NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ZKRR EGGLESTON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 558 EDA 2012

Appeal from the Judgment of Sentence January 27, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006497-2008

BEFORE: FORD ELLIOTT, P.J.E., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.: Filed: March 4, 2013

Appellant, Zkrr Eggleston, appeals from the January 27, 2012 aggregate judgment of sentence of seven to 14 years' incarceration followed by seven years' reporting probation after he was found guilty of aggravated assault, criminal conspiracy, recklessly endangering another person (REAP), and simple assault.[1] After careful review, we affirm.

The relevant facts and procedural history can be summarized as follows. On May 11, 2008, Philadelphia Police Officer William Greco, Jr., stopped Appellant in his vehicle, a white Lexus, in response to a police radio broadcast advising officers to be on the lookout for said vehicle, which was

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 2702, 903, 2705, and 2701, respectively.

being pursued by a complainant. Trial Court Opinion, 7/19/12, at 2. The complainant in the instant matter, Seth Rosen, had a confrontation with Appellant outside of their vehicles after Mr. Rosen received a call from his girlfriend Lily's mother that she "was in the midst of an unwanted visit from Appellant."[2] ***Id.*** Appellant returned to his vehicle and instructed Mr. Rosen to follow him, Mr. Rosen complied. ***Id.*** at 3. The two vehicles traveled "in circles for several minutes, until arriving at Girard Avenue and Marshall Street." ***Id.***

> Appellant then turned onto Marshall Street and, a few feet into the block, stopped to speak with an older black male who was wearing a sweater. The male leaned into Appellant's car, and briefly exchanged words with Appellant. The male then walked away, and Appellant continued driving up the block. Toward the end of the block, Appellant slammed on his breaks, causing Mr. Rosen to do the same, and [Appellant] angled his car so that Mr. Rosen could not get through.
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> Mr. Rosen testified that, at that moment, a man holding a shotgun emerged on his right side and, from a distance of four or five feet, opened fire on him. Fearing for his life, Mr. Rosen leaned over to duck down. The gunman continued to fire at him; the blasts shattered Mr. Rosen's windshield, destroyed his passenger door, knocked off his windshield wiper, and damaged his radiator and hood. Amazingly, Mr. Rosen averted the bullets, but

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[2] At the time of the incident Lily was Mr. Rosen's girlfriend. Mr. Rosen and Lily are now married. Lily had previously been married to Appellant, and at the time of the incident Lily and Appellant had been separated for one year. Trial Court Opinion, 7/19/12, at 2.

> was bleeding from the broken glass. After several rounds, there was a pause in the shooting, and Mr. Rosen lifted his head up to try to escape, but Appellant was still obstructing him. Before the gunman was able to fire another round at him, Appellant finally moved his car, allowing Mr. Rosen to flee. Driving behind Appellant, Mr. Rosen encountered a police officer who was engaged in a traffic stop. He exclaimed to the officer, "[H]e's trying to kill me … that guy just tried to kill me." The officer relayed the information over police radio, and Mr. Rosen continued his pursuit of Appellant. Responding officers stopped them at 7th and Fairmount Avenue.

Id. at 3-4.

Appellant was subsequently arrested, and on May 23, 2008, Appellant was charged with aggravated assault, criminal conspiracy, firearms not to be carried without a license, carry firearms public in Philadelphia, possessing instrument of a crime, simple assault, REAP, and two counts of criminal attempt.[3] On November 3, 2011, following a three-day jury trial, Appellant was convicted of aggravated assault, criminal conspiracy, simple assault, and REAP. The jury acquitted Appellant of one count of criminal attempt. The remaining charges were *nolle prossed* by the Commonwealth.

Thereafter, on January 27, 2012 Appellant was sentenced to consecutive terms of three and one-half to seven years' incarceration for the aggravated assault and criminal conspiracy convictions. No further penalties

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[3] 18 Pa.C.S.A. §§ 2702, 903, 6106, 6108, 907, 2701, 2705, and 901, respectively.

were imposed on the simple assault and REAP counts. Appellant did not file any post-sentence motions. On February 14, 2012, this timely appeal followed.[4]

On appeal, Appellant raises the following issues.

