NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DELLA A. SELNER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 972 MDA 2012

Appeal from the Judgment of Sentence of January 11, 2012,
in the Court of Common Pleas of Franklin County,
Criminal Division, at No. CP-28-CR-0001586-2010

BEFORE: FORD ELLIOTT, P.J.E., WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: **FILED MAY 14, 2013**

This case is a direct appeal from judgment of sentence. Appellant claims the evidence was insufficient to support her convictions for resisting arrest ("RA") and disorderly conduct ("DC"). She also contends the trial court erred in admitting hearsay testimony. We affirm the judgment of sentence.

At roughly 3:00 p.m. on July 5, 2010, Pennsylvania State Police received two calls regarding incidents at a residential area called Mickey Inn. One call came from the O'Hara residence and indicated people were trespassing by fishing in a creek on the O'Hara property. The other call

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* Retired Senior Judge assigned to the Superior Court.

came from one of the alleged trespassers, neighbors of the O'Hara home, and indicated someone had pointed a firearm at them.

Though not the primary responding officer, Corporal Rodney Anderson went to the scene, largely because of the reported firearm. His testimony revealed that most of the homes at Mickey Inn were trailers. Positioned end to end with some space in between them, the trailers sat parallel to, and on each side of, a lane that went through the neighborhood/trailer park.

When Anderson arrived, Troopers Falcone and Jobbs were already at the O'Hara residence. Anderson, Falcone and Jobbs then came to be standing close to each other outside the doorway of the home. There were two or three steps leading from the door down to the outside. O'Hara was in or near the door. Jobbs was talking to O'Hara while O'Hara's wife, Appellant, came to the door. Appellant began complaining that the troopers were questioning O'Hara about the firearm. Her demeanor and tone were agitated. Her voice was raised. When the troopers asked to see the gun, Appellant stated that she had a firearm, that it was secured and that the troopers needed a warrant to see it.

O'Hara turned to reenter the residence, but Anderson reached and grabbed his arm. In his testimony, Anderson explained he did so because he assumed the gun was in the home. He wanted to stop O'Hara for the safety of the officers and because Anderson expected to arrest O'Hara for having pointed a gun at the alleged trespassers. When Anderson grabbed

O'Hara, Appellant lunged at Anderson, attempting to go between the two men, and grabbed Anderson's arm. At that point, Falcone and Jobbs each grabbed Appellant, taking her away from Anderson and away from the steps. Anderson then took hold of O'Hara's other arm. O'Hara did not struggle, and the two men stood still without incident.

Falcone put Appellant against the side of the home and ordered her to put her hands behind her back. Appellant did not do so and, instead, squirmed and twisted. Falcone and Jobbs tried to gain control of Appellant. As they did so, she put her fists in front of her and then up under her armpits to prevent the troopers from handcuffing her. She continued to struggle while yelling that she was not going to be handcuffed and was not going to be arrested. She also said words to the effect that the troopers were not going to put their hands on her. Appellant continued screaming as the troopers persisted in their efforts to secure her arms. She was yanking her arms, sometimes pulling away from one or both troopers. During the incident, the troopers gave Appellant repeated commands to calm down, to stop yelling, to stop moving, and to place her hands behind her back. Appellant did not comply.

Anderson gave authorization to tase Appellant, and Jobbs readied her taser. However, Falcone was concerned that, because of Appellant's squirming, Jobbs might mistakenly tase Falcone rather than Appellant. Falcone then told Jobbs to wait and, by then, Falcone was able to take Appellant to the ground and finish handcuffing her. It appears Appellant still

struggled or yanked somewhat more, but Falcone controlled her. The trial testimony involved varying estimates of between fifteen and sixty seconds for the length of time between the instant when Appellant first lunged at Anderson until the moment when she was finally restrained by Falcone.

Following the aforesaid events, Appellant faced various criminal charges. She proceeded to a jury trial and was convicted of RA and DC. She later filed this timely appeal. She first contests the sufficiency of the evidence regarding both convictions.

