SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 19

THE PEOPLE OF THE STATE OF NEW YORK	:	
-against-	:	9988/2014
PETER LIANG,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO SET ASIDE VERDICT

At the conclusion of all the evidence, the defense moved to dismiss all of the charges against Peter Liang, and the Court reserved decision on the motion. (Tr. 1111-13)("I will hold off my decision until after the verdict"). Peter Liang was then convicted of Manslaughter in the Second Degree and Official Misconduct. We now renew the motion to dismiss those charges. See CPL §290.10(1); see also Tr. 1393-94 ("I had reserved my decision [and] continue to do so"); cf. CPL §330.30 ("at any time after the rendition of a verdict of guilty and before sentence . . . a [court may] set aside or modify the verdict [on] [a]ny ground . . . which, if raised upon an appeal . . . would require a reversal or modification as a matter of law by an appellate court").

I. FACTUAL BACKGROUND

A. The People's Case

1. The Testimony of Police Officer Shaun Landau

The People's principal witness was Police Officer Shaun Landau, who gave this account of the night of the shooting.[1] On Thursday, November 20, 2014, Officers Landau and

[1] Officer Landau received immunity from prosecution; he was terminated from the New York City Police Department ("NYPD") after the trial.

Liang were summoned to do an overtime tour -- 5:30 p.m. until 2:05 a.m. -- in the Pink Houses, a group of Housing Authority buildings in East New York. (Tr. 592). Officers Landau and Liang were "rookies," having graduated from the Police Academy 11 months earlier, and had been partners for eight months. (Tr. 586, 667). The Pink Houses are one of New York City's most dangerous locations. (Tr. 142, 251). Indeed, there had been a shooting there the week before, and Officers Landau and Liang were called in that night to address the "shootings condition" and to "make sure everything was safe." (Tr. 594, 661). It was only the second time that the two officers had worked in the Pink Houses. (Tr. 664).

At 11:10 p.m., after canvassing the grounds and other buildings, Officers Landau and Liang entered the eight-story building at 2724 Linden Boulevard to do "floor checks." (Tr. 600). There was no one in the lobby, and they took the elevator to the eighth floor. Once there, they walked down the hallway, intending to enter the stairwell, walk up to the roof, and then walk down, checking each floor. (Tr. 602). When they reached the end of the hallway, they peered through the window in the metal door and saw nothing. It was "[p]ure darkness, pitch black" because the stairwell lights on the eighth and seventh floors were not working. (Tr. 171, 604, 770). Officer Liang pulled out his flashlight with his right hand and his gun with his left hand (he is left-handed) and pushed the stairwell door open with his right shoulder. (Tr. 612-13). As he did, his body "turn[ed] to the left"; his left arm was "on the side of his back"; he seemed to "flinch"; and then a "shot just went off." (Tr. 614, 619, 714); id. at 620 ("[a] gun just, just fired out of nowhere," while the door was still open).

Immediately after the shot, Officer Liang returned to the hallway. Shocked, Officer Landau asked him "[w]hat the fuck happened," and Officer Liang responded "I just shot

by accident. I'm sorry, it went off by accident." (Tr. 619, 721).[2] He then said "I'm fired," which Officer Landau took to mean that Officer Liang thought he would lose his job for having accidentally discharged his gun. (Tr. 619-21). Their ears still ringing from the gun shot, the two officers went "back and forth" about who should "call it in" to Sergeant Martinez, their supervisor. (Tr. 622). Officer Landau "pulled out" Sergeant Martinez's number on his cell phone and handed the phone to Officer Liang. When Officer Liang pressed the number, however, Officer Landau "took the phone out [of his hand] and . . . hung up." (Tr. 624). At the time, the officers had no idea that anyone had been shot. (Tr. 725-26).

After a few minutes, the two officers went into the stairwell to see if there was a bullet hole in the wall. (Tr. 624-26). When they entered the stairwell, they heard the sound of a person (or persons) below, and immediately ran down the stairs. (Tr. 627-28)("[i]t . . . sounded like . . . grunting crying, something along those lines"). On reaching the fifth floor landing, the officers saw a man lying on the floor and a woman crouched over him crying. Officer Liang knelt next to the man and yelled "[o]h my God, someone's shot.' (Tr. 635). Hearing those words, Officer Landau urged him to "put it over, put it over," and heard Officer Liang broadcast "accidental discharge, MOS involved, male shot, we need a bus." (Tr. 631, 650).[3] Officer Liang also broadcast "Pink House Post One" several times and shouted at a woman in the stairwell to give him the address of the building. (Tr. 645-46).

