NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RAKEIM HARLEY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1150 EDA 2013

Appeal from the Judgment of Sentence of February 27, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-0CR-0007709-2011

BEFORE: BOWES, J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY WECHT, J.: **FILED AUGUST 19, 2014**

Rakeim Harley appeals the judgment of sentence imposed after a jury convicted him of third-degree murder,[1] firearms not to be carried without a license,[2] possession of an instrument of crime,[3] and recklessly endangering another person.[4] Specifically, Harley challenges the weight and sufficiency of the evidence offered by the Commonwealth to disprove beyond a reasonable doubt that he did not act in self-defense. We affirm.

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* Former Justice specially assigned to the Superior Court.

1 18 Pa.C.S. § 2502(c).

2 18 Pa.C.S. § 6106.

3 18 Pa.C.S. § 907(a).

4 18 Pa.C.S. § 2705.

The trial court provided the factual history of this case:

> Shortly after 7:00 on the evening of February 8th, 2010, the decedent, Ms. Tanisha McIntyre, was found lying near the intersection of 30th and Jefferson Streets in Philadelphia by police responding to an emergency call. Notes of Testimony ("N.T."), 1/8/2013, at 87-88. The decedent had been shot five times, in her chest, abdomen, back, side, and left buttock, with entrance wounds to the front, back, and side of her body. ***Id.*** at 56-57, 78-79. The wounds to her chest, abdomen, and back were penetrating gunshot wounds. ***Id.*** at 58-74. The wound to her buttock had a shallow wound track, indicating that it resulted from being grazed with a projectile in the soft tissues. ***Id.*** at 75.
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> An eyewitness, Janvier Thomas, testified that he had known [Harley] for several years. He testified that he was at the intersection of the shooting at the time it took place, spending time with some friends, and that [Harley] approached the decedent from behind, shooting her initially in the back. ***Id.*** at 128-38. Thomas further testified that the decedent was not holding a gun at the time that she was initially shot, and that he ran away once the shooting began. ***Id.*** at 139-44. He also testified that he had seen [Harley] on a prior occasion indicate by gesture that he was carrying a gun under his shirt. ***Id.*** at 168.
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> Leanna Boykin, the decedent's girlfriend, testified that [Harley] had a dispute with the decedent because he had begun a relationship with Boykin while the decedent was out of state for two months, from September 3rd to November 2nd of 2010. Upon her return, Boykin left [Harley] and returned to the decedent. ***Id.*** at 190-92.
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> Expert testimony from Philadelphia Police Officer Kelly Walker of the Firearms Identification Unit established that each of the seven spent cartridge casings found at the scene were fired from the same gun. N.T., 1/9/2013, at 23-24. A handgun found near the decedent showed no evidence of having been fired, which is consistent with eyewitness testimony that established that [Harley] approached the decedent from behind and begun firing before she had a chance to retrieve her weapon. ***Id.*** at 26-27.
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> [Harley] testified that he had seen the decedent with a gun and had been threatened by her at some point after her return. He also testified that on the day of the shooting, she aimed her gun

> at him before he shot her, and that he did not intend to kill her when he drew his gun, aimed at her, and fired seven times. On cross-examination, he acknowledged that he did not have a license to carry a firearm, and that he was therefore guilty of the charged gun offenses. He testified that he shot the decedent in order to protect himself, and that he then threw the gun into the Schuylkill River because he was scared of getting "locked up" for the murder. ***Id.*** at 83-87, 93-104.
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> He also testified on cross-examination that he had been holding the gun for a friend for about a week. He further testified that he racked the gun as he approached his friend at the site of the shooting, to whom he was attempting to return the gun, and that only after racking the weapon did he become aware of the decedent. ***Id.*** at 94-112. [Harley] gave inconsistent testimony, at one point saying the decedent had a gun aimed at him when he looked over, and at another point saying that she was merely reaching for the gun at that moment. ***Id.*** at 113-14. [Harley] acknowledged that he fired first and that the decedent did not fire at him. ***Id.*** at 133. [Harley's] uncle testified as to [Harley's] reputation for being a law-abiding, honest, and peaceful person. ***Id.*** at 135.

