

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BOBBY LAMONT FLETCHER,	:	
	:	
Appellant	:	No. 886 WDA 2012

Appeal from the Judgment of Sentence January 18, 2012,
Court of Common Pleas, Allegheny County,
Criminal Division at No. CP-02-CR-0004643-2009

BEFORE: BOWES, DONOHUE and MUNDY, JJ.

MEMORANDUM BY DONOHUE, J.: FILED: May 23, 2013

Appellant, Bobby Lamont Fletcher (“Fletcher”), appeals from the judgment of sentence following his convictions for aggravated assault – serious injury to police/transit/fire/others, 18 Pa. C.S.A. § 2702(a)(2), possession or distribution of small amount of controlled substance (marijuana), 35 P.S. § 780-113(a)(31), and accident with unattended vehicle, 75 Pa. C.S.A. § 3745. For the reasons that follow, we affirm.

The trial court aptly summarized the relevant factual background of this case as follows:

On October 2, 2008, City of Pittsburgh police officers were working undercover surveillance of a pharmacy parking lot because of information received about drug transactions at the location, and because of prior narcotics arrests that occurred there. At 7:30 p.m., the police observed two white males standing in the parking lot appearing to be waiting for someone. A Buick then arrived on the scene and

picked up one of the males. The Buick left the parking lot, and one officer followed.

The driver of the Buick went to a convenience store and parked. A man exited the car and went into the store. When he came out and got back into the car, the officer tried to detain the Buick based on the request of his partner, who had remained at the pharmacy. The officer parked next to the Buick, approximately 5 to 7 feet away. The officer exited his car, approached the Buick on the driver's side, and stood between the two vehicles approximately 3 feet from [Fletcher]. The officer observed [Fletcher] in the driver's seat. The officer displayed his badge, identified himself as police, and ordered the occupant not to move. The officer observed in plain view a baggie of marijuana in the middle of the car's console near [Fletcher's] right hand. He also saw the butt-end of a semi-automatic weapon in the pocket of [Fletcher's] hoodie.

After seeing the gun, the officer took a position farther from [Fletcher's] car, but remained between the two cars. [Fletcher] then started his car, swerved towards the officer, and hit the rear driver's side of the police vehicle pushing the car out of the way and deflating the police car's rear tire. The Buick then fled the wrong way down a one-way street. The undercover officer radioed the suspect's direction and followed the car. The officer saw [Fletcher] exit the Buick and run. Another officer arrived with a picture of [Fletcher]. The undercover officer identified [Fletcher] as his assailant from that picture. In the Buick was [Fletcher's] cell phone, and the 3.7 grams of marijuana that had been seen in the consol.

Trial Court Opinion, 10/5/12, at 1-2.

Following a suppression hearing and bench trial on November 2-3, 2011, on November 9, 2011 the trial court found Fletcher guilty of the

above-referenced crimes. On January 18, 2012, the trial court denied Fletcher's *pro se* post-trial motions and sentenced him to a term of incarceration of six to twelve years on the aggravated assault conviction, with no additional penalty on the remaining counts. This timely appeal followed, in which Fletcher raises the following two issues for our consideration and determination:

1. Did the trial court err in convicting [Fletcher] of aggravated assault where there was insufficient evidence to establish, beyond a reasonable doubt, that [Fletcher] acted with the specific intent to cause serious bodily injury to Officer Duffola[.]
2. Did the trial court err in denying the defense's motion to suppress Officer Duffola's pre-trial and in-court identifications of [Fletcher] where the pre-trial identification procedure, in which Officer Duffola was presented with a single digital image of [Fletcher], was unduly suggestive and not otherwise reliable under the totality of the circumstances, and the in-court identification did not have an independent basis apart from the pre-trial identification[.]

Fletcher's Brief at 5.

For his first issue on appeal, Fletcher contends that that the trial court found him guilty of aggravated assault without sufficient evidence to establish that he acted with the specific intent to cause serious bodily injury to a police officer. In reviewing a challenge to the sufficiency of the evidence, our standard of review is as follows:

As a general matter, our standard of review of sufficiency claims requires that we evaluate the record `in the light most favorable to the verdict

winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.’ **Commonwealth v. Widmer**, 560 Pa. 308, 744 A.2d 745, 751 (2000). ‘Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.’ **Commonwealth v. Brewer**, 876 A.2d 1029, 1032 (Pa. Super. 2005). Nevertheless, ‘the Commonwealth need not establish guilt to a mathematical certainty.’ **Id.**; **see also Commonwealth v. Aguado**, 760 A.2d 1181, 1185 (Pa. Super. 2000) (‘[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant’s innocence’). Any doubt about the defendant’s guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. **See Commonwealth v. DiStefano**, 782 A.2d 574, 582 (Pa. Super. 2001).