2. Other Evidence

In addition to the testimony of Officer Landau, the jury heard this evidence in the People's case:

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[2] A shell casing from Officer Liang's gun was found in the eighth floor landing next to the door.

[3] "MOS" means member of service, and a "bus" is an ambulance.

a. Akai Gurley's Death. As Officer Liang was entering the stairwell on the eighth floor, Melissa Butler and Akai Gurley were on the landing one floor below. Mr. Gurley was 28 years old, and Ms. Butler, who lived in apartment 7G, was his girlfriend. They had spent the night talking and braiding his hair. (Tr. 389). Shortly after 11:00 p.m., Mr. Gurley decided to go home, and the couple chose to use the stairwell because the elevator was slow. (Tr. 390). When they entered the dark stairwell, the "door on the eighth floor opened [and slammed against] the wall and then a shot went off" and there was a "muzzle burst" from above. (Tr. 394-95). Not knowing what had happened, they ran downstairs until Mr. Gurley collapsed on the fifth floor landing. (Tr. 396). Ms. Butler went to help him and noticed that he was bleeding from the chest. (Tr. 397). She then ran down one floor and asked the resident of apartment 4A, Melissa Lopez, to call 911 to report that her boyfriend had been shot. (Tr. 46, 398-99).

Ms. Lopez testified that she called 911 and reported the shooting and was transferred to E.M.S. (The evidence showed that the call was received at 11:14:46 p.m.) She then conveyed the "E.M.S. lady['s]" instructions to Ms. Butler on how to perform CPR, which Ms. Butler carried out. (Tr. 52). By that time, Officers Liang and Landau had arrived on the fifth floor landing, and Officer Liang asked Ms. Lopez two or three times for her address. (Tr. 74). He appeared "like stuck," "dumbfounded" and "like shocked." (Tr. 81-83).[4]

b. The Aftermath. Lieutenant Vitaliy Zelikov and numerous officers responded promptly to the radio call for a "possible person shot." (Tr. 228). As Lieutenant

[4] The 911 call indicates that Officer Liang asked Ms. Lopez for the building's address at 11:17:38, 11:17:41, and 11:18:12. (PX 21; Tr. 832-33). That he could not "process" what she was telling him is clear. One can hear him saying "2724?" and later "2721?" and then "24." The first time that he asked for the address, Ms. Lopez told him that she was "on the phone with the ambulance right now."

Zelikov walked up the stairwell to the fourth floor, he saw Officer Liang, who seemed "frozen." He was clearly "shaken up, pale, and . . . unsteady on his feet." (Tr. 232, 236); see also Tr. 172 (Officer Liang had "a thousand yard stare"). Lieutenant Zelikov asked what had happened, and Officer Liang "pointed toward the fifth floor" and said "I shot him by accident." (Tr. 230). After taking Officer Liang's gun, Lieutenant Zelikov walked to the fifth floor landing, where he saw Ms. Butler performing CPR and directed a police officer to take over. When he returned to the fourth floor landing, he found Officer Liang "distraught," "incoherent," and "hyperventilating" and ordered an ambulance to take him to the hospital. (Tr. 259-61, 691).

Mr. Gurley was taken to the hospital and pronounced dead. A medical examiner testified that he died from a bullet wound that had penetrated his chest cavity, gone through the heart, and lodged in his liver. (Tr. 791-92). The bullet had ricocheted off the concrete wall in the seventh floor stairwell near where he and Ms. Butler had been standing. (Tr. 200).[5] The medical examiner testified that basic CPR could not have saved him -- that with "this particular type of injury," a person can live only "minutes." (Tr. 794, 805).

c. Officer Liang's Gun. Officer Liang was carrying a Glock Model 19, semiautomatic 9mm pistol, which is one of three models that NYPD officers are authorized to carry. (Tr. 277). It has a capacity of 16 cartridges. (Id.). The gun has no external safety, but it has been adjusted to require nine to twelve pounds of "trigger pull" -- i.e., the pull needed to

[5] A retired police sergeant who had spent his professional life in law enforcement testified that he had never heard of a ricochet shot killing someone. (Tr. 922).

