

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
DONALD M. JEFFREY,		
Appellant		No. 194 EDA 2012

Appeal from the Judgment of Sentence December 7, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0004380-2009.

BEFORE: OLSON, WECHT and COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: February 27, 2013

Appellant, Donald M. Jeffrey, appeals from the judgment of sentence entered on December 7, 2011, following his jury trial convictions for aggravated assault and possession of an instrument of crime (PIC).¹ We affirm.

We summarize the facts and procedural history of this case as follows. On February 11, 2009, Appellant was walking down Church Street in Philadelphia, yelling obscenities. The victim, who was sitting on his front porch, asked Appellant to leave when Appellant stepped onto the victim's property. Appellant attempted to strike the victim with his fist, but missed.

¹ 18 Pa.C.S.A. §§ 2702(a) and 907(a), respectively.

*Retired Senior Judge assigned to the Superior Court.

The victim believed that Appellant left the scene. However, a short time later, Appellant jumped out from behind a porch pillar and struck the victim twice with an object. Appellant knocked the victim to the ground and knelt on his neck. An eyewitness, driving down Church Street, saw Appellant standing over the victim, punching his face into the sidewalk. The witness pulled over, called 911, and watched Appellant raise an axe over the victim's head. When a police officer arrived on the scene, she witnessed Appellant standing over the victim with the axe raised. The victim was bleeding profusely from his head. The officer drew her weapon and told Appellant three times to drop the axe. When Appellant finally complied, back-up officers tackled Appellant to make an arrest.

The Commonwealth initially charged Appellant with the aforementioned crimes, as well as robbery, theft by unlawful taking, receiving stolen property, simple assault, reckless endangerment, resisting arrest, attempted murder and terroristic threats. A seven-day trial in November 2009 resulted in a hung jury and mistrial. On retrial, in June 2011, the Commonwealth only proceeded on charges of aggravated assault, PIC, robbery, and resisting arrest. The robbery and resisting arrest charges were *nolle prossed* and the jury convicted Appellant on the remaining crimes. On December 7, 2011, the trial court imposed a sentence of two to four years of imprisonment for aggravated assault and a concurrent term of

five years of probation for PIC. Appellant did not file post-sentence motions. This timely appeal followed.²

On appeal, Appellant presents the following issues for our review:

- I. Is [Appellant] entitled to an arrest of judgment where the Commonwealth's verdict is not supported by sufficient evidence and where the Commonwealth did not prove its case beyond a reasonable doubt?
- II. Is [Appellant] entitled to a new trial where the verdict is not supported by the greater weight of the evidence but rather rested upon speculation, conjecture, and surmise?

Appellant's Brief at 3.

In his first issue presented, Appellant contends that the evidence was insufficient to support his conviction for aggravated assault.³ Initially, Appellant notes, "it is undisputed that there was a physical altercation between the parties and that [Appellant] wound up hitting the victim over the head with an ax/hatchet" and that "at the end of the altercation, [Appellant] was indeed on top of the victim." *Id.* at 8. Appellant claims that the Commonwealth failed to prove that his "recklessness [rose] to the level of malice to sustain a conviction for aggravated assault." *Id.* at 9.

² Appellant filed a notice of appeal on January 5, 2012. The trial court entered an order directing Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied timely. The trial court filed an opinion pursuant to Pa.R.A.P. 1925(a) on June 22, 2012.

³ Appellant does not challenge his PIC conviction and we will not review it.

Appellant suggests that the victim introduced the weapon into the fray and Appellant acted in self-defense. *Id.* at 10-11. Finally, Appellant asserts that the victim's testimony was contradictory and manifestly unreliable.⁴ *Id.* at 12.

In reviewing a claim regarding the sufficiency of the evidence,

an appellate court must determine whether the evidence was sufficient to allow the fact finder to find every element of the crimes charged beyond a reasonable doubt. In doing so, a reviewing court views all the evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. Furthermore, in applying this standard, the Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence. When performing its review, an appellate court should evaluate the entire record and all evidence received is to be considered, whether or not the trial court's rulings thereon were correct. Additionally, we note that the trier of fact, while passing on the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence.

Appellant was convicted under 18 Pa.C.S.A. § 2702(a)(1), which provides, "A person is guilty of aggravated assault if he ... attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." Serious bodily injury is defined as, "Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. § 2301.

