

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

RANDY JOHNSON

Appellant

No. 1694 EDA 2012

Appeal from the Judgment of Sentence April 2, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007947-2010

BEFORE: BOWES, J., GANTMAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.:

Filed: March 20, 2013

Appellant, Randy Johnson, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury and bench trial convictions for third degree murder, persons not to possess firearms, carrying firearms without a license, and possessing instruments of crime ("PIC").¹ We affirm.

The relevant facts and procedural history of this appeal are as follows. Appellant shot and killed the victim on December 28, 2009, after an argument outside a barbershop. On June 22, 2010, the Commonwealth charged Appellant with murder and related offenses. Following trial, a jury convicted Appellant of third degree murder, carrying a firearm without a

¹ 18 Pa.C.S.A. §§ 2502(c), 6105, 6106, 907, respectively.

license, and PIC. Appellant immediately proceeded to a bench trial, and the court found him guilty of persons not to possess firearms. On April 2, 2012, the court sentenced Appellant to an aggregate term of fifteen (15) to thirty (30) years' imprisonment. Appellant timely filed a post-sentence motion on April 9, 2012, which the court denied on May 17, 2012.

On June 1, 2012, Appellant timely filed a notice of appeal. Appellant voluntarily filed a Rule 1925(b) statement.

Appellant now raises two issues for our review:

IS [APPELLANT] ENTITLED TO AN ARREST OF JUDGMENT WITH RESPECT TO HIS CONVICTIONS FOR THIRD DEGREE MURDER, VIOLATIONS OF THE UNIFORM FIREARMS ACT AND POSSESSING INSTRUMENTS OF CRIME SINCE THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THESE CONVICTIONS AS THE COMMONWEALTH FAILED TO PROVE [APPELLANT'S] GUILT OR THE ESSENTIAL ELEMENTS OF THESE CRIMES BEYOND A REASONABLE DOUBT?

IS [APPELLANT] ENTITLED TO A NEW TRIAL AS A RESULT OF THE TRIAL COURT'S RULING THAT DENIED HIS REQUEST FOR A JURY INSTRUCTION AS TO VOLUNTARY MANSLAUGHTER?

(Appellant's Brief at 4).

In his first issue, Appellant contends the witnesses who identified him as the shooter to the police recanted their statements at trial. Likewise, Appellant asserts other witnesses who were present at the crime scene could not identify him as the shooter. Under these circumstances, Appellant insists the Commonwealth failed to establish that he actually fired the fatal gunshots. Even if the Commonwealth had established Appellant was the

shooter, Appellant maintains the Commonwealth could not prove he acted with the specific intent to kill the victim. Further, Appellant argues the Commonwealth offered no evidence to demonstrate motive. Appellant concludes the Commonwealth presented insufficient evidence to support his convictions. We disagree.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

The 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. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, 613 Pa. 642, 32 A.3d 1275 (2011) (quoting *Commonwealth v. Jones*, 874 A.2d 108, 120-21 (Pa.Super. 2005)).

“Third degree murder occurs when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice.” *Commonwealth v. Ventura*, 975 A.2d 1128, 1142 (Pa.Super. 2009), *appeal denied*, 604 Pa. 706, 987 A.2d 161 (2009) (quoting *Commonwealth v. Tielsch*, 934 A.2d 81, 94 (Pa.Super. 2007)).

The elements of third degree murder, as developed by case law, are a killing done with legal malice but without specific intent to kill required in first degree murder. Malice is the essential element of third degree murder, and is the distinguishing factor between murder and manslaughter.

Malice under the law comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intend[ed] to be injured. Malice may be inferred from the attending circumstances of the act resulting in death. Otherwise stated, malice may be found where the defendant has consciously disregarded an unjustified and extremely high risk that [his] conduct might cause death or serious injury to another.

