careless driving; and reckless driving.

Appellee filed a petition for *habeas corpus*, challenging the Commonwealth's ability to establish a *prima facie* case on all charges, with the exception of the careless driving charges. The trial court granted Appellee's petition for writ of *habeas corpus* on all claims except the meeting or overtaking a school bus charge. The Commonwealth timely appealed the trial court's determination.

On appeal, the Commonwealth presents the following question for our review:

Whether the trial court erred as a matter of law in concluding the Commonwealth failed to produce *prima facie* evidence that [Appellee] operated his vehicle in a reckless or grossly negligent manner to support charges of Homicide by Motor Vehicle, Involuntary Manslaughter, Recklessly Endangering Another Person, Simple Assault, and Reckless Driving.

Commonwealth's Brief at 2.

Where a criminal defendant seeks to challenge the sufficiency of the evidence presented at his preliminary hearing, he may do so by filing a writ

of *habeas corpus*. ***Commonwealth v. Landis***, 48 A.3d 432, 444 (Pa. Super. 2012).

The decision to grant or deny a petition for writ of [*habeas corpus*] will be reversed on appeal only for a manifest abuse of discretion.... Our scope of review is limited to deciding whether a *prima facie* case was established.... [T]he Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in **allowing the case to go to the jury**. When deciding whether a *prima facie* case was established, we must view the evidence in the light most favorable to the Commonwealth, and we are to consider all reasonable inferences based on that evidence which could support a guilty verdict. The standard clearly does not require that the Commonwealth prove the accused's guilt beyond a reasonable doubt at this stage.

***Commonwealth v. Winger***, 957 A.2d 325, 328 (Pa. Super. 2008) (quotations and citations omitted) (emphasis in original). Rather, the *prima facie* case merely requires evidence of the existence of each element of the crime charged. ***Commonwealth v. Patrick***, 933 A.2d 1043, 1045 (Pa. Super. 2007) (*en banc*), *appeal denied*, 596 Pa. 705, 940 A.2d 364 (2007). The weight and credibility of the evidence is not a factor at this stage. ***Id.***

Because the charges of homicide by vehicle, involuntary manslaughter, recklessly endangering another person, and reckless driving require Appellee to have acted recklessly, we shall address these charges together. These offenses are defined as follows:

**§ 3732. Homicide by vehicle**

**(a) Offense.**—Any person who recklessly or with gross negligence causes the death of another person while engaged in

the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic except section 3802 (relating to driving under influence of alcohol or controlled substance) is guilty of homicide by vehicle, a felony of the third degree, when the violation is the cause of death.

75 Pa.C.S.A. § 3732.

**§ 2504. Involuntary manslaughter**

**(a) General rule.**—A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.

18 Pa.C.S.A. § 2504(a).

**§ 2705. Recklessly endangering another person**

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.

**§ 3736. Reckless driving**

**(a) General rule.**—Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

75 Pa.C.S.A. § 3736(a).

A person acts recklessly with respect to an element of an offense by consciously disregarding a substantial and unjustifiable risk that the element exists or will result from the person's conduct. 18 Pa.C.S.A. § 302(b)(3). The risk must be of such a nature and degree that, in light of the circumstances known to the person and the nature and intent of the conduct



in question, the disregard of that risk involves a gross deviation from the standard of conduct of a reasonable person. *Id.* The term “grossly negligent” is equivalent to the term “reckless.” *Commonwealth v. Huggins*, 575 Pa. 395, 405, 836 A.2d 862, 868 (2003), *cert. denied*, 541 U.S. 1012 (2004).

In determining whether Appellee acted recklessly, the trial court made the following determination:

There is no evidence that [Appellee] “consciously disregarded a substantial and unjustifiable risk” that death or serious bodily injury would result from his actions. [Appellee] was driving at least ten to eighteen miles under the speed limit in darkened conditions when he unexpectedly encountered two children in the middle of the road.

\* \* \*

Even accepting that [Appellee] saw the bus’s amber lights and should have known that there were children ahead waiting to board, it does not follow that [Appellee] should have expected to encounter these children in the middle of the road in the absence of red crossing lights.

Trial Court Opinion, 6/5/12, at 9-10. Based on this analysis, the trial court concluded that Appellee’s actions did not rise to the level of recklessness required to support convictions on these charges and therefore granted Appellee’s motion to dismiss these charges.

After careful review of the record, we are constrained to disagree with the trial court’s determination. The video clip establishes that there was a group of approximately nine children standing on the side of the road as

they were waiting for the school bus. Traffic Violation Video, 12/20/11. Nothing appears to be obstructing the view of the children from the passing vehicles. *Id.* The video reflects that at 8:24:33, the group of nine children is moving towards the road in response to seeing their school bus arrive. *Id.*; Trial Court Opinion, 6/5/12, at 3. The strobing of the amber lights can be seen at 8:24:35.91, and the bus pulls into view of the video camera at 8:24:42. *Id.*; Trial Court Opinion, 6/5/12, at 3. By 8:24:43, nearly all of the students are in the road. *Id.*; Trial Court Opinion, 6/5/12, at 3. Appellee struck the first victim at 8:24:48.82. *Id.*; Trial Court Opinion, 6/5/12, at 3.