The Commonwealth may sustain its burden by means of wholly circumstantial evidence. **See Brewer**, 876 A.2d at 1032. Accordingly, ‘[t]he fact that the evidence establishing a defendant’s participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence.’ **Id.** (quoting **Commonwealth v. Murphy**, 795 A.2d 1025, 1038–39 (Pa. Super. 2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant’s crimes beyond a reasonable doubt, the appellant’s convictions will be upheld. **See Brewer**, 876 A.2d at 1032.

Commonwealth v. Pedota, __ A.3d __, 2013 WL 618790, at *1-2 (Pa. Super. February 20, 2013) (quoting **Commonwealth v. Lamonda**, 52 A.3d 365, 368 (Pa. Super. 2012)); **Commonwealth v. Pettyjohn**, __ A.3d __, 2013 WL 870622, at *2-3 (Pa. Super. March 11, 2013).

18 Pa. C.S.A. § 2702(a)(2), which defines the crime of aggravated assault – serious injury to police/transit/fire/others, provides as follows:

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

* * *

(2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation, while in the performance of duty[.]

18 Pa. C.S.A. § 2702(a)(2). Fletcher does not contest that Officer Thomas Duffola (“Officer Duffola”) was acting in his capacity as a police officer for the City of Pittsburgh at the time the events in question. Instead, Fletcher argues that there is no evidence that he acted with the intent to cause serious bodily injury to Officer Duffola. The Commonwealth’s case on this element of the crime rested entirely on Officer Duffola’s testimony:

Q. Now, when you entered the parking lot, where did you place your vehicle?

A. I was on Ward Street parked over on the side here observing him go into the store and watching his actions, waiting for backup. When he exited the store and got into his driver’s side, I came off of

Ward, entered through this entrance, came and parked my vehicle probably in the proximity of this (indicating), because I was in a rush and I know he was starting the vehicle and I had to get out as soon as possible.

Q. Can you tell the Court how close your vehicles were?

A. Within 5 to 7 feet of each other. Real close. I mean, I was almost in the next spot next [*sic*] to him.

Q. And when you got out of your vehicle, where did you go? Can you draw yourself for us.

A. My driver's side was on his driver's side, and I approached and was standing right next to his vehicle.

Q. Officer, you can have a seat again.

A. Okay.

Q. Now, when you approached, what happened?

A. I had turned on our lights of our undercover vehicle just to identify as police, parked crooked, exited with my badge displayed and approached him on foot.

Q. And what happened when you reached his vehicle?

A. I made contact, said, 'Pittsburgh police, don't move,' because he was reaching for the ignition. I said, 'Don't move.' His hands kept going back and forth, and that's when my attention was drawn to his hands. I could see the marijuana and the firearm protruding from his waist area at that time.

Q. So after you see the marijuana, what happens next?

A. Fearing there was a weapon, I stepped back and radioed Code 3 backup, which means emergency.

Q. And why did you fear there was a weapon?

A. Because I had seen what I believed to be the butt end of a handgun.

Q. And when you say you backed up, can you describe that.

A. I took a step back behind him, more over his left shoulder, to be [in] a more tactical position.

Q. And when you say 'a step,' can you be like -- how many feet?

A. Not far. Just a quick step back where my weapon would be closer to his head and he'd have to reach over his shoulder and he wouldn't be able to see me as clearly.

Q. And when you took a step back, what happened?

A. That's when he -- the car started and he gunned it.

Q. And which way did he turn?

A. **At first he swerved towards me, like he came - - if I was at my original position, I would have definitely been hit. When I took a step back, the car kind of came at me at an angle. And there was enough room for him to go straight; because the way I had parked, he could have went straight out. But since he swerved towards me, he ended up clipping the rear of my vehicle and then exited the parking lot.**

Q. Officer, what was going through your mind when he swerved towards you?

A. I thought I was going to get him. I was the only thing stopping him from escape.

Q. And did you react in any way?

A. I did. I already had my weapon drawn at that point. I had to take another step backwards, away from the vehicle, to the left of it, to escape from being sideswiped. He had hit my vehicle. I radioed that I was almost hit, he attempted to hit me. That's when I got into my vehicle and began to pursue.

Q. And without your reaction, do you think you would have been hit?

A. I would have been hit, yes.

Q. And how did that make you feel?

A. Frightened. It was such speed, I would have been seriously injured. It was very quick. It was enough for -- the speed from that short distance was able to push my car out of the way, and he was able to go out the Ward Street entrance.