> A. Whether the evidence failed to support [Appellant]'s conviction for conspiracy where the Commonwealth presented no evidence showing that [Appellant] was involved in the shooting or that he entered into an agreement to participate, and presented no evidence whatsoever identifying who [Appellant] allegedly conspired with?
>
> B. Whether the evidence failed to support [Appellant]'s conviction for aggravated assault, simple assault and recklessly endangering another person where the Commonwealth presented no evidence showing that [Appellant] was actually involved in the shooting, but simply that he was present at the scene?

Appellant's Brief at 4.

As both of Appellant's issues aver there was insufficient evidence to support his convictions, we begin by noting that "[t]he standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt." ***Commonwealth v. O'Brien***, 939 A.2d 912, 913 (Pa. Super. 2007) (citation omitted). "Any doubts concerning an

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[4] Appellant and the trial court have complied with Pa.R.A.P. 1925.

appellant's guilt [are] to be resolved by the trier of fact unless the evidence was so weak and inconclusive that no probability of fact could be drawn therefrom." ***Commonwealth v. West***, 937 A.2d 516, 523 (Pa. Super. 2007), *appeal denied,* 947 A.2d 737 (Pa. 2008). Moreover, "[t]he Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." ***Commonwealth v. Perez***, 931 A.2d 703, 707 (Pa. Super. 2007) (citations omitted).

Appellant argues that the Commonwealth "presented insufficient evidence to establish a conspiracy because it did not show any agreement between [Appellant] and anyone else." Appellant's Brief at 11. Further, Appellant avers the Commonwealth's evidence "establishes nothing more than his presence on a roadway when the shooting occurred." ***Id.*** at 16. Specifically, Appellant argues he "did not fire the shots, hold the gun prior to the shooting, have any connection with the shooter, help the shooter flee, or help the shooter dispose of the weapon." ***Id.*** Therefore, Appellant concludes the "Commonwealth's evidence failed to establish that [Appellant] was guilty of Aggravated Assault, Simple Assault, and Reckless Endangerment based on an accomplice liability theory." ***Id.*** at 19.

In the instant matter, the trial court authored a comprehensive 15-page opinion that properly disposes of each of Appellant's claims. The trial court found that there was ample evidence to sustain Appellant's convictions

for conspiracy, aggravated assault, simple assault, and REAP. Trial Court Opinion, 7/19/12, at 7. The trial court sets forth a thorough discussion of accomplice liability and the applicable law regarding each of the four crimes for which Appellant was convicted, concluding the evidence was sufficient to convict Appellant of each crime. ***Id.*** at 8-13.

In support of its conclusion, the trial court noted that, Appellant "actively aided his cohort in firing the shots at Mr. Rosen, by slamming on his brakes and angling his car so as to prevent him from evading the ambush." ***Id.*** at 10. Further, the trial court observed that "the gunman emerged and commenced shooting at the precise moment that Appellant slammed on his breaks to box in Mr. Rosen." ***Id.*** Additionally, "[d]espite multiple gunshots, Appellant did not attempt to drive away, but rather waited and maintained his obstructing position as the gunman continued to fire at Mr. Rosen." ***Id.*** Therefore, after viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, the evidence was sufficient to sustain Appellant's convictions. ***Id.*** at 10-13.

We have reviewed the record in its entirety and have considered the merits of Appellant's claims. Following our careful scrutiny of the certified record, including the notes of testimony, the parties' briefs, and the applicable law, we conclude that the trial court's conclusions were entirely proper. The well-reasoned opinion of the trial court provides a detailed analysis of the law of this Commonwealth as related to the facts of this case.

The trial court then wholly refutes each of Appellant's arguments. Accordingly, we conclude that the July 19, 2012 opinion of the Honorable Susan I. Schulman comprehensively discusses and properly disposes of Appellant's claims. Therefore, we adopt the trial court's opinion as our own for purposes of this appellate review.[5]

Judgment of sentence affirmed.

Justice Fitzgerald concurs in the result.

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[5] We note that Appellant's second claim, addressed by the trial court on pages 13-15 of its opinion, was not pursued by Appellant on appeal. Therefore, we will not review said claim, and our disposition in this matter pertains solely to Appellant's challenges to the sufficiency of the evidence.

JUL 23 2012

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0006497-2010
VS.	:	
ZKRR EGGLESTON	:	558 EDA 2012

FILED
JUL 19 2012
Criminal Appeals Unit
First Judicial District of PA

OPINION

SCHULMAN, S.I., J.