When the amber lights on a school bus are activated, “the driver of a vehicle meeting or overtaking [the] school bus shall proceed past the school bus with caution and shall be prepared to stop.” 75 Pa.C.S.A. § 3345(b). Testimony at the hearing established that Appellee saw the amber lights at “about 200 yards, maybe a little less.” N.T., 2/15/12, at 68-69. At that point, Appellee should have been driving cautiously and been prepared to stop. The strobing amber lights and the group of children approaching and entering the roadway would dictate that a prudent driver approach the scene cautiously; arguably more cautiously than the manner in which Appellee was driving. Based on the evidence presented, Appellee struck the first victim approximately 15 seconds after the children had begun moving into the

roadway in anticipation of boarding the school bus. The trial court's conclusion that Appellee "unexpectedly encountered two children in the middle of the road" or "that [Appellee] should [not] have expected to encounter these children in the middle of the road in the absence of red crossing lights" is not supported by the record. Trial Court Opinion, 6/5/12, at 10. Viewing the evidence in the light most favorable to the Commonwealth, a jury could decide that Appellee's conduct was a gross deviation from the standard of conduct of a reasonable person. 18 Pa.C.S.A. § 302(b)(3) (A person acts recklessly when their disregard of a risk involves a gross deviation from the standard of conduct of a reasonable person).

As stated previously, the Commonwealth need not establish every element beyond a reasonable doubt: they need only establish a *prima facie* case. The Commonwealth has done that here, and as a result, a determination as to conviction or acquittal of these charges is a question for the jury. Thus, we reverse the trial court's order granting Appellee's petition for *habeas corpus* as to the charges of homicide by vehicle, involuntary manslaughter, recklessly endangering another person, and reckless driving.

Next, we shall address the charge of simple assault. Simple assault is defined as:

**§ 2701. Simple assault**

**(a) Offense defined.**—A person is guilty of assault if he:

\* \* \*

(2) negligently causes bodily injury to another with a deadly weapon;

18 Pa.C.S.A. § 2701(a)(2). Negligence is statutorily defined as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

18 Pa.C.S.A. § 302(b)(4).

"Deadly weapon" is defined as follows:

**"Deadly weapon."** Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury.

18 Pa.C.S.A. § 2301. Our Court has stated: "The definition of deadly weapon does not demand that the person in control of the object intended to injure or kill the victim. Instead, it gives objects deadly weapon status on the basis of their use under the circumstances." *Commonwealth v. Scullin*, 607 A.2d 750, 753 (Pa. Super. 1992), *appeal denied*, 533 Pa. 633, 621 A.2d 579 (1992). "[A]n object can attain deadly weapon status based

on its use under the circumstances of the particular crime.” *Commonwealth v. Raybuck*, 915 A.2d 125, 129 (Pa. Super. 2006).

The trial court determined that in this case, Appellee was not “operating his vehicle in a manner that was ‘calculated or likely to produce death or serious bodily injury.’” Trial Court Opinion, 6/5/12, at 13. Based on this determination, the trial court dismissed the charge of simple assault.

As outlined previously, there is no requirement that a “deadly weapon” be used with the intent to injure or kill the victim. *Scullin*, 607 A.2d at 753. In *Scullin*, this Court held that a tire iron was a deadly weapon under the circumstances of its use by the offender, who had thrown a tire iron at the victim, thereby causing his death. *Id.* The Court acknowledged that a tire iron was not a traditional weapon, but nonetheless considered it a deadly weapon in that case because it had been used in such a manner as to create a high probability of serious bodily injury or death. *Id.* For purposes of determining whether the tire iron was a deadly weapon, the court concluded that it did not matter that the offender had not intended for the tire iron to injure the victim. *Id.* As stated by the Court, the tire iron “became a deadly weapon at the moment [the defendant] threw it in the direction of the ultimate victim.” *Id.*

It is evident that the vehicle in this case was used in a manner that caused serious bodily injury and death, thus, qualifying it as a “deadly

weapon.” 18 Pa.C.S.A. § 2301. This Court has previously concluded that a vehicle can qualify as a deadly weapon. *See Commonwealth v. Packard*, 767 A.2d 1068, 1071 (Pa. Super. 2001), *appeal denied*, 566 Pa. 660, 782 A.2d 544 (2001); *Commonwealth v. Thomas*, 656 A.2d 514, 519 (Pa. Super. 1995). Arguably, Appellee’s vehicle became a deadly weapon at the moment he drove it in the direction of the victims in this case. Viewing the evidence in the light most favorable to the Commonwealth, we conclude that the Commonwealth has made a *prima facie* showing of this element.

Furthermore, the evidence in this case, including the time when the amber lights were activated, the distance at which Appellee saw the strobing lights, and the group of children entering the roadway, could support a determination that Appellee was operating his vehicle negligently under the circumstances. A jury could conclude that Appellee’s conduct was a gross deviation from the standard of conduct that a reasonable person would observe in Appellee’s situation. 18 Pa.C.S.A. § 302(b)(4). Viewing the evidence in the light most favorable to the Commonwealth, we conclude that the Commonwealth has established a *prima facie* case for simple assault. Thus, we reverse the trial court’s decision dismissing the charge of simple assault.

In conclusion, we reverse the trial court’s decision granting Appellee’s petition for *habeas corpus* relief as to the charges of homicide by vehicle,

involuntary manslaughter, recklessly endangering another person, reckless driving and simple assault. We affirm the trial court's decision to deny Appellee's petition as to the charge of meeting or overtaking a school bus.<sup>1</sup>

Order reversed in part and affirmed in part. Case remanded for trial. Jurisdiction relinquished.

WECHT, J., files a Concurring Memorandum.

Judgment Entered

A handwritten signature in cursive script, appearing to read "Nicholas V. Cozzitelli", is written over a grey rectangular background. A horizontal line extends from the end of the signature to the right.

Deputy Prothonotary

Date: May 3, 2013

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<sup>1</sup> The trial court denied Appellee's petition for *habeas corpus* relief as to the meeting or overtaking school bus charge. Although that portion of the trial court's order is unchallenged on appeal, we affirm the trial court's decision regarding that charge since all charges were addressed in a single order and to provide clarity to the trial court on remand.