IN THE

Supreme Court of Virginia

RECORD NO. 090069

KELIS ALLEN HAMILTON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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COMES NOW Kelis Allen Hamilton (Hamilton), appellant, by counsel, and for his Petition for Appeal, states as follows:

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in finding that the evidence was sufficient to establish that Garrett Johnston was assaulted by a mob, as defined by Va. Code §18.2–38.

2. The Court of Appeals erred in finding that the evidence was sufficient to establish that Daniel Payne was assaulted by a mob, as defined by Va. Code §18.2–38.

3. The Court of Appeals erred in finding that the evidence was sufficient to prove that Kelis Hamilton was a member of the mob, assuming that one existed, that assaulted Garrett Johnston.

4. The Court of Appeals erred in finding that the evidence was

sufficient to prove that Kelis Hamilton was a member of the mob, assuming that one existed, that assaulted Daniel Payne.

5. The Court of Appeals erred in finding that the evidence was sufficient to prove that Kelis Hamilton was a member of the mob, assuming that one existed, that assaulted Zachary Small.

6. The Court of Appeals erred in finding that the evidence was sufficient to prove that Kelis Hamilton actively participated in or was a member of a criminal street gang.

STATEMENT OF THE CASE

The Shenandoah Valley Multi-Jurisdiction Grand Jury indicted Hamilton on four charges: one criminal street gang charge pursuant to Va. Code §18.2-46.2, and three charges of mob assault pursuant to Va. Code §18.2-42. (App. at 1-4.) The alleged victims of the mob assaults were Zachary Scott Small, Daniel Payne and Garrett Johnston. (App. at 2-4.) A jury found Hamilton guilty of all four charges and sentenced him to five years of incarceration on the gang charge, twelve months of incarceration on the mob assault of Zachary Small and six months each on the mob assaults of Daniel Payne and Garrett Johnston. (App. at 9-11.)

Following preparation of a pre-sentence report, the circuit court

affirmed the jury's verdicts and sentenced Hamilton to a total period of incarceration of five years and twenty-four months. (App. at 9-11.) Hamilton noted his appeal in a timely fashion.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish that Garrett Johnston was assaulted by a mob, as defined by Va. Code §18.2–38.

This question relates to the first assignment of error.

2. Whether the evidence was sufficient to establish that Daniel Payne was assaulted by a mob, as defined by Va. Code §18.2–38.

This question relates to the second assignment of error.

3. Whether the evidence was sufficient to prove that Kelis Hamilton was a member of the mob, assuming that one existed, that assaulted Garrett Johnston.

This question relates to the third assignment of error.

4. Whether the evidence was sufficient to prove that Kelis Hamilton was a member of the mob, assuming that one existed, that assaulted Daniel Payne.

This question relates to the fourth assignment of error.

5. Whether the evidence was sufficient to prove that Kelis Hamilton

was a member of the mob, assuming that one existed, that assaulted Zachary Small.

This question relates to the fifth assignment of error.

6. Whether the evidence was sufficient to prove that Kelis Hamilton actively participated in or was a member of a criminal street gang.

This question relates to the sixth assignment of error.

STATEMENT OF FACTS

I. The party on Stingy Hollow Road

On August 12-13, 2006, brothers Austin and Garrett Johnston hosted a party at a one hundred ten acre farm on Stingy Hollow Road in Augusta County, Virginia. (App. at 46.) This was a "going-away party," a "last hoo-rah of the summer" which has attended by an estimated four hundred persons. (App. at 47.) It lasted from 10 o'clock in the evening on August 12 to three o'clock in the morning on August 13. (App. at 52.)

Garrett Johnston provided alcohol at the party (App. at 53), which many of the Commonwealth's witnesses reported having consumed. (App. at 55, 61, 73, 94 and 104). Garrett Johnston reported that he had a "good bit" to drink. (App. at 58.) Zachary Small drank "six or eight beers." (App. at 61.) Donald Stouffer "was feeling pretty buzzed" after having "ten or so"

beers. (App. at 73.) Matthew Howdyshell admitted to being "intoxicated" and guesses he had "over ten [beers] for sure." (App. at 94.) Adam Switzer admitted to having been drinking that evening, but felt he was not really "intoxicated drunk." (App. at 104.) Kelis Hamilton himself testified that he had "a total of five beers" at the party. (App. at 188.)

The incidents discussed in detail below, which led to the assault of the three victims in this case, were far from the only fights that broke out at this party. Garrett Johnston, one of the victims and the host of the party, testified that there had been "scuffles" even before the group of Bloods showed up. (App. at 48, 53.) Daniel Payne, a guest and one of the other victims, testified that he had to break up a fight prior to the incident in which he was assaulted. (App. at 59.) Katherine Duncan, one of the other guests, testified that when she first arrived at the party there "had been some fights." (App. at 96.)