Zkrr Eggleston ("Appellant") has appealed this Court's judgment of conviction and sentence. This Court submits the following Opinion in accordance with the requirements of Pa. R.A.P. 1925, and for the reasons set forth herein, recommends that its judgment be affirmed.

PROCEDURAL HISTORY

On November 3, 2012, following a jury trial, Appellant was convicted of Aggravated Assault,[1] Criminal Conspiracy (Aggravated Assault),[2] Recklessly Endangering Another Person ("REAP"),[3] and Simple Assault.[4] On January 27, 2012, upon review of the pre-sentence investigation report ordered by this Court, and consideration of all relevant facts and circumstances of this case, this Court sentenced Appellant to consecutive terms of three and one-half (3 ½) to seven (7) years' incarceration for Aggravated Assault and Criminal Conspiracy, to be followed by seven (7) years' reporting probation. This Court imposed no further penalty for either REAP or Simple Assault. Appellant subsequently appealed, and this Court ordered him to

[1] 18 Pa.C.S. § 2702.
[2] 18 Pa.C.S. § 903.
[3] 18 Pa.C.S. § 2705.
[4] 18 Pa.C.S. § 2701.

file a Concise Statement of Matters Complained of on Appeal in accord with Pa. R.A.P. 1925(b). Counsel for Appellant timely complied.

FACTUAL HISTORY

Philadelphia Police Officer William Greco, Jr., testified first for the Commonwealth at trial. Officer Greco testified that on May 11, 2008, at approximately 3:45 p.m., he was traveling westbound on the 400 block of East Spring Garden Street when police radio broadcast to be on the lookout for a white Lexus, which was being pursued by a complainant. Approaching the 6th Street intersection, Officer Greco observed a white Lexus turn right onto Spring Garden Street from 6th; he immediately pursued the white Lexus, which traveled one block, before turning northbound onto 7th Street. Officer Greco stopped the vehicle -- which was being driven by Appellant -- one block north at the Fairmount Avenue intersection. As Appellant was being detained, the complainant, who was very upset, emerged from his black Dodge Ram pick-up truck, yelling "you set me up" at Appellant. Officer Greco testified that the complainant's vehicle had a shattered windshield and bullet holes in the passenger door. (See N.T. 11/02/11, pp. 15-37).

The Commonwealth next presented the testimony of the complainant, Seth Rosen. Mr. Rosen testified that, on May 11, 2008, he spent the day preparing for a Mother's Day dinner at his residence, which he shared with his then-girlfriend, and now-wife, Lily. Prior to their relationship, Lily was married to Appellant, with whom she had a son.[5] On the above date, Mr. Rosen received a phone call alerting him that Lily's mother, who lived in the northeast, was in the midst of an unwanted visit from Appellant. Mr. Rosen drove to her residence to assist her; en route, he saw Appellant approaching from the opposite direction in a white Lexus SUV. They

[5] Mr. Rosen and Lily commenced dating in September 2007, after Appellant and Lily had been separated for one year. (See N.T. 11/02/11, p. 42).

stopped their respective vehicles, and Mr. Rosen stated that he would like to speak with Appellant, who responded affirmatively in a "very cocky" manner, and directed Mr. Rosen to follow him. Mr. Rosen lost sight of Appellant, but received a phone call directing him to the parking lot of Delilah's, a gentlemen's club located on the 100 block of Spring Garden Street.[6] There, he noticed that Appellant had a passenger in his vehicle, and therefore Mr. Rosen asked his friend and co-worker, Cory Mackryan, to accompany him. Appellant declined to get out of his SUV, but instead taunted Mr. Rosen by inching his vehicle forward and laughing. Appellant then directed Mr. Rosen to follow him to a more "neutral" turf to resolve their dispute. (See N.T. 11/02/11, pp. 38-54).