Q. And where did he strike your car?

A. The driver's side rear by the trunk, right by the wheel well. It was a perfect angle to push it out of the way.

Q. And did your car sustain damage?

A. It did, damage to the wheel well and the tire was flat.

N.T., 11/2/11, at 63-68.

The highlighted testimony was sufficient as a matter of law to establish that Fletcher attempted to cause serious bodily injury to Officer Duffola, as he testified that Fletcher swerved in his direction and that he would have been hit if he had not taken a step back from where he had been standing just a moment prior. Officer Duffola also testified that swerving in his direction was unnecessary if Fletcher was merely attempting to escape the

parking lot, since there was adequate room to maneuver around the parked police car. “Where one does not verbalize the reasons for his actions, we are forced to look to the act itself to glean the intentions of the actor.” ***Commonwealth v. Robinson***, 817 A.2d 1153, 1159 n.6 (Pa. Super. 2003). Giving the Commonwealth as the verdict winner the benefit of all reasonable inferences, as our standard of review requires, Fletcher’s intent to inflict serious bodily injury may be readily inferred from Officer Duffola’s above-highlighted description of Fletcher’s actions.

Fletcher insists, however, that Officer Duffola’s position at the time of the incident made it “physically impossible” for him to have been struck by the car, and that the circumstances indicate that Fletcher was only attempting to flee the scene (rather than injure anyone). Fletcher’s Brief at 17. Fletcher raised these same arguments during Officer Duffola’s cross-examination at trial, who refused to agree with them. N.T., 11/2/11, at 69-75 (“It was definitely a turning motion towards me because I was on the side. I had to step away from the vehicle, and I was in fear that he was going to actually squish me between his car and my car, the angle he took, because there was plenty of space for him to go forward.”). The trial court, as the finder of fact, heard all of Fletcher’s arguments in this regard, but nevertheless determined that Fletcher’s actions demonstrated a specific intent to inflict serious bodily injury. Because this finding is supported by the record (*i.e.*, Officer Duffola’s testimony), we will not disturb it on appeal.

Fletcher next argues that “[e]ven assuming, *arguendo*, that one were to find some indication that the driver of the Buick intended to hit Officer Duffola, it would *at least* be equally plausible that the driver had the sole intent to drive away from the Officer.” Fletcher’s Brief at 29 (emphasis in original). Again however, pursuant to our standard of review when considering a sufficiency of the evidence claim, we must give the Commonwealth, as the verdict winner, the benefit of all reasonable inferences. **Widmer**, 560 Pa. at 319, 744 A.2d at 751. While there were other plausible outcomes that the trier of fact could have reached from the evidence presented, in this case the trial court, as reflected by its verdict, found Officer Duffola’s testimony credible and determined that Fletcher intentionally swerved his car in the officer’s direction in a deliberate attempt to hit him, in part because he (Fletcher) could have escaped from the parking lot without so swerving. Because the evidence at trial adequately established that Fletcher acted with the specific intent to inflict serious bodily injury on Officer Duffola, no relief is due on Fletcher’s first issue on appeal.

For his second issue on appeal, Fletcher argues that Officer Duffola’s identifications of Fletcher, both prior to and at trial, were unduly suggestive and unreliable, and that as a result the trial court erred in denying his motion to suppress them. Fletcher’s Brief at 31. In particular, Fletcher contends that when Officer Duffola was presented with a single digital image

of Fletcher at the scene of the crime, this amounted to an unreliable one-man lineup. **Id.**

In a recent *en banc* decision, this Court explained our scope of review when addressing claims relating to identification evidence:

'In reviewing the propriety of identification evidence, the central inquiry is whether, under the totality of the circumstances, the identification was reliable.' **Commonwealth v. Moyer**, 836 A.2d 973, 976 (Pa. Super. 2003), *appeal denied*, 578 Pa. 694, 851 A.2d 142 (2004) (quoting **McElrath v. Commonwealth**, 405 Pa. Super. 431, 592 A.2d 740, 742 (1991)). The purpose of a 'one on one' identification is to enhance reliability by reducing the time elapsed after the commission of the crime. **Id.** 'Suggestiveness in the identification process is but one factor to be considered in determining the admissibility of such evidence and will not warrant exclusion absent other factors.' **Id.** (quoting **McElrath**, 592 A.2d at 742).

As this Court has explained, the following factors are to be considered in determining the propriety of admitting identification evidence: 'the opportunity of the witness' to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the perpetrator, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation.' **Id.** (quoting **McElrath**, 592 A.2d at 743). The corrupting effect of the suggestive identification, if any, must be weighed against these factors.