II. Assault of Garrett Johnston

At some point "earlier" in the party, Garrett Johnston, one of the hosts, saw what he "assumed" was a number of "Bloods" at the party wearing red bandanas and "chilling in one section of the tent." (App. at 48.) Johnston introduced himself and asked them if they were Bloods. (App. at

48.) When they responded, "Yes," Johnston said, "All right. You guys have a good night." (App. at 48.)

Later, about three o'clock in the morning, Johnston testified that the same group got into a "big fight." (App. at 47-48.) Johnston does not know what made them upset. (App. at 49.) He did hear them saying "blood-at" as if they "were trying to mimic a gun going off or something." (App. at 49.)

Johnston approached them and inquired as to what was going on. (App. at 49.) At that point Marty Scott, whom the others had surrounded in an attempt to protect him, hit Johnston in the head with a tiki torch "or something like that." (App. at 49-50.) Johnston suffered no injuries from this (App. at 50), nor did he have anything else done to him (App. at 49).

By her description, it would appear that Katherine Duncan observed the same fight in which Johnston was hit. (App. at 96.) She observed Marty Scott "standing out in front of a crowd wanting to fight people." (App. at 96.) According to Duncan, the people surrounding Scott were wearing red bandanas around their face and red t-shirts. (App. at 96.) Other than Scott, the only person from that group that Duncan recognized was Jakari Hart. (App. at 96.) She recalls that Scott "had a stick in his hand, and he was threatening people to come up towards him so he could fight them."

(App. at 96.) She observed him connect with two people. (App. at 96.) Presumably, one the persons Duncan observed Scott strike may have been Johnston, though she never says that. (App. at 97.)

Johnston does not recall seeing Kelis Hamilton at the party at all. (App. at 52.) Duncan recalls seeing Kelis Hamilton earlier in the night, when she first got there, though she does not remember what he was wearing. (App. at 97.) Neither Johnston nor Duncan testified that they saw Kelis Hamilton in the group surrounding Marty Scott at the time that Johnston was struck.

III. Assault of Daniel Payne

At an unspecified time, Daniel Payne, a guest at the party, heard what "sounded like fireworks" coming from about halfway up on top of the hill and went to find out what was going on. (App. at 55-56.) When he got there he saw "a couple of guys standing up on the side of the hill, and more standing down low." (App. at 56.) Payne asked what was going on, but no one would tell him so he "went to go up and ask the other guys." (App. at 56.) A person whom Payne did not know then hit him in the face with a tiki torch. (App. at 56.) When Payne "went after" his assailant, someone, either the assailant or a person standing with him, pulled a gun, pointed it

at Payne's chest and pulled the trigger. (App. at 57.) Fortunately, the gun did not fire. (App. at 58.) Payne does not recall what either of them was wearing. (App. at 57.) Payne did suffer a cut on the side of his face from the tiki torch. (App. at 58.) Payne testified he did not know Kelis Hamilton and does not remember seeing him at the party. (App. at 58.)

Two other guests testified they that observed the assault on Daniel Payne. Adam Switzer testified that there were "just a lot of people wearing red, and everybody decided it'd be a good idea to fight." (App. at 104.) He witnessed a firearm being "fired in the air numerous times, and then it was in Daniel's chest and the trigger was pulled and there was nothing in the chamber." (App. at 105.) He remembers hearing someone yell "blood-at" and seeing Payne get hit with the tiki torch. (App. at 105.) Switzer does not know Kelis Hamilton and did not see him at the party that night. (App. at 106.) Clement Miller also saw Payne, whom he calls "D.J." get struck with the tiki torch. (App. at 107.) He witnessed someone handing a gun to another individual and saying, "Kill that mother fucker." (App. at 107.) The other individual then pointed the gun at Payne and pulled the trigger. (App. at 107.)

Based upon the scant information presented by the Commonwealth

at trial, it is impossible to determine whether Johnston and Payne were injured at the same time or in the same incident. There are some similarities between their stories – such as that they were both struck by tiki torches. Perhaps they were the two people that Katherine Duncan saw struck with the "stick" wielded by Marty Scott. (App. at 96.) However, there are marked differences, such as Payne not sharing Johnston's recollection that all of the people were wearing red. Without more evidence having been elicited on this subject, it is simply impossible to tell. What all of the testimonies have in common is that neither Johnston, Payne, Duncan, Switzer or Miller recall seeing Kelis Hamilton anywhere near the group gathered at the time either Johnston or Payne were assaulted.