Commonwealth v. Geiger, 944 A.2d 85, 90 (Pa.Super. 2008), *appeal denied*, 600 Pa. 738, 964 A.2d 1 (2009) (internal citations and quotation marks omitted) (emphasis added). Malice can be inferred from the use of a deadly weapon on a vital part of the victim’s body. *Ventura, supra* at 1142.

Additionally, Section 6105 of the Crimes Code provides:

§ 6105. Persons not to possess, use, manufacture, control, sell or transfer firearms

(a) Offense defined.—

(1) A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.

18 Pa.C.S.A. § 6105(a)(1).

Section 6106 of the Crimes Code provides:

§ 6106. Firearms not to be carried without a license

(a) Offense defined.—

(1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 Pa.C.S.A. § 6106(a)(1).

Section 907 of the Crimes Code provides:

§ 907. Possessing instruments of crime

(a) Criminal instruments generally.—A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.

18 Pa.C.S.A. § 907(a).

A witness' prior inconsistent statement that identified the defendant as

the shooter is sufficient to sustain the defendant's convictions where no other witnesses identified the shooter. *Commonwealth v. Montgomery*, 861 A.2d 304, 307-08 (Pa.Super. 2004).

Prior inconsistent statements...can be admitted as substantive evidence provided the declarant testifies at trial and is subject to cross-examination concerning the statement and one of the following is true: 1) the prior inconsistent statement was given under oath subject to the penalty of perjury at a trial, hearing, deposition, or other proceeding; 2) the prior inconsistent statement is contained within a signed writing adopted by the declarant; and/or, 3) the rendition of the statement offered is a verbatim contemporaneous recording of an oral statement.

Commonwealth v. Henkel, 938 A.2d 433, 442-43 (Pa.Super. 2007), *appeal denied*, 598 Pa. 756, 955 A.2d 356 (2008).

Instantly, Christopher Benene testified that he knew the victim, who was his barber. On the night of the shooting, Mr. Benene was across the street from the victim's barbershop and heard an argument coming from the barbershop. Following the argument, Mr. Benene heard gunshots. Mr. Benene looked out a window and saw an individual fire two additional shots through the barbershop door. Mr. Benene subsequently provided the police with a statement identifying Appellant as the shooter.

At trial, however, Mr. Benene said he could not actually identify the shooter, and he had lied during his interview with the police "because they kept harassing" him and he "got tired of it." (*See* N.T. Trial, 1/24/12, at 81.) The Commonwealth confronted Mr. Benene with the statement he had

provided to Detective Thorsten Lucke. In the statement, Mr. Benene indicated he had seen two males approach the barbershop prior to the shooting. Mr. Benene also identified the shooter as "Randy," an individual he had met in the neighborhood approximately one week before the shooting. (*Id.* at 78-79). After identifying "Randy" as the shooter, the police presented Mr. Benene with a photo array. Mr. Benene selected Appellant's photo from the array and confirmed he was the shooter.

The Commonwealth also presented testimony from Detective Lucke, who took the statement from Mr. Benene. Detective Lucke testified that he and his partner, Detective Byard, interviewed Mr. Benene on January 21, 2010. During the interview, Detective Lucke used a computer to contemporaneously type out the questions and Mr. Benene's answers. At the conclusion of the interview, Mr. Benene reviewed and signed the statement. Mr. Benene also signed the photo array, circled Appellant's photo in the array, and wrote Appellant's name above the photo. Here, the jury was free to give more credence to the testimony regarding Mr. Benene's pretrial identification. *See Jones, supra; Montgomery, supra.*

Significantly, the Commonwealth presented other witnesses to provide additional details regarding the shooting. Jamir Adams testified that he was playing video games in his sister's room when he heard gunshots coming from outside their home. The Commonwealth questioned him about his

statement, given to the police following the shooting, which provided, in pertinent part, as follows:

We turned the light...off in the bedroom and raised the shades to the front window. That's when we saw three black men running from the barbershop towards our house. I could hear the men saying, "Yeah, we did it."