discharge a bullet. (Tr. 282).[6] Officer Liang's gun required 11 1/2 pounds of pressure if pulled in the middle and less on the tip. (Tr. 281, 297).[7]

d. Police Use of Guns in a Stairwell. As noted, Officers Landau and Liang were doing a "floor check" in the Pink House building when Officer Liang's gun discharged. Numerous officers testified that in entering a stairwell, it is sound practice for an officer to have his gun in his hand with his finger along the side of the gun and the gun pointed in a safe direction. (Tr. 167). Officer Andrae Fernandez testified that he had received "training within the Housing Bureau that when you're going to approach a roof landing, you have your gun out of the holster." (Id.). Detective Matthew Parlo, Detective Nathan Garcia and Officer Landau gave similar testimony. (Tr. 319, 350-51)("Senior Housing police officers taught [us] to have [a] firearm out" when approaching the roof landing). Officer Landau testified that Officer Liang's regular practice when entering a stairwell was to have his gun out with his finger on the side of the gun. He did not see Officer Liang put his finger on the trigger that night. (Tr. 710, 713).

e. Startled Response. Detective Mark Acevedo, who works in the NYPD Firearms Analysis Section, gave this testimony about "startled response":

> Q. Do you know what a startled response is?
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> A. It's a reaction to when you become startled or afraid and the body reacts in a way that you might not realize how it's reacting.
>
> Q. And that way is your hands clench; right?

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[6] An external safety is located on the outside of the weapon, and an officer has to disengage it with his finger or thumb. (Tr. 919). The military and several police departments use guns with external safeties. (Tr. 534, 919-20).

[7] A Glock ordinarily requires 5 1/2 pounds of trigger pull. For the NYPD, Glock adds a specially-designed "NY2" trigger to make the gun somewhat more difficult to discharge. (Tr. 281-82). Twice at trial, once in the People's case and once during deliberations, the jurors were permitted to pull the trigger of Officer Liang's gun.

A. Yes.

(Tr. 294). And Detective Joseph Agosto, a Police Academy firearms instructor, testified that when an officer is startled and his hand "clench[es] up," it is possible for the gun to accidentally discharge, even if the officer is initially holding his finger on the outside of the frame. (Tr. 544).[8]

f. Traffic in the Stairwell. Officer Landau testified that it was "very rare" to find someone in the stairwell of a Housing Project building. (Tr. 709). That Thursday night, he and Officer Liang had encountered no one in the stairwells of the other buildings that they had canvassed. (Tr. 760-61, 1014).

g. CPR Training. A Police Academy instructor testified that NYPD recruits receive six to seven hours training in CPR and are tested on what they learn. (Tr. 431). A recruit must score 85 percent to pass the test. According to Officer Landau, however, the training was not rigorous, and the recruits were "fed the answers" to the exam, so that they would pass. (Tr. 758). Officer Landau testified that he did not relieve Ms. Butler when he saw her performing CPR because he "didn't feel qualified." (Tr. 744).[9] Notably, officers were instructed

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[8] The academic literature confirms Detective Agosto's testimony. See Christopher Heim et al., The Risk of Involuntary Firearms Discharge, 48(3) Human Factors 413, 418 (2006)(empirical study shows that "police officers may unconsciously make contact with the trigger despite regulations stipulating that the trigger finger be kept outside the trigger guard [and] the resulting pressure on the trigger can be sufficient to unintentionally overcome the trigger pull of most police weapons"); Roger M. Enoka, Involuntary Muscle Contractions and the Unintentional Discharge of a Firearm, 3(2) Law Enforcement Executive Forum 27 (2003)("[u]nintentional discharges . . . are the result of involuntary muscle contractions that occur during the appropriate handling of a firearm"; sometimes, "the index finger could be forced to join the gripping action and it could even slip inside the trigger guard and depress the trigger").

[9] Although the People told the jury in their opening statement that Officer Liang had been "carefully trained in CPR" (Tr. 20), it is now clear that he was not. After the trial, the instructor assigned to teach CPR to Officer Liang's class was "stripped of her gun and shield for

at the Police Academy not to render assistance that was beyond their ability to perform. (Tr. 461-62).