IV. Assault of Zachary Small

At some point during the party, Zachary Small was walking through a group of people and accidentally kicked over a bottle with his foot. (App. at 61.) Small reached over to pick up the bottle, but when he realized it was empty, he let it fall back over. (App. at 61.) At that point, Small testifies that a large African-American male "hauled off and hit me in my face." (App. at 61-62.) Small, who felt that his jaw was broke, said, "Hold on, man ... It ain't like that." (App. at 62.) Someone else replied, "You made it like

that," and hit Small again. (App. at 62.) Someone else hit Small again, and then he felt something hit him on the back of the head and he was knocked out. (App. at 62-63.) When Small woke up, he was in his friend's car. (App. at 64.) Later Small he realized he had a cigarette burn on the lower part of his back that had not been there before the party. (App. at 65.)

Small did not recall what the group of people he was walking through at the time of the incident was wearing. (App. at 63.) When asked if he remembered those same people say anything about what they were wearing, Small testified that, "Nobody said nothing about what I was wearing." (App. at 67.) However, after being shown a previous statement to refresh his memory (App. at 68), Small testified that he "kind of" recalls hearing someone say, "We ain't wearing red for nothing," while he was being assaulted (App. at 69).

Small had been friends with Kelis Hamilton for about ten years. (App. at 70.) Though Small had seen Hamilton at the party that night, he did not see him at the time he was assaulted. (App. At 70.)

Chris McLaughlin recalls witnessing approximately a dozen individuals kicking and beating Small. (App. at 84-85.) He recalls that the group was wearing predominately red, and saying "You don't think we're

wearing red for nothing." (App. at 85.) McLaughlin does not recall seeing Kelis Hamilton in the group of persons that were assaulting Small. (App. at 86.)

Matthew Howdyshell saw the "end of" the assault on Small. (App. at 91.) Howdyshell witnessed Small lying on the ground, and saw him get up, stumble and fall back to the ground again. (App. at 91.) When Small fell back to the ground, Howdyshell witnessed a black male wearing a red shirt come up to him and kick him while yelling "dip set." (App. at 91.) Howdyshell testified that there was a group of about twenty persons standing around who witnessed the assault on Small. (App. at 94.) Though Howdyshell knows Kelis Hamilton, he does not testify that he saw Hamilton around when Small was assaulted. (App. at 94.)

The only person who implicated Kelis Hamilton in the assault on Zachary Small was Donald Stouffer, a convicted felon. (App. at 77.) Stouffer did not witness Small being attacked, but did see him on the ground after he had already been knocked out. (App. at 87.) Stouffer testified that he saw Hamilton, "I guess putting a cigarette out on his back or ..." (App. at 76.) However, upon cross-examination Stouffer changed his story, and testified that he saw Hamilton "standing over Zach – over

Small, doing something" but admits he never saw Hamilton put a cigarette out on Small's back. (App. at 78.) Though Stouffer "couldn't tell what [Hamilton] was doing", he "took for granted, after [he] seen the pictures" that Hamilton had put the cigarette out on Small's back. (App. at 78.) When asked if he had been mistaken when he told the prosecutor that he had seen Hamilton put the cigarette out on Small's back, Stouffer replied, "Yeah; I guess. I don't know." (App. at 78.)

It is impossible from the evidence presented by the Commonwealth at trial to tell what temporal connection the assault on Small had to the other two assaults. None of the four witnesses (Small, McLaughlin, Howdyshell and Stouffer) the Commonwealth called testified as to when during this approximately five hour party (App. at 62) this incident occurred.

V. Trial testimony pertaining to Kelis Hamilton

At trial the Commonwealth called sixteen witnesses, yet few of them had any testimony that pertained specifically to the Defendant, Kelis Hamilton. Of the three assault victims two, Johnston and Payne, never saw Hamilton at the party (App. at 52 and 58), and the other, Small, had seen him earlier but did not see him at the time he got assaulted (App. at 68.) Of those attending the party, four individuals – Howdyshell (App. at

93), Switzer (App. at 106), Flavin (App. at 101-104) and Miller (App. at 107) –- never even saw Hamilton there. Katherine Duncan saw Hamilton earlier in the evening, but did not see him around at the time she witnessed Marty Scott strike two other persons. (App. at 96-97.)

Stouffer, as discussed above, was the sole witness who testified that he saw Hamilton engage in any assaultive conduct at the party when he saw him put a cigarette out on Small's back. (App. at 76.) Upon cross-examination Stouffer, a convicted felon, admitted he did not see Hamilton do this, but merely assumed that Hamilton had done so after he saw pictures that indicated a cigarette had in fact been put out on Small's back. (App. at 78.)