⁴ This portion of Appellant's sufficiency argument, challenging the victim witness' veracity, goes to the weight of the evidence which we address **infra**.

Commonwealth v. Burton, 2 A.3d 598, 601 (Pa. Super. 2010)(some citations omitted).

Here, Appellant sets forth the elements of aggravated assault and concedes that he hit the victim with an axe. Appellant's Brief at 8. However, in order to support a claim for self-defense, Appellant claims that the victim introduced the weapon into the altercation. ***Id.*** at 11. Appellant fails to cite any legal authority regarding self-defense, including the burden of proof and the elements of the defense. Thus, we deem the issue waived. ***See*** Pa.R.A.P. 2119(b); ***see also Commonwealth v. Hernandez***, 39 A.3d 406, 412 (Pa. Super. 2012) (failure to develop argument with citation to and analysis of relevant authority waives issue on appeal).

Assuming *arguendo* Appellant had properly raised the argument, it would nonetheless fail on the merits. "If a defendant introduces evidence of self-defense, the Commonwealth bears the burden of disproving the self-defense claim beyond a reasonable doubt. Although the Commonwealth is required to disprove a claim of self-defense ... a jury is not required to believe the testimony of the defendant who raises the claim." ***Commonwealth v. Chine***, 40 A.3d 1239, 1243 (Pa. Super. 2012) (citation omitted). "As a general rule, an individual is justified in using force upon another person when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." ***Id.*** *citing* 18 Pa.C.S.A.

§ 505(a). “However, the Commonwealth may disprove a claim that a defendant's use of deadly force was justifiable by establishing that: 1) the defender did not reasonably believe deadly force was necessary to protect himself from imminent danger of death or great bodily harm, 2) the defender provoked the incident, or 3) the defender violated a duty to retreat with safety or avoid the danger.” *Id.* Ostensibly, Appellant appears to argue that the victim provoked the incident, but fails to address the use of deadly force necessary for protection and the duty to retreat.

Here, the Commonwealth presented testimony from an eyewitness who stated that she saw Appellant “pounding the [victim’s] head into the ground.” N.T., 6/22/2011, at 102. While calling 911, the eyewitness observed Appellant standing over the victim, wielding an axe. *Id.* at 103. When police arrived on the scene, the arresting officer “observe[d Appellant] squat over the [victim] with an axe in his hand held over [the victim’s] head and blood everywhere.” *Id.* at 113. She could “see the blood coming out of the [victim’s] head[,] dripping down his neck, a big puddle of blood on the concrete.” *Id.* at 113-114. She described the victim as “bleeding profusely.” *Id.* at 114. The officer drew her weapon and ordered Appellant “several times to put the axe down[.]” *Id.* Appellant tossed the axe, would not get off the victim, and police eventually tackled Appellant. *Id.* at 115. The foregoing evidence established that Appellant continued to use force and

refused to retreat. Thus, we find such evidence sufficient to disprove Appellant's self-defense claim.

Next, Appellant claims the verdict was against the weight of the evidence. "A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial: (1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion." Pa.R.Crim.P. 607. Here, there are no written motions docketed or contained in the certified record. Thus, Appellant was required to raise the issue orally before sentencing. However, we are unable to review this claim because the sentencing transcript is not contained in the certified record. It is Appellant's duty to confirm that the certified record is complete to ensure meaningful appellate review. ***Commonwealth v. Edwards***, 594 A.2d 720 (Pa. Super. 1991), *citing* Pa.R.A.P. Chapter 19. While our Prothonotary made an informal request to the trial court for the missing transcript, it could not be located. It is not this Court's responsibility to expend time, effort and manpower scouting around judicial chambers or the various prothonotaries' offices of the courts of common pleas for the purpose of unearthing transcripts that were not formally made part of the certified record. ***See Commonwealth v. Preston***, 904 A.2d 1 (Pa. Super. 2006). Because of the missing transcript, we are unable to determine whether this issue was properly preserved and are constrained to deem the issue waived.

Furthermore, we are convinced that Appellant did not preserve this issue because the trial court also found the weight claim waived. **See** Trial Court Opinion, 6/22/2012, at 12-14. Accordingly, we deem Appellant's second issue waived.

Judgment of sentence affirmed.