Mr. Rosen testified that he followed Appellant in circles for several minutes, until arriving at Girard Avenue and Marshall Street. There, Appellant advised Mr. Mackryan to exit Mr. Rosen's car, stating, "[H]ey man, this has nothing to do with you. It's between me and the white boy." Mr. Rosen then told Mr. Mackryan, "[L]isten, he is alone, you know, I can handle him, I don't need you to be here," at which point Mr. Mackryan exited the vehicle and walked away. Appellant then turned onto Marshall Street and, a few feet into the block, stopped to speak with an older black male who was wearing a sweater. The male leaned into Appellant's car, and briefly exchanged words with Appellant. The male then walked away, and Appellant continued driving up the block. Toward the end of the block, Appellant slammed on his breaks, causing Mr. Rosen to do the same, and angled his car so that Mr. Rosen could not get through. (See N.T. 11/02/11, pp. 58-64).

Mr. Rosen testified that, at that moment, a man holding a shotgun emerged on his right side and, from a distance of four or five feet, opened fire on him. Fearing for his life, Mr. Rosen

[6] Mr. Rosen was Delilah's Director of Security, and at that point had worked there for 11 years. Lily also worked there as a hostess. (See N.T. 11/02/11, p. 41).

leaned over to duck down. The gunman continued to fire at him; the blasts shattered Mr. Rosen's windshield, destroyed his passenger door, knocked off his windshield wiper, and damaged his radiator and hood. Amazingly, Mr. Rosen averted the bullets, but was bleeding from the broken glass. After several rounds, there was a pause in the shooting, and Mr. Rosen lifted his head up to try to escape, but Appellant was still obstructing him. Before the gunman was able to fire another round at him, Appellant finally moved his car, allowing Mr. Rosen to flee. Driving behind Appellant, Mr. Rosen encountered a police officer who was engaged in a traffic stop. He exclaimed to the officer, "[H]e's trying to kill me...that guy just tried to kill me." The officer relayed the information over police radio, and Mr. Rosen continued his pursuit of Appellant. Responding officers stopped them at 7th Street and Fairmount Avenue. Mr. Rosen exclaimed to the officers, "[H]e just tried to set me up, he just tried to kill me." As Appellant was being handcuffed, he turned around, smiled and winked at Mr. Rosen. (See N.T. 11/02/11, pp. 64-69).

Philadelphia Police Detective Brett Brooks testified next for the Commonwealth. Detective Brooks testified that he was called to the crime scene shortly after the incident. The area was cordoned off with police tape to preserve the integrity of the crime scene. Detective Brooks took photographs of four spent shotgun cartridges lying in the street, which he secured under property receipt. Based on information he had received, Detective Brooks entered an abandoned dwelling located above a storefront at 972 Marshall Street; he proceeded up to the second floor, where, in one of the rooms, he found a shotgun tucked behind a dilapidated refrigerator. The shotgun was loaded with two live cartridges -- which were of the same size/gauge, color, and manufacturer of those found lying in the street in front of the building. Detective Brooks photographed the shotgun and its environs before securing it under property receipt for further analysis. (See N.T. 11/02/11, pp. 119-134; N.T. 11/03/11, pp. 23-24).

The Commonwealth next called Raul Mota Rojas ("Mr. Mota") to the stand. Mr. Mota testified that, on the afternoon of May 11, 2008, he was inside his ninth-floor apartment located on the 900 block of North 7th Street,[7] when he heard gunshots outside. Mr. Mota peered out his window and saw a tall, thin male running toward Poplar Street. The male knocked three times on the door of a residence. Another male, later identified as Dozier Smith, answered the door, and they proceeded to the rear yard. Mr. Rota went downstairs for further observation. He followed the males back to Marshall Street, where he heard Mr. Smith ask a woman in front of 972 Marshall Street, "[W]here is the rifle[?]" and she responded, "[R[ight where they threw it". Mr. Smith then went inside the store, and returned holding a shotgun. The woman then told Mr. Smith to "put it in the second floor, put it in the back part -- in the rear of the bedroom." Mr. Smith took the shotgun into the upstairs portion of 972 Marshall Street. When police arrived, Mr. Rota pointed out the building in which Mr. Smith had taken the shotgun. (See N.T. 11/02/11, pp. 176-180).