Only two witnesses, Chris McLaughlin and Jakari Hart, testified as to having interacted with Hamilton at the party. McLaughlin, who wore a red baseball cap, a red Tommy Hilfiger pullover and jeans to the party, testified that Hamilton came up to him wearing a red cap and a red shirt (App. at 84), gave him "daps" and said, "You're a Blood and don't even know it." (App. at 83.) McLaughlin replied that he was not "gang related" and walked away. (App. at 84.)

Hart testified that at some point during the night he fired his gun, a

Selva .22, into the air, while Kelis stood nearby him doing nothing. (App. at 109.) At some point Jakari Hart gave the gun to Marty Scott. (App. at 111.) Hart told Hamilton to get the gun back from Marty. (App. at 112.) However, Hamilton never asked for the gun and Hart never saw Hamilton with the gun. (App. at 111-114). Apparently the incident ended when some other individuals tacked Marty and the gun "went flying." (App. at 112.) Again, the Commonwealth does not elicit any clues as to when during this over five hour party (App. at 52), this incident with Marty Scott and the gun occurred. It is unclear as to whether it was connected with the incident in which Marty Scott was wielding the tiki torch and struck Garrett Johnston and possibly Daniel Payne, or whether this was a separate incident entirely.

Evidence regarding Kelis Hamilton was similarly scant from the Commonwealth's expert witnesses. Two of them, David Graham and Special Agent Mark Campbell, never mentioned Kelis Hamilton[1]. The only expert witness to give any testimony particular to Hamilton was Investigator

[1]It should be noted that these two witnesses were presumably called primarily to establish that the Nine Trey Bloods are a criminal street gang as defined in Virginia Code §18.2-46.1, a fact the defense never disputed.

Chris Hartless. Hartless serves as a police officer with the City of Staunton and is currently assigned to the Regional Anti-Gang Enforcement Task Force. (App. at 141.) Hartless has been employed by the City of Staunton for eight and a half years (App. at 141), and has been a member of the Virginia Gang Investigators Association since 2003 (App. at 142). He has taken over two hundred hours of classes in gang activity, and has taught classes to both public and private groups, including fellow law enforcement officers. (App. at 142.) Hartless testified that he has come into contact with Nine Trey Blood gang members and has taught classes specific to the Nine Trey Bloods. (App. at 142.) Hartless testified that despite his extensive knowledge of the Nine Trey Bloods, Hamilton's name had not "popped up on [his] radar screen as far as gang investigations prior to this event." (App. at 156.) Hartless testified that Hamilton did not have any tattoos[2] and had not been seen wearing gang colors. (App. at 156.) Thus, based on his training and experience, Hartless testified that in his expert opinion Hamilton was not involved in the Nine Trey Blood gang at the time

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[2]Special Agent Mark Campbell testified that the percentage of Nine Trey Blood gang members without any tattoos whatsoever would be "rather low." (App. at 139.)

of this party. (App. at 157.)

ARGUMENT AND AUTHORITIES

I. Standard of review

All of the questions presented attack the sufficiency of the evidence presented at trial. The standard to be applied by this Court in these situations is well established:

> When the sufficiency of the evidence is challenged after conviction it is our duty to view it in the light most favorable to the Commonwealth, granting all reasonable inferences fairly deducible therefrom. The judgment should be affirmed unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it ... The burden is upon the Commonwealth to prove the guilt of a person charged with a criminal offense beyond a reasonable doubt. Every fact necessary to a verdict of guilty must be proved. The Commonwealth must prove the guilt of an accused to the exclusion of every reasonable hypothesis consistent with his innocence.

Jones v. Commonwealth, 210 Va. 299, 302, 170 S.E.2d 779, 782 (1969) (internal quotations marks and citations omitted).

Even so, to uphold the conviction "all necessary circumstances must be consistent with guilt, must be inconsistent with innocence, and must exclude every reasonable hypothesis of innocence." Rogers v.

Commonwealth, 242 Va. 307, 319, 410 S.E.2d 621, 628 (1991). Any inferences relied upon to establish the defendant's guilt "may be taken from proved circumstances only to the extent those inferences are reasonable and justified." Moran v. Commonwealth, 4 Va. App. 310, 314, 357 S.E.2d 551, 553 (1987). If there is any reasonable hypothesis of innocence the Commonwealth fails to exclude, then the evidence is insufficient as a matter of law and the conviction must be reversed. See id.

II. The evidence was insufficient to establish that the assaults of Garrett Johnston and Daniel Payne were committed by a mob.

