

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MARKISE CROSBY

Appellant

No. 1737 EDA 2011

Appeal from the Judgment of Sentence June 24, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0008007-2009

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY PANELLA, J.

Filed: January 3, 2013

Appellant, Markise Crosby, appeals from the judgment of sentence entered June 24, 2011, by the Honorable Rose Marie DeFino-Nastasi, in the Court of Common Pleas of Philadelphia County. We affirm.

On September 9, 2008, at approximately 9:30 p.m., Crosby and Tommy Williams were standing on the porch of Williams's grandmother's house when Crosby engaged in an altercation with his longtime friend, Nasiyr Carter. Carter believed that Crosby and his friends had burglarized the house of another childhood friend, Cedric Brown. The argument escalated and several neighbors and Williams's grandmother asked the men to keep the noise down. Ultimately, Crosby pulled out a gun and fired at Brown 11 times, striking him in the back of the head, neck, torso, arms and left thigh. Crosby fled the scene and was not arrested until October 22, 2008. Brown died at the scene.

Prior to trial, Crosby entered a guilty plea to carrying a firearm without a license and carrying firearm on public streets or property in Philadelphia. Following a jury trial, Crosby was convicted of third-degree murder and possessing an instrument of crime. On June 24, 2011, the trial court sentenced Crosby to an aggregate term of 20 to 40 years' imprisonment. This timely appeal followed.

On appeal, Crosby raises the following issues for our review:

- I. Is the defendant entitled to an arrest of judgment with regard to his convictions for third degree murder since the evidence was insufficient to sustain the verdict of guilt as the Commonwealth failed to sustain its burden of proving the defendant's guilt beyond a reasonable doubt?
- II. Is the defendant entitled to a new trial as a result of the trial court's ruling that allowed the Commonwealth to play the contents of the 911 radio calls?
- III. Is the defendant entitled to a new trial as a result of the trial court's ruling that allowed the Commonwealth to introduce a wanted flyer presumably depicting the defendant?
- IV. Is the defendant entitled to a new trial as a result of the trial court's ruling that allowed the Commonwealth to cross-examine a character witness with the defendant's guilty plea to weapons offenses stemming from the instant case?
- V. Is the defendant entitled to a remand for resentencing since the trial court's sentence of incarceration of 20 to 40 years was excessive, unreasonable and not reflective of the defendant's character, history and condition?

Appellant's Brief at 5.

Crosby first claims that the evidence was insufficient to support his third-degree murder conviction. Our standard of review is as follows.

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 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 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 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. Helsel, 53 A.3d 906, 917-918 (Pa. Super. 2012) (citation omitted).

"To establish the offense of third degree murder, the Commonwealth need only prove beyond a reasonable doubt that the defendant killed an individual, with legal malice, '*i.e.*, ... wickedness of disposition, hardness of heart, wantonness, cruelty, recklessness of consequences, or a mind lacking regard for social duty.'" ***Commonwealth v. Devine***, 26 A.3d 1139, 1146 (Pa. Super. 2011) (citation omitted), ***appeal denied***, 42 A.3d 1059 (Pa. 2012). "Malice is established where an 'actor consciously disregard[s] an unjustified and extremely high risk that his actions might cause death or

serious bodily harm.'" *Id.* at 1146. "***[M]alice may also be inferred from the use of a deadly weapon on a vital portion of the victim's body.***" ***Commonwealth v. Chine***, 40 A.3d 1239, 1242 (Pa. Super. 2012) (citation omitted) (emphasis in original).

Crosby argues, somewhat incredulously, that the Commonwealth failed to establish that he acted with the requisite malice in shooting Brown. Crosby alleges that "the victim gave some indication that he was possessed of a weapon," and therefore that Crosby acted "reasonably" when he shot Brown 11 times. We disagree. The evidence in this case clearly established that Crosby acted with malice when he shot Brown repeatedly. Crosby surely acted with malice when he shot Crosby in the head and neck, both vital parts of the body.