B. The Defense Case

Officer Liang testified in his own defense, and his testimony was similar to that of Officer Landau. He told the jury that on November 20, 2014, he and Officer Landau did a 6:00 p.m. to 2:00 a.m. overtime tour "because of the shootings and the robber[ies] that [were] happening in the Pink Houses" (Tr. 1011-12); that that night, they had done "floor checks" in two buildings before entering 2724 Linden Boulevard and had seen no one in the stairwells of either buildings (Tr. 1014-15); and that they entered 2724 Linden Boulevard and took the elevator to the eighth floor, intending to go up to the roof and then walk down. (Tr. 1016-17).[10]

After leaving the elevator, Officers Liang and Landau walked to the stairwell and saw that it was pitch black. Officer Liang then took out his weapon and his flashlight and pushed open the door to the stairwell with his shoulder. His gun was in his left hand pointed down with his finger "on the side of the weapon." (Tr. 1017). And then this:

> I open the door, push it on my right shoulder and when I -- and as soon as I got in, I heard something on my left side, quick sound, and it just startled me. And the gun went off after my body tensed up.

(Tr. 1019); see also id. at 1074 ("I just turned and the gun went off"). His ears ringing, Officer Liang then reholstered his gun, pointed his flashlight down the stairs, saw no one, and moved

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conducting insufficient CPR training." Police Academy Instructor Stripped of Gun, Shield, New York Daily News, March 9, 2016.

[10] Officer Liang also testified that there were almost no people in the stairwells of Housing Authority buildings at night -- that at that time "the elevator comes a lot faster and there's no need to walk the stairs"). (Tr. 1096, 1097)(pedestrian traffic is "almost nonexistent"). The lobby video showed that the elevator came immediately that night when Officer Liang pushed the button. See DX F.

back into the hallway. (Tr.1019, 1076); (Tr. 1078)("it was just a natural reaction to go back into the light").[11]

Once back in the hallway, Officer Landau asked "what the fuck happened," and Officer Liang responded that he had "accidentally fired a shot." (Tr. 1020). He wondered aloud if he could be "fired" for accidentally discharging his gun and told Officer Landau to "call it in [to the Sergeant]." (Tr. 1020). After some back and forth about who should make the call, Officer Liang took Officer Landau's phone, which had the Sergeant's number programmed in it, and dialed the number, but Officer Landau stopped him and took the phone from him. (Tr. 1021).

Not knowing that anyone had been hit by the accidental shot, the two officers went back into the staircase to see where the bullet had struck. When they reached the seventh floor, Officer Liang heard "someone crying" and raced down the stairs. On the fifth floor landing, he saw Mr. Gurley lying there with Ms. Butler by his side. (Tr. 1022, 1082). Officer Liang then bent over Mr. Gurley, saw that his eyes were "rolled back," realized that he was badly injured and exclaimed "[o]h my God, someone's hit." (Tr. 1022, 1081). He sent over the radio

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[11] On cross-examination, there was this testimony:

> Q. And whatever startled you was down and from the left?
>
> . . . .
>
> A. Yes.
>
> Q. You knew that was a person. Right?
>
> A. No, I didn't know.
>
> Q. You didn't know? So, tell us what was it that startled you.
>
> A. It was some quick sound.

(Tr. 1056).

the message "Pink Post One, male shot, call bus." Because he didn't know the building's address, he asked Ms. Lopez, who was in the stairwell, for the address "many times and she told him the address many times." (Tr. 1025). He had "trouble processing" what she said, but eventually "put the address over with [his] post." (Id.). He was "panicking" and "in disbelief" that someone actually had been shot with his gun. (Tr. 1026).

Within seconds of arriving at the fifth floor landing, Officer Liang saw Ms. Lopez screaming instructions to Ms. Butler on how to perform CPR. (Tr. 1084). He knew that Ms. Lopez was "on the phone with 911" and that she was relaying what she was being told. (Tr. 1085).[12] He did not attempt to perform CPR, believing that the best thing was "to call [for] professional medical help." (Tr. 1025-26). Like Officer Landau, Officer Liang testified that he had not received meaningful CPR training at the Police Academy and had been given the answers to the test. (Tr. 1005-06, 1036-37).

The jury also heard from several other defense witnesses. Daniel Reefer, a private investigator, testified that he spent an hour in the 2724 Linden Boulevard stairwell on January 20, 2016 (from 7:45 p.m. to 8:45 p.m.) and January 21, 2016 (from 10:30 p.m. to 11:30 p.m.), and saw "no activity." (Tr. 955-58, 968). Robert Lamonica, a firearms expert, testified that he tested Officer Liang's gun using more sophisticated technology than that available in the

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[12] On cross-examination, Officer Liang gave this testimony:

> Q. But by the time you got downstairs, Ms. Lopez was already on the phone. Right?
>
> A. Right.
>
> Q. She was already speaking to 911. Right?
>
> A. . . . Yes.

(Tr. 1086).