A. Legal definition of a mob.

Va. Code §18.2-38 defines a mob as "[a]ny collection of people, assembled for the purpose and with the intention of committing an assault and battery upon any person or an act of violence as defined in §19.2-297.1, without authority of law." Determining whether a mob has been assembled is of utmost importance, because if it has, then an individual who is a member that mob can be convicted under Va. Code §18.2-42, even if he or she did not actually commit the assault in

question:

> Whether such an assembly with a common purpose has occurred is critical for the following reason: once the group assembled comprises a mob, if the assault or battery which is committed is a simple assault or battery ... every person composing the mob becomes criminally culpable even though the member may not have actively encouraged, aided or countenanced the act.

Harrell v. Commonwealth, 11 Va. App. 1, 8, 396 S.E.2d 680, 683 (1990).

However, just because an individual is assaulted by a group of persons or a member of a group of persons does not necessarily mean that an assault by a mob has occurred. For the "fact that [the victims] were assaulted by members of a group does not alone prove that they were assembled for that purpose and with that intent." Harrell v. Commonwealth, 11 Va. App. 1, 10, 396 S.E.2d 680, 685 (1990). Nor does "every incidence of group violence or assaultive conduct which involves a number of people collectively involved in assaultive conduct constitutes a 'mob' assault and battery." Id. at 7, 396 S.E.2d at 683. Rather, if the "evidence merely proved that individuals were 'independently reacting adversely and violently' to a

situation, the proof will not suffice to establish that the individuals were part of a mob." Iverson v. Commonwealth, 1995 Va. App. LEXIS 526, at *6-7 (citing and quoting Harrell v. Commonwealth, 11 Va. App. 1, 10, 396 S.E.2d 680, 684 (1990)). "The criterion which distinguishes individuals behavior while part of a group from 'mob' behavior is assembling for the specific purpose and with the specific intent of committing an assault and battery upon any person." Harrell v. Commonwealth, 11 Va. App. 1, 7, 396 S.E.2d 680, 683 (1990).

The definitive case in Virginia on mob assaults is Harrell v. Commonwealth, 11 Va. App. 1, 396 S.E.2d 680 (1990). The Harrell case involved a man named Jerome Pattenaude who was awakened at midnight by a "boisterous and unruly" group of about twenty persons outside his home. Id. at 4, 396 S.E.2d at 681. When Pattenaude went outside to disperse the crowd, he saw Brad Metheny, one of his neighbors, get struck by a bicycle and knocked to the ground. Id. While Pattenaude was trying to disperse the group, the defendant, Robert Harrell, struck him in the abdomen with a club, rupturing his spleen. Id. at 5, 396 S.E.2d at 681. Pattenaude and Metheny then retreated to Pattenaude's residence, while being pursued by "five or

six unidentified individuals from the crowd." Id. It was not until Pattendaude's wife announced that she had called the police that the crowd dispersed. Id. Harrell maintained that his actions had been taken in self-defense. Id., 396 S.E.2d at 682.

Upon appeal, the Court of Appeals reversed Harrell's conviction. Id. at 12, 396 S.E.2d at 685. While the Court found Harrell's actions "reprehensible," it held that the Commonwealth had not proven beyond a reasonable doubt that the group was a "mob" at the time that Harrell assaulted Pattenaude. Id. Said the Court: "The conclusion that the group was assembled with mob intent was speculation, the evidence being reasonably susceptible to the interpretation that this was a group of individuals assembled for a lawful purpose, from which group one or more individuals committed criminal acts." Id. Or put more simply: "One belligerent individual complaining about the seizing of his bicycle does not constitute a mob." Id. at 11, 396 S.E.2d at 685.

Contrast Harrell, to the facts in Hughes v. Commonwealth, 43 Va. App. 391, 598 S.E.2d 743 (2004), in which the Court of Appeals had no problems finding that the defendant was part of a mob:

> Appellants arrived at the party together,

> uninvited and armed. When asked to leave, they become angry and aggressive. Systematically, they attacked a number of the party's hosts and guests. Each brother assisted the other brothers in the attacks. Each brother fought off people who were trying to assist the victims. Appellants, agitated when asked to leave the party, collectively attacked a number of victims and did not act as independent aggressors. The jury properly found, based on this evidence, that appellants acted as a mob.

Id. at 402, 598 S.E.2d at 748.

B. Garrett Johnston was not assaulted by a mob.

There is no evidence that Marty Scott, who assaulted Garrett Johnston, was anything more than the "one belligerent individual" alluded to in Harrell. Johnston testified that a group of Bloods he had encountered earlier in the evening got into a fight at the end of the night. (App. at 48.) Johnston does not know what started the fight and does not mention with whom they were fighting or how many people were involved in the fight. (App. at 49.) When Johnston went to ask what was going on, Marty Scott hit him in the head with a tiki torch. (App. at 49-50.) As for the persons surrounding Marty Scott, Johnston testifies that they were trying to protect him. (App. at 50.) Katherine Duncan also testified that Marty Scott "had a

stick in his hand, and he was threatening people to come towards him so he could fight them." (App. at 96.) She saw no one else with a stick in their hand, and did not testify to seeing anyone else in the group around Marty Scott engage in assaultive behavior. (App. at 96.) There was simply no evidence that anyone else in the group with Marty Scott either assaulted anyone, or shared his intent to assault other persons.