We begin by noting the law relating to Appellant's RA conviction and her sufficiency challenge thereto:

> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa.C.S.A. § 5104.

We have discussed our review of sufficiency claims in this way:

> . . . [O]ur standard is whether, viewing all the evidence and reasonable inferences in the light most favorable to the Commonwealth, the factfinder reasonably could have determined that each element of the crime was established beyond a reasonable doubt. This Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. We do not weigh the evidence or make

> credibility determinations. Moreover, any doubts concerning a defendant's guilt were to be resolved by the factfinder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence.

Commonwealth v. King, 990 A.2d 1172, 1178 (Pa. Super. 2010) (internal citations omitted).

Appellant contends the evidence did not establish that, with the intent of preventing the troopers from effecting a lawful arrest or discharging any other duty, she created a substantial risk of bodily injury to any of the troopers or anyone else, or employed means justifying or requiring substantial force to overcome her resistance. As such, she concludes the evidence did not prove she was guilty of RA. She is wrong.

We first observe that the evidence showed Appellant acted with the intent to prevent the troopers from discharging one or more lawful duties. Anderson tried to detain O'Hara for the lawful purposes of officer safety. Whether Anderson intended to arrest O'Hara, as some of Anderson's testimony suggested, or whether Anderson, at that juncture, merely wanted to stop O'Hara from obtaining a weapon from inside the home, the fact is that Anderson was discharging a lawful duty. Appellant then interfered with, and tried to prevent, Anderson's efforts. While Appellant was doing so, Falcone and Jobbs attempted to discharge a lawful duty related to Anderson's efforts—*i.e.*, they tried to restrain Appellant in order to stop her from interfering with what Anderson was doing. In short, when the evidence is viewed most favorably to the Commonwealth, it supports the conclusion

that Appellant intended to interfere with the various legal duties in which the troopers were engaged.

Also, under the appropriate Commonwealth-favorable standard, the evidence supports the reasonable conclusion that, in the course of trying to prevent the troopers from discharging their lawful duties, Appellant employed means justifying or requiring substantial force to overcome her resistance to the troopers. She squirmed, twisted, pulled away, yanked, locked her fists, struggled against being restrained, and specifically said that she was not going to be handcuffed or arrested. Two officers, one male and one female, needed somewhere between fifteen and sixty seconds, roughly, to subdue Appellant. The situation was sufficiently difficult for the troopers that Anderson authorized the use of a taser. Prior to the use thereof, Falcone managed to take Appellant to the ground. From these facts, the jury could have concluded beyond a reasonable doubt that Appellant's behavior not only justified but, in fact, required substantial force from the troopers in order to overcome her resistance.

We note that, in large measure, Appellant's argument emphasizes that the struggle was, in her view, relatively short and that the troopers, particularly Falcone, needed only routine techniques to subdue her, techniques involving force that Appellant characterizes as minimal. She primarily concludes that substantial force was neither justified nor required to overcome her resistance. Her argument is unavailing. Any doubts about the severity of the struggle as that severity related to the elements of RA

was for the factfinder. We will not reweigh the evidence or substitute our judgment for that of the jury. The evidence was surely not so weak and inconclusive that no probability of guilt could have been based thereon. Appellant's sufficiency claim regarding RA has no merit.

Appellant next challenges the sufficiency of the evidence regarding DC. The DC provisions under which Appellant was convicted are:

> **(a) Offense defined.**--A person is guilty of [DC] if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
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> *******
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> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
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> **(b) Grading.**--An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.
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> **(c) Definition.**--As used in this section the word "public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public.

18 Pa.C.S.A. § 5503(a)(4), (b), (c).

Appellant first claims that the Commonwealth did not prove she intended to cause or recklessly created a risk of **public** inconvenience,

annoyance or alarm. She points out that the incident occurred on private property near the side of her home. She contends this fact demonstrates the event was not sufficiently public to satisfy the DC statute. She is again wrong.

