

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DONTAE MARTIN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 172 EDA 2012

Appeal from the Judgment of Sentence December 21, 2011
In the Court of Common Pleas of Philadelphia County Court of Common
Pleas - Criminal at No(s): CP-51-CR-0012445-2010

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY STEVENS, P.J.

Filed: February 25, 2013

This is an appeal from the judgment of sentence entered by the Court of Common Pleas of Philadelphia County after a jury convicted Appellant Dontae Martin of attempted murder,¹ aggravated assault,² possession of an instrument of crime,³ two violations of the Uniform Firearms Act (firearms not to be carried without a license,⁴ and carrying firearms in public in Philadelphia⁵). Appellant challenges the sufficiency and the weight of the evidence supporting his attempted murder conviction. We affirm.

¹ 18 Pa.C.S.A. § 901(a).

² 18 Pa.C.S.A. § 2702(a).

³ 18 Pa.C.S.A. § 907(a).

⁴ 18 Pa.C.S.A. § 6106(a)(1).

⁵ 18 Pa.C.S.A. § 6108.

Appellant was charged with the aforementioned offenses in connection with the shooting of Jerome Rhodes. On June 20, 2010, at approximately 1:30 a.m., Rhodes was walking down Logan Street in Philadelphia when he saw Appellant walking towards him. Rhodes recognized Appellant as a friend of his cousin. When the two men reached each other, Appellant asked the Rhodes if he could have some money. Rhodes responded, "I don't have no money for nobody." N.T. Trial, 10/12/2011, at 26. After this brief interaction, Rhodes walked past Appellant and continued on his way. Just a few seconds later, Appellant called Rhodes by name. When Rhodes turned around, Appellant shot Rhodes twice, once in the left arm and once in the stomach.

Once the shots were fired, Rhodes fell against a nearby car and Appellant immediately fled the scene. Rhodes was able to stumble down the street towards Germantown to seek help for his injuries. A woman who saw Rhodes's condition called the police, who arrived on the scene quickly. While Rhodes was waiting for an ambulance to come, he went in and out of consciousness and was bleeding profusely.

Rhodes was transported to Albert Einstein Medical Center for treatment where he stayed for two months in recovery. Rhodes's wounds required three surgeries after his stomach become repeatedly infected, but the doctors were never able to remove the bullet in Rhodes's stomach as they feared that such a surgery might result in serious complications.

Rhodes needed to use a colostomy bag for eight months after the shooting and still complained of stomach problems at trial.

Rhodes was able to give the Philadelphia Police a statement about the shooting one day after it had occurred. On June 21, 2010, Detective Donald Suchinsky went to the hospital and interviewed Rhodes, who identified the shooter as "Dontae" and gave the detective an approximate location of where he believed the shooter lived. From this information, Detective Suchinsky was able to ascertain that Appellant Dontae Martin resided in this neighborhood. As a result, Detective Suchinsky brought a photo array to the hospital from which Rhodes was able to positively identify Appellant as the shooter.

On October 14, 2011, a jury convicted Appellant of the aforementioned charges. On December 21, 2011, the trial court sentenced Appellant to ten (10) to twenty (20) years imprisonment for the attempted murder charge, two and one half (2½) to five (5) years imprisonment for the Section 6106 VUFA charge, and two and one half (2½) to five (5) years imprisonment for the Section 6108 VUFA charge. As these sentences were set to run consecutively, Appellant received an aggregate sentence of fifteen (15) to thirty (30) years imprisonment. This timely appeal followed.⁶

⁶ We do not have the benefit of a trial court opinion in this case as the trial judge left the bench after this appeal was filed. In addition, we note that Appellant filed a Motion to Supplement the Reproduced Record as the notes (*Footnote Continued Next Page*)

Appellant first claims the trial court erred in finding the Commonwealth presented sufficient evidence to convict him of attempted murder. When reviewing a challenge to the sufficiency of the evidence, our standard of review is well-established:

The standard we apply in reviewing the sufficiency of 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 factfinder 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 that of 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 a 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. Bowen, 55 A.3d 1254, 1260 (Pa. Super. 2012) (citation omitted).

The Pennsylvania Crimes Code provides that “[a] person commits an attempt when with intent to commit a specific crime, he does any act which constitutes a substantial step towards the commission of the crime.” 18
(Footnote Continued) _____

of testimony were not immediately sent to this Court as part of the record. As we were able to acquire the notes of testimony for our review, we find this motion to be moot.