C. Daniel Payne was not assaulted by a mob.

Likewise, there was no evidence that any mob shared the intent of the person who assaulted Daniel Payne. Payne heard what sounded like fireworks and went to find out what was going on. (App. at 55-56.) When he went up to ask someone what was happening, he was hit in the face with a tiki torch. (App. at 56.) When he went after that person, someone pulled a gun, pointed it at his chest and pulled the trigger. (App. at 57.) The gun did not go off. (App. at 58.) Adam Switzer and Clement Miller, who also witnessed this event, had similar recollections. (App. at 104-08.) There was no evidence that any other person participated in this assault, or that any "mob" shared the intent of the person who assaulted Daniel Payne.

III. The evidence was insufficient to prove that Kelis Hamilton

was a member of the mob that assaulted Garrett Johnston, Daniel Payne or Zachary Small, assuming that a mob existed.

Even if a mob existed at the assault of either of these three individuals, in order for Hamilton to be convicted, the Commonwealth must also prove that he was a member of that mob. See generally Iverson v. Commonwealth, 1995 Va. App. LEXIS at *7 (1995)(holding that "no evidence proved that Iverson joined in any mob that may have formed"); Simmons v. Commonwealth, 1995 Va. App. LEXIS 522 at *8 (holding that the evidence was "insufficient to prove beyond a reasonable doubt that Simmons acted as a part of a mob"); Wynn v. Commonwealth, 1995 Va. App. LEXIS at *8 (holding that the evidence "was insufficient to prove beyond a reasonable doubt that Wynn acted as a part of a mob"). If the Commonwealth's evidence shows no more than presence at the scene, then that will be insufficient to support a conviction. Jones v. Commonwealth, 210 Va. 299, 303, 170 S.E.2d 779, 782 (1969).

A. The evidence was insufficient to prove that Kelis Hamilton was present when Garrett Johnston or Daniel Payne was assaulted.

There was absolutely no evidence presented at trial that Kelis

Hamilton was even present when Garrett Johnston was struck in the face by the tiki torch wielded by Marty Scott. Not only did Johnston not see Hamilton at the time he was assaulted, he does not recall even seeing him at the party. (App. at 52.) Katherine Duncan had seen Kelis Hamilton earlier in the evening, but did not see him at the time she witnessed Marty Scott hit two people with a stick. (App. at 96-97.)

Likewise, no one testified to seeing Kelis Hamilton at the time Daniel Payne was assaulted. In addition to Daniel Payne, two witnesses, Adam Switzer and Clement Miller, testified to witnessing his assault. (App. at 105, 107.) None of the three testified that they saw Kelis Hamilton present when this assault occurred. There was absolutely no evidence upon which the jury could have based its decision that Kelis Hamilton was part of any mob (assuming one existed) that assaulted Daniel Payne.

Given the lack of any witness who saw Kelis Hamilton present when Garrett Johnson or Daniel Payne was assaulted, it is difficult to see how he could be convicted of either of those assaults. It is only possible if one accepts the Commonwealth's faulty premise that anything that any of the witnesses testified to happened at the same time and place.

However, the Commonwealth's own evidence proves this in an

impossible assumption. This party was held on one hundred ten acres. (App. at 46.) Four hundred people attended the party. (App. at 47.) Numerous fights, in addition to the ones that resulted in these charges, were breaking out throughout the night. (App. at 48, 53, 59 and 96.) Finally, the party lasted five hours. (App. at 57.) To then assume, without evidence, that all of the action described by the various witnesses happened in the same place and at the same time is absurd.

This is the assumption the Commonwealth asks you to make, however, because there is scant evidence of when the various events testified to occurred. Garrett Johnston, the lone exception, did testify that his assault occurred at three o'clock a.m. (App. at 47-48.) In contrast, Daniel Payne does not say when during the five hours party his assault occurred, other than it happened right after he "heard fireworks." (App. at 55.) Likewise, Zachary Small testified that his assault occurred "at one point in the evening." (App. at 61.) None of the other witnesses called by the Commonwealth draw any temporal connection between the three assaults.

Therefore, to assume that the incidents surrounding all three assaults happened at the same time and the same place is pure conjecture.

However, it is exactly that the Commonwealth asks the Court to make, in fact requires that the Court make, to find that Hamilton was present at, or in any way involved in the assaults on Garrett Johnston and Daniel Payne.