Crosby additionally argues that the Commonwealth failed to establish that he had a clear motive to kill Brown. Of course, "the Commonwealth is not required, as a matter of law, to prove the accused's motive even where the offense charged is murder in the first degree." ***Commonwealth v. Briggs***, 608 Pa. 430, 510 n.44, 12 A.3d 291, 340 n.44 (2011) (citation omitted). Accordingly, we do not hesitate to find the evidence was sufficient to support the conviction of third-degree murder.

Crosby next claims that the trial court erred when it permitted the Commonwealth to play a 911-radio call recording an eyewitness account of the shooting. Appellant's Brief at 34. Unfortunately, as noted by the Commonwealth, a transcription or recording of the 911-call is not included in

the certified record, and we are therefore precluded from considering this claim. ***Commonwealth v. Preston***, 904 A.2d 1, 7 (Pa. Super. 2006) (*en banc*), ***appeal denied***, 591 Pa. 663, 916 A.2d 632 (2007) ("In the absence of an adequate certified record, there is no support for an appellant's arguments and thus, there is no basis on which relief could be granted.").

Even if we were to review this claim, it would not entitle Crosby relief. The trial court admitted the 911-recording under the excited utterance or present sense impression exceptions to the general rule against hearsay. Despite Crosby's outrageous claim that the "observation of the shooting of a human being is not an 'unexpected and shocking occurrence,'" Appellant's Brief at 39, we would affirm on that basis. **See** Trial Court Opinion, 5/22/12 at 12-16.

Crosby's third issue raised on appeal argues that the trial court erred when it permitted the Commonwealth to introduce a wanted flyer depicting Crosby. Appellant's Brief at 41. Crosby argues that the wanted flyer, prepared by police when he absconded following Brown's murder, was cumulative and unduly prejudicial. As with the 911-recording, however, Crosby has failed to include in the certified record a copy of the wanted flyer. We are therefore deprived of the opportunity to gauge the prejudicial effect, if any, the photograph may have had. Thus, Crosby's failure to include the photograph in the certified record is fatal to his claim. **See *Commonwealth v. Lassen***, 659 A.2d 999, 1008 (Pa. Super. 1995) (finding

Appellant's claim that admitted photographs were unduly prejudicial waived where photographs were not included in the certified record).

Crosby next argues that the trial court erred when it permitted the Commonwealth to cross-examine a character witness with [Crosby's] guilty plea to weapons offenses stemming from the instant case." Appellant's Brief, at 44.

It is well-settled that "[t]he scope of cross examination is a matter within the trial court's discretion and will not be disturbed by this Court absent an abuse of that discretion." *Commonwealth v. Hoover*, 16 A.3d 1148, 1149 (Pa.Super.2011). "As a general matter, Pennsylvania Rule of Evidence 404(a) pronounces a broad prohibition on using evidence of an accused's bad character to establish 'action in conformity therewith' during a criminal proceeding." *Commonwealth v. Fletcher*, 580 Pa. 403, 432, 861 A.2d 898, 915 (2004). Nonetheless, pursuant to Pa.R.E. 404(a)(1), "the accused may offer witnesses to testify to the accused's relevant character traits." *Hoover*, 16 A.3d at 1149 (citation omitted). See Pa.R.E. 404(a)(1) ("In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same."). "In order to prove this [relevant] trait of good character, the accused may opt to introduce evidence of his or her reputation among associates or within a particular community." *Fletcher*, 580 Pa. at 432, 861 A.2d at 915 (citing Pa.R.E. 405(a)). However, if the accused offers such reputation evidence, the Commonwealth may attempt to impeach those witnesses. See *Fletcher, supra; Commonwealth v. Ross*, 856 A.2d 93, 101 (Pa.Super.2004) ("A defendant who presents character testimony runs certain risks [since] character witnesses, like other witnesses, can be subjected to cross-examination."). "For example, when cross examining character witnesses offered by the accused, the Commonwealth may test the witnesses' knowledge about specific instances of conduct of the accused where those instances are probative of the traits in question." *Hoover*, 16 A.3d at 1149–50 (citing Pa.R.E. 405(a)). *Fletcher*, 580 Pa. at 432, 861 A.2d at 915 (holding the Commonwealth, on cross-examination, may question the

accused's character witnesses regarding their knowledge of particular acts of misconduct by the accused to test the accuracy of the witnesses' reputation evidence).