While it is true that Appellant's actions occurred close to her home, the trial testimony established that her home was in a trailer community. There was a public road running through the area and there were residences positioned along that road. Based on these facts, the jury could have reasonably determined the area in question constituted a neighborhood to which the public or substantial group had access. Such a finding would be consistent with the definition of the term "public" in the DC statute.

We observe that Appellant relies on ***Commonwealth v. Beattie***, 601 A.2d 297 (Pa. Super. 1991), to support her contention that the events on her private property did not involve a risk to the public. That case is distinguishable. In ***Beattie***, this Court found that the events in question (*i.e.*, the appellant's vocal and emphatic refusal to provide police with identification) did not occur in a place to which the public or a substantial group had access because the incident happened on the appellant's two-acre lot that was bounded by a water company and an unoccupied two-acre parcel. ***Beattie***, 601 A.2d at 301. In the present case, while there was some testimony about one or more vacant lots near the incident, the record contained sufficient evidence (*e.g.*, public road, other residences) which, when viewed in the light most favorable to the Commonwealth, could have

led the jurors to conclude beyond a reasonable doubt that the area was public for the purposes of the DC statute.

To whatever extent Appellant might also be trying to challenge the causation or creation aspect of the public inconvenience, annoyance or alarm element (*i.e.*, that she intended to cause or recklessly created a risk thereof), her position is likewise incorrect. Appellant's ongoing struggle and screaming were sufficient facts from which the jurors could find that, at the least, she recklessly created the aforesaid risk.

Appellant next argues her DC conviction was infirm because the Commonwealth did not prove she created a hazardous or physically offensive condition. Her argument fails.

A hazardous condition involves danger or risk. ***Commonwealth v. Williams***, 574 A.2d 1161, 1164 (Pa. Super. 1990). The dangers or risks the DC statute seeks to avoid quite plainly include physical injuries. ***Id.*** The evidence we have already discussed revealed that Appellant engaged in an ongoing physical struggle with two troopers. One or both troopers could have been injured by Appellant's twisting and pulling away. A trooper could have fallen and been hurt. Along these lines, we note Jobbs specifically testified that, because the struggle began on, and occurred near, steps, she was worried that she might trip and hit her head. Additionally, Falcone's testimony revealed his concern, at one point during the struggle, that Jobbs might accidentally injure him with the taser when trying to subdue

Appellant. In light of all the evidence, the factfinders were free to conclude that Appellant's actions created a hazardous condition—specifically, a struggle that put the troopers in danger or risk of being physically harmed.

Next, Appellant maintains the evidence did not establish she engaged in any conduct warranting a misdemeanor grading under 18 Pa.C.S.A. § 5503(b). Appellant's position is incorrect. She persisted in her DC after one or both troopers reasonably warned her to desist. Moreover, the facts of record are such that it was reasonable to conclude Appellant's aforementioned behavior was, in fact, intended to cause substantial harm or serious inconvenience. The evidence thus demonstrated that Appellant's actions satisfied the requisites of Section 5503(b).[1]

Appellant's remaining issue involves the admission of evidence. She claims the court wrongly admitted hearsay from Anderson. During Anderson's direct examination, he explained that, upon his arrival at the O'Hara home, Anderson saw and heard Jobbs talking to O'Hara. The

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[1] After presenting her aforesaid arguments that the evidence was not sufficient to support her RA and DC convictions, Appellant's brief then presents a separate argument that the court should have granted her a judgment of acquittal at the end of the Commonwealth's case and/or in response to her post-sentence motion. While this separate argument makes some limited claim that the trial court used the wrong standard for evaluating Appellant's judgment-of-acquittal requests, the argument is essentially a repackaging of Appellant's earlier sufficiency claims. As we have already discussed, those claims are without merit. Because Appellant has not shown the evidence against her was insufficient, she has not shown she was entitled to a judgment of acquittal at any time.