B. The evidence was insufficient to prove that Kelis Hamilton was part of the mob that assaulted Zachary Small.

Finally, the evidence was insufficient to establish that Kelis Hamilton was part of the mob, assuming one existed, that assaulted Zachary Small. Neither Small, nor two of the other witnesses to his assault, Christopher McLaughlin or Matthew Howdyshell, saw Kelis Hamilton present when Zachary Small was assaulted. (App. at 70, 86 and 94.) None of the other approximately twenty to thirty persons present when this occurred were called as witnesses to say that Kelis Hamilton was present. (App. at 105.)

The sole exception was convicted felon Donald Stouffer. (App. at 77.) Stouffer testified that he saw Kelis Hamilton standing over Small "doing something." (App. at 78.) Only after the fact, when Stouffer had seen the pictures of the cigarette burn on Small's back, Stouffer assumed or "took for granted" that Hamilton had put the cigarette out on Small's back. (App. at 78.)

Since all Small actually saw was Hamilton standing over Small "doing

something" it is equally likely that Hamilton was checking on or assisting his friend of ten years (App. at 66), as it was that he was assaulting him. The Commonwealth "failed to meet its burden of proving a chain of circumstances excluding all reasonable conclusions inconsistent with guilt" and thus the conviction for the mob assault of Small must be reversed. Harrell v. Commonwealth, 11 Va. App. 1, 4, 396 S.E.2d 680, 681 (1990).

IV. There was no evidence that Kelis Hamilton was a member or an member or active participant in a gang.

A. Interpreting Virginia's gang statute.

By chapter 332 of the 2000 Acts of Assembly the Virginia General Assembly added Article 2.1 to Title 18.2, Chapter 4 of the Code of Virginia. This new article created several new substantive offenses aimed at those who committed other criminal acts while associated with a criminal street gang. In so doing Virginia joined a host of other states that have enacted some type of legislation aimed at combating gang activity. According to the Institute for Intergovernmental Research, as of May of 2008 there are forty-six states, plus the District of Columbia, who have enacted some form of legislation relating to gangs, and Wyoming may soon become the forty-seventh. See Highlights of Gang-Related Legislation Spring 2008, at

http://iir.com/nygc/gang%2Dlegis/highlights-gang-related-legislation.htm (last visited May 12, 2008).

Hamilton was charged with violating Va. Code §18.2-46.2, the relevant portion of which states that, "Any person who actively participates in or is a member of a criminal street gang and who knowingly and willfully participates in any predicate criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang shall be guilty of a Class 5 felony." Therefore, to sustain a conviction, three elements must be proven: (1) a predicate act must have been committed; (2) that predicate act must have been committed for the benefit of, at the direction of or in association with a criminal street gang; and (3) the defendant must have been an active participant or a member of a criminal street gang.

"Under well-established principles of statutory interpretation, where possible, every word of a statute must be given meaning." Gray v. Graves Mountain Lodge, Inc., 26 Va. App. 350, 494 S.E.2d 866 (1998). Thus, in this case, to commit an act for the benefit of, at the direction of or in association with a criminal street gang must mean something separate and distinct from committing an act while a member or actively participating in a criminal street gang. In other words, for every word of this statue to be

given effect, is must be possible to commit an act for the benefit of a street gang, and yet not be a member of active participant in a street gang. It must also be possible to be a member or active participant in a street gang, and commit acts that are not for the benefit of the gang. To commit an act for the benefit of a street gang cannot automatically indicate membership or active participation, and membership or active participation cannot automatically mean every act one commits is for the benefit of the gang. If these two elements did overlap in their definitions, or if one necessarily meant the other, then including both in the statute would have been superfluous. However, the rules of statutory interpretation prohibit interpreting a statute in such a way as to make part of it meaningless, if at all possible.

Having determined that membership or active participation must have a meaning separate and distinct from the "for the benefit of, at the direction of, or in association with" language, we must then figure out what it does mean. To do so, we must rely on the plain language of the statute. To date, there have been no appellate decisions interpreting this statute, including defining what it means to me a "member" of a gang or to "actively participate" in a gang. Even so, "the intention may primarily be discerned

from the language of the statute." Campbell v. Commonwealth, 13 Va. App. 33, 37, 409 S.E.2d 21, 24 (1991). "[W]here a statute is unambiguous, the plain meaning is to be accepted without resort to rules of interpretation." Id. at 38, 409 S.E.2d at 24. According to Merriam-Webster's Collegiate Dictionary, a member is "one of the individuals composing a group." Merriam-Webster's Collegiate Dictionary 724 (10 ed. 1998). To participate means "to take part" or "to have a part or share in something." Id. at 847. To be active means "characterized by action rather than contemplation or speculation." Id. at 12.