Two of the men ran to a tan car that was parked behind a black car that was parked on the curb directly across from our house. The two men got into the tan car, and the third man handed a black gun to the two men in the tan car, and they drove away.

The third man put a flashlight in the front seat of the black car. The man then opened the driver door of the car but did not sit in the car and tried to start the car, but it would not start.

So he opened the hood of the black car and did something. I don't know what he did inside the hood of the car, but he then closed the hood and started shooting towards the barbershop with a silver gun.

The third man then went to the black car again, looked inside, and then ran up the street towards the barbershop, crossing the street as he turned right at the corner.^[2]

* * *

Question: Jamir, how many times did you see the third man fire his gun?

² Officer Gary Guaraldo, who works with the Crime Scene Unit, testified that he processed a Black Buick Regal parked near the crime scene, on the 5200 block of Glenloch Street. Officer Guaraldo recovered a flashlight on the rear floor of the vehicle. Officer Guaraldo also lifted several fingerprints from the hood of the car. Subsequent investigation matched the fingerprints to Appellant.

Answer: It was, like, five times. He shot two times at the window and once at the door of the barbershop, and then he shot once in the air and once around the corner as he ran away.

(*See* N.T. Trial, 1/26/12, at 41-43.)

Although, Jamir Adams said he did not remember giving the statement to the police, Detective Gary White testified that he went to the Adams' home on January 6, 2010. After meeting with Jamir's parents, Detective Adams interviewed Jamir in his dining room, while his parents remained in the same room, approximately ten feet away. During the interview, Detective White wrote down his questions and Jamir's responses verbatim. After the interview, Jamir and his father reviewed and signed the statement.

Jamir Adams' sister, Karina Medina-Adams, testified that she heard a noise outside her window. She looked out the window and saw three men and two cars. She also saw a man dressed in black shooting into the barbershop. The shooter then passed off the firearm to the other men, who fled the scene. At that point, the man in black approached a black car, and he carried a flashlight. The man opened the hood of the vehicle, closed the hood, and threw the flashlight inside the vehicle. Karina did not see where the man went after closing the hood of the vehicle.

Jermaine Smith testified that he was walking on Glenloch Street near the barbershop when he heard gunshots. Two men wearing black, hooded jackets and blue jeans ran past Mr. Smith. At this point in Mr. Smith's trial testimony, the Commonwealth questioned Mr. Smith about the statement he

had given to the police following the shooting. In it, Mr. Smith had said: "One of the males that was running had on a black fur coat that was similar to the one that Randy was wearing earlier that day." (*Id.* at 106). When police asked Mr. Smith whether he knew the man in the black fur coat, Mr. Smith responded, "It was Randy." (*Id.* at 108). Mr. Smith also explained that he had known "Randy" for a few months. After identifying "Randy" as the shooter, the police presented Mr. Smith with a photo array. Mr. Smith selected Appellant's photo from the array and confirmed that he was one of the males running up Glenloch Street.

Mr. Smith vigorously disavowed the prior statement, claiming he was intoxicated on the night of the shooting. Nevertheless, the Commonwealth presented Detective Crystal Williams, who testified that she conducted the interview of Mr. Smith on February 1, 2010. Detective Williams testified that she took Mr. Smith's statement verbatim. At the conclusion of the interview, Mr. Smith reviewed the statement, signed it, and executed a statement of adoption attestation. Mr. Smith also signed the photo array from which he identified Appellant.

The Commonwealth presented Dr. Edwin Lieberman, the assistant medical examiner. Dr. Lieberman testified as an expert in the field of forensic pathology. Dr. Lieberman opined that the victim died as a result of multiple gunshot wounds; the bullets pierced vital organs, including the victim's liver and the inferior vena cava, a vein that carries blood from the

lower extremities to the heart.