Commonwealth v. Brown, 23 A.3d 544, 558 (Pa. Super. 2011) (*en banc*).

At the suppression hearing, Officer Duffola testified as follows regarding his identification of Fletcher as the person he encountered in the convenience store parking lot:

- Q. And where did the vehicle go?
- A. The vehicle eventually parked at 3601 Boulevard of the Allies. It's a convenience store with its own little parking lot off of the Boulevard, well lit from the store [and] street lights. It's still in the heart of Oakland. My partner told me to detain the person in that vehicle.
- Q. Okay. And do you remember what the weather conditions were like that night?
- A. It was just an October night, no rain, no adverse conditions.
- Q. And when you received the instruction to detain that vehicle, what did you do?
- A. I observed the male had gotten out of the vehicle and entered the convenience store. My partner informed me to detain the male. I then went onto our radio channel and asked for backup, stating I was about to detain a male, gave the location, what the male was wearing and what the vehicle looked like. I was waiting for backup to arrive when the male exited the store and entered the vehicle. At that point I approached in my unmarked vehicle --
- Q. If I could just take two seconds. Sorry to stop you. So you saw the male get out of the vehicle and enter the store?
- A. That's correct.
- Q. And then you saw him exit the store?
- A. Correct.
- Q. Do you remember what he was wearing that night?
- A. It was a black hoodie, dark-colored jeans or --

[Counsel for Fletcher]: Excuse me, Officer. I didn't catch that. What was he wearing?

[Officer Duffola]: A black hoodie and dark-colored pants or jeans.

[Counsel for Fletcher]: Thank you.

Q. And after you called for backup, what happened next?

A. I was waiting for backup to arrive when the male exited and entered the vehicle. I couldn't wait any further, figuring that he would get in the vehicle and leave. At that point I approached in my unmarked vehicle, parked next to him or near him, exited, had my badge displayed, stated, 'Pittsburgh police, do not move.' At that point I was probably about 3 feet away from the male who is seated at the defense table in the brown jumpsuit.

Q. Okay. And what window were you looking through the vehicle?

A. His driver window.

Q. Was it tinted?

A. No.

Q. And were you able to give a description based on what you saw?

A. Yes.

Q. And what would that description be?

A. A black male, medium to dark skinned, scruffy, not a beard as he has now, but it was like unshaven for that day. Did not have glasses, and the black hood was up.

Q. And do you see that person sitting in the courtroom today?

A. I do.

Q. Can you please identify either by where he is sitting or what he is wearing.

A. Defense table with the brown jumpsuit.

[Counsel for the Commonwealth]: Your Honor, can the record reflect that he has identified the defendant?

THE COURT: Yes.

Q. Now, what happened next?

A. I identified myself as being the police, I had my badge displayed. He looked over at me. He began to reach for the key that was in the ignition. I said, "Don't. Let me see your hands." [...]

Q. And what happened at that point?

A. Upon seeing the gun, I backed away from the vehicle and towards the rear of him to take a tactical position. [...]

Q. How long were you able to view the defendant in that period of time?

A. While I was telling him not to move and that, probably about 20 to 30 seconds.

Q. And that entire time, nothing obstructed your view?

A. No. I was about 2 feet away from him until I saw the weapon.

* * *

Q. Did you eventually meet with other officers?

A. I did. I went back to where he had fled from his vehicle.

Q. And at that time what happened?

A. I was met by Officer Sisak. Officer Sisak then directed me to his patrol unit and said, "Is this the male that you saw?" And on his MTT, the little computer in his car, was the picture of the male I had seen.

Q. And who was that a picture of?

A. I later learned his name was Bobby Fletcher.

N.T., 11/2/11, at 9-14.

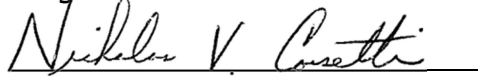
Based upon this testimony from Officer Duffola, we agree with the trial court's determination that "no substantial likelihood exists of a misidentification of [Fletcher] by the officer." Trial Court Opinion, 10/5/12, at 4. Applying the factors set forth in **Brown**, Officer Duffola observed Fletcher in a well lit parking lot from a distance of approximately two feet away through un-tinted glass, without any obstruction, and without any adverse weather conditions. Moreover, Officer Duffola identified Fletcher from a photograph within a few minutes of observing him at the scene of the crime, and his identification did not waiver between that time and the time of trial. Accordingly, to the extent (if any) that the single photo identification at the scene was unduly suggestive, we conclude that no basis exists to disturb the trial court's finding that overall reliability of the

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identification outweighs any suggestiveness. As a result, no relief is due on Fletcher's second issue on appeal.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: May 23, 2013