NYPD laboratory and that the trigger pull at the tip was 10.3 pounds. (Tr. 929-30). And Officer John Funk testified that he was in Officers Liang and Landau's class at the Police Academy and that the CPR training was inadequate. (Tr. 873-74).

II. ARGUMENT

As discussed below, the evidence was legally insufficient to support Peter Liang's convictions for Manslaughter in the Second Degree and Official Misconduct. A verdict is legally sufficient "when, viewing the facts in the light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt." People v. Donaldson, 9 N.Y.3d 342, 349 (2007). No such valid line exists here.

A. Reckless Manslaughter

The basic legal principles are familiar. Second degree manslaughter is committed when a defendant recklessly causes the death of another person. Penal Law §125.15. A person acts "recklessly," when he "is aware of and consciously disregards a substantial and unjustifiable risk that [death] will occur." Penal Law §15.05(3). And the risk "must be of such nature and degree that the disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Id. The risk must reflect "the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong." People v. Asaro, 21 N.Y.3d 677, 685 (2013).

A classic case of reckless manslaughter is People v. Garcia, 114 A.D.2d 423 (2d Dept. 1985). There, the defendant fired his 12-gauge shotgun in the direction of a group of children in a backyard two doors away and killed an 11-year old boy. The defendant was aware of and consciously disregarded a substantial and unjustifiable risk that a child would be killed

from his shot, and his disregard constituted a gross deviation from the standard of conduct that a reasonable person would have observed in the circumstances. He was seriously blameworthy, and his conviction was therefore upheld.

Other defendants convicted of reckless manslaughter in shooting deaths have likewise been seriously blameworthy. See, e.g., People v. Licitra, 47 N.Y.2d 554, 559 (1979)(defendant, without justification, "removed a loaded revolver from his belt area, swung it across his body with his finger on the trigger, and allowed the barrel to point in the direction of another person, barely three feet away," when the gun discharged); People v. Speringo, 258 A.D.2d 379, 380 (1st Dept. 1999)(defendant, "an off-duty police officer, entered a restaurant inebriated, precipitated a fight, drew his weapon, and pointed it at the head of a patron, whereupon the gun discharged as people attempted to wrest it away from him"); People v. Hill, 266 A.D.2d 473, 474 (2d Dept. 1999)(defendant held "a loaded shotgun with his finger on the trigger in close proximity to the victim" and the gun discharged); People v. Abreu-Guzman, 39 A.D.3d 413 (1st Dept. 2007)("under pressure from the other participant, [defendant] fired the fatal shot in the victim's direction without looking"); People v. Johnson, 205 A.D.2d 707, 708 (2d Dept. 1994)(defendant "pointed a gun at his girlfriend's head at . . . close range" without "inspect[ing] the chamber to determine if any bullets remained therein" and "pulled the trigger"); People v. Coley, 289 A.D.2d 252, 253 (2d Dept. 2001)(defendant "danced and posed with a loaded handgun in front of the decedent and two other teenaged females, and while . . . handling the gun it discharged, killing the decedent"); People v. Perez, 278 A.D.2d 2, 3 (1st Dept. 2000)("defendant took a loaded weapon from his pocket and pointed it at the deceased's chest" and the gun discharged during a struggle).

Never before has a defendant been convicted of reckless manslaughter on less proof of blameworthy conduct than that adduced against Peter Liang. Fairly viewed, the evidence showed that Officer Liang entered the pitch black stairway of a dangerous Housing Authority building with his finger on the side of the gun and the gun pointed downward. As his partner, a prosecution witness, testified, that was the way they were trained to proceed and that was Officer Liang's regular practice. See Halloran v. Virginia Chemicals, Inc., 41 N.Y.2d 386, 392 (1977)("[p]roof of a deliberate and repetitive practice . . . is highly probative"). Once in the stairway, Officer Liang was startled by a quick sound and "flinched." His hand clenched, his finger accidentally pressed against the trigger, and a bullet was discharged into the stairwell below.

If that is what occurred, and it almost certainly is, then a manslaughter conviction cannot be upheld. Officer Liang did not disregard a substantial and unjustifiable risk that death would occur from his actions. Mr. Gurley's death was a tragic and freak accident in which a coincidence of timing (Officer Liang's entering the eighth floor stairwell at the same time that Mr. Gurley was present a floor below), a well-documented human reflex (Officer Liang's startled response on hearing an unexpected sound in a pitch black stairwell) and an odd ricochet (one unprecedented in NYPD annals) combined to cause the death of an innocent man.