Commonwealth v. Kouma, 53 A.3d 760, 768-769 (Pa. Super. 2012).

Here, William Hurd, Crosby's grandfather, testified that during the time the shooting occurred, Crosby had a "very good reputation" for being a "peaceful non violent [sic] person." N.T., Jury Trial, 3/18/11 at 71. On cross-examination, the prosecutor asked Hurd whether he was aware of the fact that Crosby was in possession of an illegal firearm at the time of the shooting. *Id.* at 72. When Hurd denied knowledge of that fact, the prosecutor asked whether Hurd was in court when Crosby pled guilty to "having a gun." *Id.* At this point, defense counsel objected on grounds of relevance. *Id.*

"This Court has consistently repeated the principle that although evidence of good character may not be rebutted by evidence of specific acts of misconduct, a character witness may be cross-examined regarding his or her knowledge of particular acts of misconduct by the defendant to test the accuracy of his or her testimony and the standard by which he or she measures reputation." ***Kouma***, 53 A.3d at 769 (citation omitted). The prosecutor's question regarding Hurd's knowledge of Crosby's guilty plea to possession of an illegal weapon was undoubtedly relevant to test the foundation for Hurd's testimony that he was unaware Crosby was in possession of an illegal weapon at the time the murder occurred. Therefore,

the trial court correctly overruled defense counsel's objection. We find no abuse of discretion.

Lastly, Crosby argues that the sentence imposed by the trial court was excessive and not reflective of Crosby's character, history and condition. This claim challenges the discretionary aspects of Crosby's sentence. Preliminarily, we must determine whether Crosby has the right to seek permission to appeal the court's exercise of its discretion. **See *Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010). When an appellant challenges the discretionary aspects of his sentence, we utilize a four-part test to determine:

whether appellant has filed a timely notice of appeal, **see** Pa. R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa. R. Crim. P. [720]; (3) whether appellant's brief has a fatal defect, Pa. R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 PA.CON.S.TAT.ANN. § 9781(b).

Id. (internal citations omitted).

The record reveals that on July 1, 2011, Crosby filed a *pro se* motion for reconsideration of sentence.¹ We note, however, that at this time Crosby was represented by Helen Levin, Esquire. Pursuant to our Rules of Appellate Procedure and case law, this Court is prohibited from reviewing *pro se* filings

¹ Crosby filed the motion for reconsideration of sentence the same day as the notice of appeal to this Court.

of a counseled appellant. **See** Pa.R.A.P. 3304; **see also Commonwealth v. Nischan**, 928 A.2d 349, 355 (Pa. Super. 2007) (noting that an appellant's *pro se* filings while represented by counsel were a "nullity"), **appeal denied**, 594 Pa. 704, 936 A.2d 40 (2007). Accordingly, Crosby's *pro se* filings failed to preserve his challenge to the discretionary aspects of his sentence.

Nevertheless, we note that Crosby's sentence falls within the standard range of the sentencing guidelines. "[W]here a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code." **Commonwealth v. Moury**, 992 A.2d 162, 171 (Pa. Super. 2010) (internal citations omitted). Moreover, where, as here, the trial court has the benefit of a pre-sentence investigation report, "we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." **Id.** at 171 (internal citations omitted). Accordingly, we cannot find the trial court abused its discretion.

Judgment of sentence affirmed.