Pa.C.S.A. § 901(a). “The substantial step test broadens the scope of attempt liability by concentrating on the acts the defendant has done and does not any longer focus on the acts remaining to be done before the actual commission of the crime.” *In re R.D.*, 44 A.3d 657, 678 (Pa. Super. 2012), *reargument denied* (June 18, 2012), *appeal denied*, 56 A.3d 398 (Pa. 2012) (citation omitted). More specifically, if a person takes a substantial step toward the commission of a killing, with the specific intent in mind to commit such an act, he may be convicted of attempted murder. *Id.* (citation omitted); 18 Pa.C.S.A. §§ 901, 2502.

In addition, the Commonwealth must prove a defendant had specific intent to kill to sustain a conviction for attempted murder. *Commonwealth v. Spells*, 612 A.2d 458, 461 ([Pa. Super.] 1992). “An attempt to commit murder can only constitute an attempt to commit murder of the first degree, because both second and third degree murder are unintended results of a specific intent to commit a felony or serious bodily harm, not to kill.” *Id.* First degree murder is an intentional killing which is defined as a willful, deliberate and premeditated killing.” 18 Pa.C.S.A. § 2502(d). However, “the period of reflection required for premeditation to establish the specific intent to kill may be very brief; in fact, the design to kill can be formulated in a fraction of a second.” *Commonwealth v. Rivera*, 603 Pa. 340, 355, 983 A.2d 1211, 1220 (2009) (quoting *Commonwealth v. Drumheller*, 570 Pa. 117, 808 A.2d 893, 910 (2002)).

This Court has provided that “[t]he *mens rea* required for first-degree murder, specific intent to kill, may be established solely from circumstantial evidence. The law permits the fact finder to infer that one intends the natural and probable consequences of his acts.” ***Commonwealth v. Jackson***, 955 A.2d 441, 444 (Pa. Super. 2008). It is also well-established that “[t]he manner by which a killing is accomplished can provide an inference of specific intent to kill: *i.e.*, the use of a deadly weapon upon a vital part of the victim's body allows such an inference.” ***Commonwealth v. Bennett***, ---Pa.---, 57 A.3d 1185, 1202 (Pa. 2012).

In arguing that his attempted murder conviction was not supported by sufficient evidence, Appellant concedes he shot the victim but claims the Commonwealth failed to prove Appellant acted with premeditation or specific intent to kill. Appellant argues further that he should not be convicted of attempted murder because Appellant only shot the victim “on the flank of the body,” “did not stand over the victim firing until his weapon was empty,” and did not prevent the victim from seeking help for his injuries. Appellant’s Brief, at 11. These arguments are devoid of any merit.

Upon our review of the case, we find the Commonwealth presented sufficient evidence that Appellant intended to kill the victim. Just moments before the shooting, the victim refused to give Appellant any money and walked away from Appellant. Appellant had sufficient time to form specific intent to kill the victim as Appellant called the victim’s name, caused the

unarmed victim to turn around, and shot the victim twice. Appellant chose to shoot the victim in the stomach, a vital organ, and immediately fled the scene. From this shooting, the victim sustained severe stomach injuries that required three surgeries, two months of hospitalization, and the use of a colostomy bag for eight months. We find the jury could have reasonably concluded that Appellant intended to kill the victim.

We note that this Court has upheld attempted murder convictions when the victim's injuries were far less severe and even where victims were not actually harmed. ***See Commonwealth v. Manley***, 985 A.2d 256 (Pa. Super. 2009) (finding jury could properly infer defendant had specific intent to kill when the defendant fired several bullets in the general area of the victim's vital organs and missed); ***Jackson***, 985 A.2d at 445 (concluded there was sufficient evidence that defendant intended to kill a detective when the defendant ran from the detective, turned around, and raised his arm towards the detective, but never fired). Accordingly, we conclude there was sufficient evidence for the jury to convict Appellant of attempted murder.

Appellant also challenges the weight of the evidence supporting his murder conviction for the first time on appeal. However, Appellant has waived this issue because he failed to raise a weight of the evidence claim in the trial court. "Failure to challenge the weight of the evidence presented at trial in an oral or written motion prior to sentencing or in a post-sentence

motion will result in waiver of the claim.” *Commonwealth v. Bryant*, 57 A.3d 191, 196 (Pa. Super. 2012) (citing *Commonwealth v. Bond*, 604 Pa. 1, 985 A.2d 810, 820 (2009)); Pa.R.Crim.P. 607. As a result, we decline to review the merits of Appellant’s claim.

Judgment of sentence affirmed.