Commonwealth then asked Anderson what he heard O'Hara say to Jobbs. Appellant objected on hearsay grounds. The Commonwealth responded that Anderson's testimony was not being elicited for the truth of what he was about to say but, instead, to explain the three troopers' overall attitude. The court overruled the objection. After the court did so, the Commonwealth essentially repeated its question and Anderson answered as follows:

> Commonwealth: . . . Anderson, what was . . . O'Hara basically saying to the troopers?
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> Anderson: He was explaining that he had looked outside and that he thought someone was trespassing on his property. So, he went out to confront them regarding that but when he walked outside, the people were actually on the neighboring property fishing and he decided he was going to go over and talk to them back there, because the neighboring property, no one lives there and I believe . . . O'Hara actually mows the lawn there.
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> So, he went over to confront them regarding that and had a firearm in his possession because he was concerned for his safety.

N.T., 12/14/11, at 36.

In its opinion, the trial court indicates it admitted Anderson's response not for the truth of its contents but to demonstrate the effect it had on the troopers—*i.e.*, to show that the troopers were concerned that O'Hara possessed a firearm and to explain that their concern caused them to conduct their investigation in the way they did. Appellant argues Anderson's aforementioned testimony was inadmissible hearsay because it was used to

establish what allegedly took place between O'Hara and one or more other people prior to police arrival.

Hearsay is a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. Pa.R.E. 801(c). Thus, an out-of-court statement offered for some purpose other than its truth (*e.g.*, to explain the investigating officers' conduct) is not hearsay. ***Commonwealth v. Hardy***, 918 A.2d 766, 777 (Pa. Super. 2007). Hearsay is generally not admissible unless it falls within some exception set forth by rule. Pa.R.E. 802.

Decisions regarding the admission of evidence are within the discretion of the trial court, and we will not disturb such decisions absent an abuse of discretion. ***Hardy***, 918 A.2d at 776. We note additionally that, even if a court wrongly admits evidence, including hearsay, we will not disturb the judgment of sentence if the error in admitting the evidence was harmless. ***Hardy***, 918 A.2d at 777. An error will be deemed harmless where there was no reasonable probability that it could have contributed to the verdict. ***Commonwealth v. Rosen***, 42 A.3d 988, 998 (Pa. 2012).

While the trial court evidently intended to admit Anderson's aforesaid testimony not to prove what happened before the police arrived but, rather, to explain the troopers' attitude and/or why they began their investigation as they did, we do not see that any instruction to that effect was given to the jury. Without having been told that Anderson's testimony was only admitted

for a restricted purpose, and not to prove its truth, the jurors would have had no reason to limit their use of that testimony. That is, although the court and the parties may have understood the intended purpose of the evidence, the jury was not restricted from utilizing the evidence in any way. It thus appears to us that Anderson's testimony could have been used to prove the truth of the matter asserted therein in violation of the general hearsay prescription.

Nevertheless, Appellant is not entitled to relief because, as the Commonwealth notes in its brief, any error in admitting this testimony was harmless. Anderson related what O'Hara apparently said about the alleged trespassers and about O'Hara's decision to confront them while carrying a gun. O'Hara's reported comments did not implicate Appellant in any wrongdoing in any way. Her conduct that constituted RA and DC was independent of what O'Hara apparently said to Jobbs. There is no reasonable probability that O'Hara's comments, as testified to by Anderson, could have contributed to the guilty verdict against Appellant. Because any error in the admission of the testimony in question was harmless, we will not disturb Appellant's judgment of sentence.

It is also worth noting that, as Appellant herself concedes in her brief, the calls received by the officers apparently indicated that a firearm was on the property. Additionally, Falcone's testimony indicated that Appellant revealed to the troopers that there was a firearm present. Thus, to whatever extent Appellant may be attempting to argue that O'Hara's

reported comment about having a gun was somehow prejudicial to her, the record contained other evidence of the gun's existence in the home. The existence of such other evidence further militates in favor of the conclusion that the admission of Anderson's testimony was harmless.

Based on our foregoing discussion, Appellant's claims fail. Therefore, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Mary A. Hoyle

Interim Deputy Prothonotary

Date: 5/14/2013