B. Law as applied to Kelis Hamilton.

There was no evidence presented at trial that established that Kelis Hamilton was an active participant or a member of a gang under any common sense interpretation of those terms. In fact, this conclusion was reached by the Commonwealth's own expert witness, Investigator Christopher Hartless. Based on his significant training and experience, Hartless was qualified by the court a an expert "in gangs and the Nine Trey Bloods specifically" without objection. (App. at 143.) Hartless explained that in his significant experience with gangs, Hamilton had never "popped up on [his] radar screen." He then gave his expert opinion that Hamilton

"was not involved" with the gang at the time of this party. (App. at 157.) This was based in part on the fact that Hamilton had no tattoos and had not been seen wearing colors prior to the party. (App. at 156.)

The only evidence presented at trial which would even suggest a gang connection for Hamilton was a brief conversation between himself and Christopher McLaughlin. According to McLaughlin, Hamilton came up to him and said, "You're a Blood and you don't even know it." (App. at 83.) It was assumed by McLaughlin that Hamilton said this because he was wearing red. (App. at 83.) However, it is not known exactly what Hamilton meant, because McLaughlin replied, "I'm not gang related," and immediately walked away. (App. at 84.)

Based upon the plain language of the statute, the requirement that the defendant be a member or actively participating in the gang is a separate element that must be proven by the Commonwealth beyond a reasonable doubt before the defendant can be convicted. And there was no evidence on this point. There was no evidence Hamilton had ever been seen with fellow gang members. There was no evidence that he admitted to being a gang member. There was no evidence that he had gang tattoos. Finally, based on all of this evidence, the Commonwealth's own gang

expert gave his opinion that Hamilton was not a gang member at the time of these assaults.

V. Overturning any one of the three misdemeanor assault convictions requires, at a minimum, remanding the case to circuit court.

Hamilton's indictment for felony gang participation does not specify which of the three misdemeanor assaults, or if all of the assaults, are the predicate act or acts for this charge. Va. Code §18.2-46.2 requires, among other things, commission of a predicate criminal act, as defined in Va. Code §18.2-46.1. Presumably all three misdemeanor assault charges are the predicate acts in Hamilton's case. However, his indictment does not state that specifically, but merely charges Hamilton with committing "a predicate criminal act for the benefit of, at the direction of, or in association with any criminal street gang." (App. at 1.)

For the reasons stated above, Hamilton contends that all three misdemeanor assault charges should be overturned by this Court. If this Court agrees and overturns all three charges, then the felony gang participation charge must also be dismissed. For, if Hamilton is no longer of any predicate criminal act, then he necessarily cannot be found guilty of

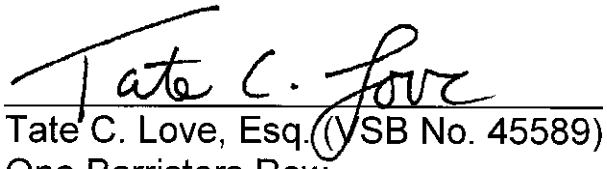
committing that act for the benefit of, at the direction of, or in association with a criminal street gang.

However, should the Court overturn one or two of the misdemeanor assault convictions, but uphold the remaining one or two, Hamilton contends the Court would then have no choice but to remand the case. From the indictment, and from the record before the Court, there is no clarity if one or all of the misdemeanor assaults are the predicate criminal act or acts for the felony gang participation charge. In this situation, the Court would have no choice but to remand the felony gang participation charge for a new trial, based on the misdemeanor assault or assault convictions that had been upheld. If any of the misdemeanor assault convictions are overturned, it would not be fair to Hamilton to uphold the felony gang participation charge, because of the possibility that the jury was basing that conviction on a predicate criminal act that has now been dismissed. In this situation, a remand would be the only just result.

CONCLUSION

WHEREFORE, the appellant, Kelis Allen Hamilton, respectfully requests that this Court reverse his convictions on all four counts, or, if necessary, to remand as many of them as needed for a new trial.

BLACK, NOLAND, & READ, P.L.C.



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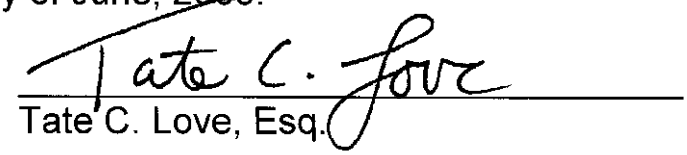
CERTIFICATE

I hereby certify that I have complied with Rule 5:26(d), by filing fifteen copies of the Opening Brief of Appellant with the Clerk of this Court (along with an electronic copy) and mailing three copies to opposing counsel this 8th day of June, 2009.



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