Philadelphia Police Officer Chan Nheb testified next for the Commonwealth. He testified that, on the afternoon of May 11, 2008, he reported to 7th Street and Fairmount Avenue in order to back up Officer Greco. Upon gathering information from Mr. Rosen, and after additional back-up units had arrived, Officer Nheb proceeded to the scene of the shooting. En route, he was flagged down on North 7th Street by Mr. Mota, who pointed out the Poplar Street residence from which Mr. Smith had emerged. As Officer Nheb spoke with the witness, Mr. Smith came out of the same residence, 859 Poplar Street, and Officer Nheb detained him. After gathering

[7] Marshall Street is immediately adjacent, and runs parallel, to 7th Street. (See N.T. 11/02/11, p. 176).

information from Mr. Smith, Officer Nheb relayed over police radio the location of the shotgun. (See N.T. 11/02/11, pp. 186-194).[8]

Upon consideration of the above evidence, the jury found Appellant guilty of Aggravated Assault, Criminal Conspiracy (Aggravated Assault), Recklessly Endangering Another Person ("REAP"), and Simple Assault. Following a pre-sentence investigation, this Court imposed sentence as previously set forth.

DISCUSSION

Appellant raises the following issues on appeal:

> 1. "WHETHER THE EVIDENCE WAS SUFFICIENT TO FIND MR. EGGLESTON GUILTY OF SIMPLE ASSAULT, AGGRAVATED ASSAULT, OR RECKLESSLY ENDANGERING ANOTHER PERSON WHERE THE COMMONWEALTH PRESENTED NO EVIDENCE THAT [APPELLANT] WAS INVOLVED IN THE SHOOTING IN ANY WAY, BUT JUST THAT HE WAS MERELY PRESENT AT THE SCENE?"
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> 2. "WHETHER THE EVIDENCE WAS SUFFICIENT TO FIND [APPELLANT] GUILTY OF SIMPLE ASSAULT OR AGGRAVATED ASSAULT WHERE THE COMMONWEALTH PRESENTED NO EVIDENCE THAT ANYONE WAS INJURED?"
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> 3. "WHETHER THE EVIDENCE WAS SUFFICIENT TO FIND MR. EGGLESTON GUILTY OF CONSPIRACY WHERE THE COMMONWEALTH PRESENTED NO EVIDENCE THAT MR. EGGLESTON WAS INVOLVED IN THE SHOOTING IN ANY WAY OR THAT HE ENTERED INTO ANY AGREEMENT TO COMMIT THE SHOOTING, BUT JUST THAT HE WAS MERELY PRESENT AT THE SCENE?"
>
> 4. "WHETHER THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION UNDER BATSON WITHOUT ANY INQUIRY INTO

[8] Prior to resting, the Commonwealth presented the expert testimony of its firearms examiner, Kenneth James Lay. Examiner Lay testified that he test-fired the shotgun that was recovered from 972 Marshall Street, and found it to be operational: "this gun fired as designed, no problems." Examiner Lay noted that part of its barrel, as well as its stock, had been sawed off. He compared the four spent, and two live, shotgun cartridges, and found them to be of the same gauge and sub-manufacturer, to wit, Remington "Gun Club". Finally, Examiner Lay compared the spent cartridges with cartridges that he fired from the gun, and concluded that the former were consistent with being fired from that specific shotgun. (See N.T. 11/03/11, pp. 20-26).

THE PROSECUTOR'S REASON FOR STRIKING TWO AFRICAN AMERICAN WOMEN IN A ROW WITH THE PROSECUTOR'S FIRST TWO STRIKES?"

This Court will address Appellant's first three claims in section 1, and his final claim in section 2.

1. Whether Sufficient Evidence Sustained Appellant's Convictions.

Appellant claims that the evidence was insufficient to sustain his convictions. The record refutes this claim.

a. Sufficiency Standard

In evaluating a challenge to the sufficiency of the evidence, a reviewing court must view the evidence in the light most favorable to the Commonwealth as verdict winner. It accepts as true all the evidence, direct and circumstantial, and all reasonable inferences arising therefrom upon which the finder of fact could properly have based its verdict, in determining whether the evidence and inferences are sufficient to support the challenged conviction. Commonwealth v. Carroll, 507 A.2d 819, 820 (Pa. 1986); Commonwealth v. Griscavage, 517 A.2d 1256, 1259 (Pa. 1986); Commonwealth v. Hopkins, 747 A.2d 910, 913 (Pa. Super. 2000).