Of course, the prosecution's theory has always been that Officer Liang had his finger on the trigger as he entered the stairwell. Even if that were so, his reckless manslaughter conviction still could not stand.[13] For a police officer to have his finger on the trigger may

[13] Notably, there was no direct evidence that Officer Liang's finger was on the trigger when he entered the stairwell. Officer Liang testified that it was not, and Officer Landau testified that it was Officer Liang's regular practice to keep his finger on the gun's frame. The People rely on the inference that because Officer Liang's finger was on the trigger when the gun discharged, it must have been there when he went through the door. At this stage, it is not required that the

violate police procedure, but it is not seriously blameworthy conduct that warrants criminal condemnation. See People v. Lewis, 53 A.D.2d 963, 964 (3d Dept. 1976)("[c]riminal liability cannot be predicated upon every careless act merely because [it] results in [a] death"). That a rookie officer (or any officer) might be on high alert when entering a dark stairwell in a building he has patrolled only once before and to which he has been assigned to check for "shooting conditions" is not surprising. See People v. Lora, 85 A.D.3d 487, 495 (1st Dept. 2011)("[i]n evaluating the propriety and reasonableness of the actions by the police, [a court] must take cognizance of the realities of urban life in relation to the dangers to which officers are exposed"). Thus, even if one could find that Officer Liang's finger was on the trigger when he pushed open the door, that conduct would not be a "gross deviation" from the standard of conduct that a reasonable officer might observe in such circumstances. See Model Penal Code §2.02 Commentary at 237 (1985)("[e]ven substantial risks, it is clear, may be created without recklessness when the actor is seeking to serve a proper purpose").

Moreover, it bears emphasis that the People offered no evidence to contradict Officer Liang's testimony that his gun was pointed down when he entered the stairwell. Any suggestion to the contrary is pure speculation. See People v. Choremi, 301 N.Y. 417, 419 (1950)("[s]uspicion and surmise [do not] constitute[] that kind of proof which our system of justice demands to support a conviction"); (Tr. 1310)("your verdict . . . must not rest upon baseless speculations"). Under normal circumstances, pointing a gun toward the ground should dissipate the risk that an accidental discharge will result in a death. See Tr. 484 (testimony of Detective Agosto: one of the four factors that must be present before a firearm discharge can

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People prove their case to a "moral certainty" even though the proof was circumstantial, see People v. Hines, 97 N.Y.2d 56, 62 (2001)(the moral certainty standard is "reserved . . . [for] the trier of fact"), but the lack of direct proof on this question -- whether Officer Liang's finger was on the trigger when he entered the stairwell -- highlights the weakness of the People's case.

injure someone is that "the muzzle must be pointed at someone"). The risk that a gun pointed downwards will accidentally discharge and kill an unseen person standing at the bottom of a staircase is so remote that it cannot be the basis for a manslaughter conviction. See generally People v. Warner-Lambert Co., 51 N.Y.2d 295 (1980)(declining to impose criminal liability where death occurred in a manner that was unforeseeable).

Furthermore, as several witnesses testified, the stairwells of Housing Authority buildings are rarely populated late at night. That was Officer Liang's firm belief (and also Officer Landau's), and their experience at two other buildings that night confirmed it. The fact that the stairwell was pitch black made it even more unlikely that a resident might be walking there. Thus, the risk of an accidental discharge harming someone in the stairwell was not "substantial," which is what the criminal law requires for a conviction. Put differently, unlike the defendants Garcia, Licitra, Speringo, Hill, Abreu-Guzman, Johnson, Coley and Perez, Officer Liang had no idea that anyone was anywhere in his vicinity when his firearm discharged. See People v. Johnson, 131 A.D.2d 697, 698 (2d Dept.1987)("that there was a risk is apparent from the fact that the death occurred; however, it was not so substantial, or of such a nature, that a reasonable person would be under a duty to perceive it").

Although not a shooting case, the decision of the Court of Appeals in People v. Cabrera, 10 N.Y.3d 370 (2008), is instructive. There, Cabrera, a young and inexperienced driver, entered a tricky downhill curve at 70 miles per hour, well in excess of the posted 40 mile per hour warning sign. Moreover, he had four teenage friends in the car, none of whom was wearing a seat belt, even though his "junior license" precluded him from operating a vehicle "with more than two passengers under 21 years of age who [were] not members of [his] immediate family" and required him "to ensure that all passengers have buckled their seat belts."