Contrary to Appellant's assertion, the Commonwealth presented evidence confirming his identity as the shooter.³ Likewise, the use of a firearm upon a vital part of the victim's body demonstrated the malice necessary to support the third degree murder conviction. *See Ventura, supra*. To the extent Appellant also complains the Commonwealth failed to present evidence of motive, that kind of evidence is unnecessary to support the convictions. *See Commonwealth v. Chmiel*, 585 Pa. 547, 889 A.2d 501 (2005), *cert. denied*, 549 U.S. 848, 127 S.Ct. 101, 166 L.Ed.2d 82 (2006) (stating proof of motive is unnecessary to support murder conviction). Viewed in the light most favorable to the Commonwealth as verdict winner, sufficient evidence supported the verdict. *See Hansley, supra*. Therefore, Appellant is not entitled to relief on his first issue.

In his second issue, Appellant contends the Commonwealth's witnesses testified that the victim was intoxicated and acting in an "aggressive and threatening manner prior to the shooting...." (Appellant's Brief at 30). Appellant asserts the victim brandished a firearm and pointed it at Appellant. In light of this evidence regarding the victim's provocative actions, Appellant insists he was entitled to a "heat of passion" voluntary

³ Appellant did not dispute his presence at the crime scene. Rather, Appellant relied on the testimony from his fiancée, Yolanda Blackburn, for the proposition that Appellant was being held at gunpoint in the barbershop at the time of the shooting.

manslaughter jury instruction. Although defense counsel requested this instruction during the charging conference, Appellant complains the court denied the request. Appellant concludes the court should have provided a voluntary manslaughter instruction, and he is entitled to a new trial on this basis. We disagree.

“There is no requirement for the trial judge to instruct the jury pursuant to every request made to the court.” *Commonwealth v. Newman*, 555 A.2d 151, 158-59 (Pa.Super. 1989), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995). “In deciding whether a trial court erred in refusing to give a jury instruction, we must determine whether the court abused its discretion or committed an error of law.” *Commonwealth v. DeMarco*, 570 Pa. 263, 271, 809 A.2d 256, 260-61 (2002).

A jury charge is erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. *Commonwealth v. Baker*, 963 A.2d 495 (Pa.Super. 2008), *appeal denied*, 606 Pa. 644, 992 A.2d 885 (2010). “Jury instructions must be supported by the evidence of record as instructions regarding matters that are not before the court serve no purpose but to confuse the jury.” *Commonwealth v. Bruce*, 717 A.2d 1033, 1037 (Pa.Super. 1998), *appeal denied*, 568 Pa. 643, 794 A.2d 359 (1999).

Further, the Crimes Code defines voluntary manslaughter as follows:

§ 2503. Voluntary manslaughter

(a) General rule.—A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) the individual killed; or

(2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

(b) Unreasonable belief killing justifiable.—A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable.

* * *

18 Pa.C.S.A. § 2503(a), (b).

Instantly, the trial court reasoned:

This Court heard argument from both the attorney for the Commonwealth and for the Defense as to the inclusion of voluntary manslaughter in the instructions to be charged to the jury. [A]ppellant's theory of defense was that [A]ppellant...did not shoot the victim... Detective Crystal Williams testified that she took a verbal statement from [A]ppellant, which was logged on her activity sheet and presented at trial. In that statement, [A]ppellant stated that he observed an argument between the decedent and another male. In that same discussion, he also stated that he was headed into the barbershop when the shooting started and he retreated by running towards Bridge Street. An instruction concerning voluntary manslaughter would conflict with this theory of defense. Having heard argument from both sides concerning this instruction and having considered the evidence presented at trial, this [c]ourt did not believe that the evidence supported a jury instruction as to voluntary manslaughter.

(**See** Trial Court Opinion, filed September 24, 2012, at 8.) (internal citations to the record omitted). We agree. A voluntary manslaughter instruction would have served no purpose but to confuse the jury, given Appellant's defense theory. **See Bruce, supra**. Consequently, Appellant is not entitled to relief on his second issue. Accordingly, we affirm.

Judgment of sentence affirmed.