"[T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence." Commonwealth v. Jones, 874 A.2d 108, 120 (Pa. Super. 2005); see Commonwealth v. Rippy, 732 A.2d 1216, 1218-1219 (Pa. Super. 1999) (while conviction must be based on more than mere speculation, "the Commonwealth need not establish guilt to a mathematical certainty"). Any question of doubt is for the fact finder to determine. See Commonwealth v. Sullivan, 371 A.2d 468, 478 (Pa. 1977); Commonwealth v. Sneddon, 738 A.2d 1026, 1027 (Pa. Super. 1999). "The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial

evidence." Jones, 874 A.2d at 120. Thus, the decision of the trier of fact will not be disturbed where there is support for the verdict in the record. Commonwealth v. Bachert, 453 A.2d 931, 935 (Pa. 1982). When assessing the sufficiency of the evidence, this Court "may not weigh the evidence and substitute [its] judgment for that of the fact-finder." Commonwealth v. Vetrini, 734 A.2d 404, 407 (Pa. Super. 1999). If, after considering the evidence and all reasonable inferences drawn therefrom, the fact finder could have found that every element of the crime charged was proven beyond a reasonable doubt, the evidence will be deemed sufficient. Commonwealth v. Newsome, 787 A.2d 1045, 1047 (Pa. Super. 2001).

b. Accomplice Liability

It is axiomatic that "a defendant, who was not a principal actor in committing the crime, may nevertheless be liable for the crime if he was an accomplice of a principal actor." Commonwealth v. Murphy, 844 A.2d 1228, 1234 (Pa. 2004) (citing 18 Pa.C.S. § 306; Commonwealth v. Bradley, 392 A.2d 688, 690 (Pa. 1978) (the actor and his accomplice share equal responsibility for commission of a criminal act)). "A person is deemed an accomplice of a principal if "'with the intent of promoting or facilitating the commission of the offense, he: (i) solicit[ed the principal] to commit it; or (ii) aided or agreed or attempted to aid such other person in planning or committing it.'" Murphy at 1234 (quoting 18 Pa.C.S. § 306; citing Commonwealth v. Spotz, 716 A.2d 580, 585 (Pa. 1998)).

> Accordingly, two prongs must be satisfied for a defendant to be found guilty as an "accomplice." First, there must be evidence that the defendant intended to aid or promote the underlying offense. Second, there must be evidence that the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene. There must be some additional

> evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so. With regard to the amount of aid, it need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime.

Murphy at 1234 (internal citations omitted).

i. Aggravated Assault

"A person may be convicted of aggravated assault graded as a first degree felony if he 'attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.'" Commonwealth v. Matthew, 909 A.2d 1254, 1257 (Pa. 2006) (quoting 18 Pa.C.S. § 2702(a)(1)). "'Serious bodily injury' means '[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.'" Matthew at 1257 (quoting 18 Pa.C.S. § 2301). "'A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.'" Matthew at 1257 (quoting 18 Pa.C.S. § 901(a)). "An attempt under § 2702(a)(1) requires a showing of some act, albeit not one causing serious bodily injury, accompanied by an intent to inflict serious bodily injury." Matthew at 1257 (citing Commonwealth v. Alexander, 383 A.2d 887, 889 (Pa. 1978)).

> In Commonwealth v. Alexander, 477 Pa. 190, 383 A.2d 887 (Pa. 1978), the Pennsylvania Supreme Court articulated a totality of the circumstances test for determining whether a defendant, who was charged under the attempt provision of the aggravated assault statute, possessed the intent to inflict serous bodily injury. The test the Court provided consisted of a non-exhaustive list of factors to be considered on a case-by-case basis. The list included evidence of a significant difference in size or strength between the defendant and the victim, any restraint on the defendant preventing him from escalating the attack, the defendant's use of a weapon or other implement to aid his attack,

> and statements or actions that might indicate his intent to inflict injury. Id. at 889. Recently, in Matthew, the Supreme Court re-affirmed the totality of the circumstances test announced in Alexander, and held that the test should be used to decide whether there is sufficient evidence to convict a defendant charged with aggravated assault for attempting to inflict serious bodily injury upon another. Matthew, 909 A.2d at 1259.

Commonwealth v. Jackson, 955 A.2d 441, 446 (Pa. Super. 2008).