Id. at 372. Once in the curve, the car rotated and slid off the road, crashing into a utility pole and killing three of the passengers. On these facts, the Court of Appeals set aside Cabrera's homicide conviction. Although acknowledging that Cabrera's behavior was "certainly negligent and unquestionable blameworthy," the Court found that it was not so "morally blameworthy" as to convert a civil wrong into a crime. Id. at 378.

Cabrera reminds us that a homicide conviction -- here the Class C felony of reckless manslaughter -- requires "seriously condemnatory behavior." Id. It is not enough that there is careless conduct creating a risk of a tragic accident or that clear regulations are flouted. If Cabrera is not a criminal, then Peter Liang is not as well.

Finally, it bears note that the prosecutor advanced a new theory in summation -- that Officer Liang intentionally "fired a shot near towards where Akai Gurley stood," knowing someone was there. (Tr. 1225)("he knew someone was there"). Whatever the propriety of the prosecutor's switching theories, the new theory is bankrupt. Officer Liang's every action shows that he had no knowledge that anyone was in the stairwell and that the shot was unintentional. Only one shot was discharged, and Officer Liang gave no pursuit. There was no evidence that his arm was extended, and no reason to think the bullet would have hit where it did if it were. After the gun went off, Officer Liang reentered the stairwell and told Officer Landau that it had happened "by accident." His words were a spontaneous declaration and undoubtedly true. People v. Johnson, 1 N.Y.3d 302, 306 (2003)(during such a brief period, "considerations of self-interest could not have been brought fully to bear by reasoned reflection"). Officer Liang and Officer Landau then went back and forth as to who should call the Sergeant to report that accidental discharge -- a shot which they feared might get Officer Liang "fired" but never

suspected had caused a death. In short, the claim that Officer Liang fired his gun intentionally at someone in the stairwell finds no support in the record of this case.

For these reasons, the evidence was legally insufficient to support Officer Liang's reckless manslaughter conviction.

B. Official Misconduct

Peter Liang was also convicted of the Class A misdemeanor of Official Misconduct for "knowingly refrain[ing] from performing a duty . . . clearly inherent in the nature of his office." Penal Law §195.00(2). In their Bill of Particulars, the People specified that the charge was based on Officer Liang's "knowingly refraining from performing his duty to seek or provide medical care for Mr. Gurley." People's Bill of Particulars at ¶ 33; see People v. Barnes, 50 N.Y.2d 375, 379 n.3 (1980)(prosecution is limited to the theory it advances in the bill of particular). On any reasonable view of the evidence, that charge cannot survive scrutiny.

The seminal case is People v. Feerick, 93 N.Y.2d 433 (1999). There, the defendants, in direct contravention of an order from their lieutenant, pushed their way into an apartment with weapons drawn and without a search warrant, restrained the occupants, ransacked the apartment, and threatened the occupants with arrest, all in an effort to recover one of the officer's police radio, which had been lost in the building. On these facts, the Court of Appeals upheld the officers' convictions for Official Misconduct, finding that they were "engaged in ultra vires criminal conduct." Id. at 448; see also id. at 449 ("although purportedly acting under the authority of the Police Department and while on duty, [the defendants] were not pursuing the radio in furtherance of prescribed law enforcement duties, but rather in violation of orders and for their own benefit")(emphasis in original).

What is important here are not the facts of Feerick, which are light years from this case, but the cautionary notes that the Court sounded about the reach of the Official Misconduct

statute. Those notes included these: "good faith but honest errors in fulfilling one's official duties are not what the Legislature meant to criminalize," id. at 445; "[t]he Legislature intended to encompass flagrant and intentional abuse of authority by those empowered to enforce the law," id.; "the Legislature sought to ensure that good faith miscalculations in the exercise of official judgment did not run the risk of a criminal prosecution," id. at 446; the "benefit ingredient [of the statute] excludes . . . neglect of duty, which, though possibly a basis for removal or disciplinary action . . . does not seem a fair basis for the automatic imposition of criminal sanctions," id.; and "[p]roof that a public servant intended to receive a benefit . . . negates the possibility that the misconduct was the product of inadvertence, incompetence, blunder, neglect or dereliction of duty, or any other act, no matter how egregious, that might more properly be considered in a disciplinary rather than a criminal forum," id. at 448 (emphasis added).

Applying these rigorous standards, Peter Liang's Official Misconduct conviction cannot stand. First, it is clear that Officer Liang could not have "knowingly" refrained from seeking or providing medical care for Mr. Gurley until he knew that Mr. Gurley had been shot. That knowledge did not exist until Officer Liang ran down to the fifth floor landing, knelt over Mr. Gurley and realized what had occurred. (Tr. 1022, 1081)("Oh my God, someone's hit"). What happened before that in the eighth floor hallway, when Officers Liang and Landau went back and forth about who should call Sergeant Martinez, is therefore irrelevant. Officer Liang might be criticized for not promptly reporting the accidental discharge, but that is not the inaction with which he is charged.

Second, soon after arriving at the fifth floor landing, Officer Liang saw Ms. Butler performing CPR on Mr. Gurley on the instructions of an "E.M.S. lady," which Ms. Lopez was

relaying. Officer Liang had no duty to take over for her, and no reason to believe that he was more capable at the task. No police procedure required him to perform CPR, and he had received grossly inadequate training in it. See W. Donnino, Practice Commentary, Penal Law §195 ("the duty to act [must] be so clear that the public servant is fairly on notice as to the standards that he or she must meet"). In calling for help, Officer Liang did what a reasonable officer would do in the circumstances.[14]

Third, there is not the slightest suggestion that Officer Liang's conduct on the fifth floor landing was intended to obtain a benefit for himself or deprive Mr. Gurley of one. What cannot be ignored is that when he saw Mr. Gurley lying on the ground, Officer Liang was in shock. In Ms. Lopez's words, he was "stuck." He had trouble processing the address of the building as she repeatedly gave it to him. On this record, no fact finder could reasonably conclude that he was seeking to advantage himself or harm Mr. Gurley, whose fate was inextricably tied to his own. See People v. Esposito, 160 A.D.2d 378, 379 (1st Dept. 1990)("the . . . imposition of criminal sanctions [cannot be] based on some ill-defined benefit").

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[14] The jury heard this testimony for a senior instructor at the Police Academy:

> Q. So, if a police officer comes upon a person and you take a look, and you immediately see that you've got a very, very dire situation on your hands, isn't it a fact that the first think you want to do is to get help, to get medical professionals on the scene?
>
> A. What we teach is the first thing you want to do is make sure is the person okay and then the next -- well, first, we survey the scene make sure it's safe for me to go; we go to the person, is the person okay, and then I will call an ambulance.

(Tr. 455); see also Tr. 466 (if a civilian "is doing [CPR] correctly there is no reason for [an officer] to do it for her").

In the cases in which police officers have been convicted for Official Misconduct, their malfeasance has been clear and the intent to benefit obvious. See, e.g., People v. Nieves, 197 A.D.2d 542, 543 (2d Dept. 1993)(police officer permitted drug dealer to sell drugs in return for having "[a] reliable source"); People v. Hill, 161 A.D.2d 520 (1st Dept. 1990)(police attendant delayed processing arrests until arrestees agreed to pay him); People v. Cheswick, 166 A.D.2d 88, 90 (2d Dept. 1991)(police lieutenant "inexcusably failed to restrain his subordinates," who were mistreating a prisoner); People v. Flanagan, 132 A.D.3d 693, 694 (2d Dept. 2015)(police officer sought to prevent high school student from being arrested "due to [student's] father's connections in the police department"); People v. Heckt, 62 Misc.2d 287, 288 (Erie Cnty. Ct. 1969)(police officers "knowingly participated in illegal card games . . . and failed in the performance of their duty to make proper arrests"); People v. Lemma, 50 Misc.3d 34 (App. Term 2d Dept. 2015)(detective failed to exonerate robbery suspect whom he knew was innocent and incarcerated for the crime). Merely to state the facts of these cases is to recognize that this case is in a different league.

* * *

At its core, the People's case was premised on the notion that Peter Liang should have performed CPR on Mr. Gurley (even though it would have been useless). The People opened on the theory that Office Liang had been "carefully trained in CPR," and they called a Police Academy witness to extoll the rigors of that training. In closing, they emphasized that Ms. Butler "didn't have the training that [Officer] Liang had." (Tr. 1266). Three witnesses -- Officer Liang, Officer Landau, and Officer John Funk -- testified that the Police Academy training was seriously deficient. We know now that their testimony was true. See supra n.9. If

the People continue to press a "he-should-have-performed-CPR" theory in response to this motion, it would be to punish an officer for not performing a task that he was not trained to do.

III. CONCLUSION

For the reasons set forth above, Peter Liang's convictions for Manslaughter in the Second Degree and Official Misconduct should be set aside.

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