Applying the foregoing principles to the instant case, the record amply supports Appellant's conviction for aggravated assault, and patently refutes his contention that he was "merely present" at the scene. The evidence established that Appellant manifested a clear intent to facilitate the shooting, and in fact, actively aided his cohort in firing the shots at Mr. Rosen, by slamming on his brakes and angling his car so as to prevent him evading the ambush. Indeed, Appellant -- who had a plain motive to commit the crime given Mr. Rosen's relationship with Appellant's former wife and baby's mother -- stopped to speak with a male on Marshall Street immediately prior to the ambush. Moreover, the gunman emerged and commenced shooting at the precise moment that Appellant slammed on his breaks to box in Mr. Rosen. Additionally, the evidence established that the gunman, who was standing only four or five feet away, fired multiple shots at Mr. Rosen, striking his windshield, hood and passenger door, as further depicted in the photographs of Mr. Rosen's truck, which were submitted into evidence. Despite multiple gunshots, Appellant did not attempt to drive away, but rather waited and maintained his obstructing position as the gunman continued to fire at Mr. Rosen. Finally, Appellant eliminated any question regarding his culpability for the horrific assault by winking at Mr. Rosen as police placed him in handcuffs. Accordingly, the evidence was beyond sufficient to sustain Appellant's conviction.

ii. REAP

In order to sustain a conviction for REAP, the Commonwealth must prove that Appellant "'recklessly engage[d] in conduct which place[d] or may [have] placed another person in danger of death or serious bodily injury.'" Commonwealth v. Schmohl, 975 A.2d 1144, 1148 (Pa. Super. 2009) (quoting 18 Pa.C.S. § 2705). "A person acts recklessly if he or she 'consciously disregards a substantial and unjustifiable risk' of injury to others." Schmohl at 1148 (quoting 18 Pa.C.S. § 302(b)(3)).

It is well settled that REAP is a lesser included offense of aggravated assault. See, e.g., Commonwealth v. Mosley, 585 A.2d 1057, 1065 (Pa. Super. 1991) ("It has been established that reckless endangerment is a lesser included offense of aggravated assault because the elements of aggravated assault include all the elements of reckless endangerment.") (citing Commonwealth v. Boettcher, 459 A.2d 806 (Pa. Super. 1983); Commonwealth v. Cavanaugh, 420 A.2d 674 (Pa. Super. 1980).

Instantly, based on the reasons set forth in the preceding subsection, particularly Appellant's slamming on his breaks to box in Mr. Rosen -- rendering him a "sitting duck" for Appellant's cohort -- as well as the synchronization of Appellant's actions with those of the gunman, the evidence amply supported Appellant's conviction for REAP.

iii. Simple Assault

"A person commits simple assault if he 'attempts to cause or intentionally, knowingly, or recklessly causes bodily injury to another.'" Commonwealth v. Torres, 766 A.2d 342, 344 (Pa. 2001) (quoting 18 Pa.C.S. § 2701(a)(1)). "The elements of this offense are necessarily included in the crime of aggravated assault, which is defined as conduct by which one 'attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly

under circumstances manifesting extreme indifference to the value of human life,' 18 Pa.C.S. § 2702(a)(1), and also in the crime of reckless endangering another person, which is defined as conduct by which one 'recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury,' 18 Pa.C.S. § 2705." Commonwealth v. Cavanaugh, 420 A.2d 674, 676 (Pa. Super. 1980).

Here, pursuant to the reasons set forth in the discussion of Appellant's aggravated assault and REAP convictions, the evidence necessarily sufficed to sustain his conviction for simple assault. See Commonwealth v. Channell, 484 A.2d 783, 786 (Pa. Super. 1984) (simple assault is a lesser included offense of both aggravated assault and REAP).

iv. Criminal Conspiracy

"The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished." Commonwealth v. Gibson, 668 A.2d 552, 555 (Pa. Super. 1995) (quoting Commonwealth v. Volk, 444 A.2d 1182, 1185 (Pa. Super. 1982)). "An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities." Commonwealth v. Swerdlow, 636 A.2d 1173, 1177 (Pa. Super. 1994) (quoting Commonwealth v. Kennedy, 453 A.2d 927, 929-930 (Pa. 1982)). "An agreement sufficient to establish a conspiracy can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode." Commonwealth v. Rivera, 637 A.2d 997, 998 (Pa. Super. 1994) (en banc).

Here, the evidence amply supported Appellant's conspiracy conviction. As discussed above, Appellant was instrumental in boxing in Mr. Rosen, rendering him a sitting duck, and

further, "stayed put" as the gunman fired shot after shot, preventing Mr. Rosen from escaping. Further, the synchronized actions of Appellant and the gunman demonstrated all too plainly their unified purpose. Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, the evidence was more than sufficient to sustain Appellant's conspiracy conviction. As such, Appellant is due no relief.

2. Whether This Court Erred by Denying Appellant's Batson Motion.

Finally, Appellant claims that this Court erred by denying his motion under Batson[9] where the prosecutor allegedly struck "two African American women in a row with the prosecutor's first two strikes." This claim is without merit.

> In Batson, the United States Supreme Court held that a prosecutor's challenge of potential jurors solely on account of their race violates the Equal Protection Clause. 476 U.S. at 89. Batson set forth a three-part test for examining a criminal defendant's claim that a prosecutor exercised peremptory challenges in a racially discriminatory manner. Commonwealth v. Harris, 572 Pa. 489, 817 A.2d 1033, 1042 (Pa. 2002); Batson, 476 U.S. at 97. First, the defendant must make a prima facie showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race. Id. Second, if the prima facie showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue. Id. Third, the trial court must then make the ultimate determination of whether the defense has carried its burden of proving purposeful discrimination. Id.
>
> Generally, in order for a defendant to satisfy the first requirement of demonstrating a prima facie Batson claim, he must establish that he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove from the venire members of his race, and that other relevant circumstances combine to raise an inference that the prosecutor removed the jurors for racial reasons. Harris, 817 A.2d at 1042; Batson 476 U.S. at 96. Whether the defendant has carried this threshold burden of establishing a prima facie case should be determined in light of all the relevant circumstances. Id.

[9] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Commonwealth v. Ligons, 971 A.2d 1125, 1142 (Pa. 2009).

Preliminarily, this Court notes that, prior to raising his objection under Batson, Appellant used five of his first six peremptory challenges to strike five white males from sitting as jurors, prompting a Batson motion by the Commonwealth. Moreover, counsel struck the five white males after colloquying only 16 venirepersons, and had not accepted any white venirepersons. Appellant's counsel explained to the Court that his reason for doing so was because each of the stricken venirepersons had "sat as a juror before." However, this Court observed that Appellant's counsel had accepted prospective Juror Number 7 despite having previously sat as a juror -- and counsel did so with several strikes still available. Consequently, this Court found counsel's proffered explanation disingenuous, and conservatively placed two of the stricken five jurors onto the panel. (See N.T. 11/01/11, pp. 17-68).

Conversely, the Commonwealth struck two allegedly African American females -- not "in a row" as Appellant maintains, but through the first 16 venirepersons. Moreover, at that early point in voire dire, other African American females had been accepted for the panel, and the Commonwealth still had five of its seven strikes remaining. (See N.T. 11/01/11, pp. 17-68).[10] Thus, "in light of all the relevant circumstances" -- i.e., at that early stage with most of the Commonwealth's challenges still available, and African American females having already been accepted -- counsel for Appellant plainly did not establish a prima facie showing that the Commonwealth had struck the "prospective jurors on account of race." Batson at 97, quoted in Ligons at 1142. Additionally, the trial court invited counsel for Appellant to renew his challenge

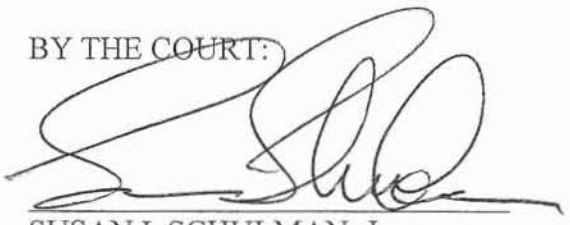
[10] In contrast, no white males had been selected by that point.

as jury selection continued, however, he declined to do so. (N.T. 11/1/11 pp. 61, 62). Accordingly, Appellant's claim fails.

CONCLUSION

For the reasons set forth in the foregoing Opinion, this Court's judgment of conviction and sentence should be affirmed.

BY THE COURT:



DATE: 7/18/12

SUSAN I. SCHULMAN, J.