Trial Court Opinion ("T.C.O."), 5/29/2013, at 2-4 (citations modified).

Following a four-day jury trial, Harley was convicted of third-degree murder, firearms not to be carried without a license, possession of an instrument of crime, and recklessly endangering another person. The trial court imposed an aggregate sentence of nineteen and one-half to thirty-nine years of imprisonment. Trial counsel timely filed a post-sentencing motion on March 8, 2013, which was denied by the trial court on March 11, 2013. On April 11, 2013, Harley timely filed a notice of appeal.[5] On April 16, 2013,

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[5] According to Pa.R.A.P. 903(a), the appeal to this Court was due no more than thirty days after March 11, 2013, which fell on April 10, 2013. On April 11, 2013, one day after the thirty-day deadline, this Court received
(Footnote Continued Next Page)

the trial court ordered Harley to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On May, 16, 2013, Harley filed a petition seeking permission to file his Rule 1925(b) statement *nunc pro tunc*, to which he attached his proposed statement. On May 17, 2013, the trial court granted the petition and accepted the statement as timely filed. Thereafter, the trial court prepared the above-excerpted opinion pursuant to Rule 1925(a).

Harley raises one issue for our review:

> Whether the verdict is against the weight and sufficiency of the evidence because [Harley] raised self-defense at trial, and presented testimony to show that the victim was armed with a gun at the time of the shooting, had threatened [Harley], and [Harley] believed he was in danger of death or serious bodily harm when he shot the victim.

Harley's Brief at 4.

In framing his issue as a challenge to the weight and sufficiency of the evidence, Harley conflates two distinct claims with different standards of

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Harley's notice of appeal, rendering it untimely on its face. However, pursuant to the prisoner mailbox rule, documents are deemed filed by prisoners when they are turned over to prison authorities for delivery. ***See Commonwealth v. Jones***, 700 A.2d 423, 425-26 (Pa. 1997). In this case, only one day separated the expiration of Harley's time to appeal and the filing of his notice of appeal. Because it is all but unfathomable that a notice of appeal would be filed the same day it was submitted to prison authorities, we will infer that Harley deposited his notice of appeal to prison authorities on or before the last day of the thirty-day period during which he could appeal.

review. In ***Commonwealth v. Widmer***, 744 A.2d 745 (Pa. 2000), our Supreme Court highlighted the distinction between challenges to the sufficiency of the evidence and challenges to the weight of the evidence, noting that the remedy for insufficient evidence is an acquittal while a verdict against the weight of the evidence is a mistrial, the remedy for which is the award of a new trial. As well, a contention that a given verdict was against the weight of the evidence effectively concedes the legal sufficiency of the evidence. ***Id.*** at 751-52. Thus, we must evaluate each claim separately.

Although Harley essentially fails to distinguish these two claims for purposes of argument, the trial court considered each in turn, and we will do the same, beginning with the sufficiency of the evidence.

> [O]ur applicable standard of review is "whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict[-]winner, was sufficient to enable the fact[-]finder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt." ***Commonwealth v. Eichinger***, 915 A.2d 1122, 1130 (Pa. 2007). Additionally, when examining sufficiency issues, "we bear in mind that: the Commonwealth's burden may be sustained by means of wholly circumstantial evidence; the entire trial record is evaluated and all evidence received against the defendant considered; and the trier of fact is free to believe all, part, or none of the evidence when evaluating witness credibility." ***Commonwealth v. Markman***, 916 A.2d 586, 598 (Pa. 2007).

Commonwealth v. Crabill, 926 A.2d 488, 491-92 (Pa. Super. 2007).

Harley's argument focuses solely upon the Commonwealth's alleged failure to prove beyond a reasonable doubt that he did not act in self-defense. Regarding the sufficiency of the evidence in the context of a self-defense argument, our Supreme Court has explained as follows:

> The use of force against a person is justified when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person. ***See*** 18 Pa.C.S. § 505(a).[6] When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt. While there is no burden on a defendant to prove the claim, before the defense is properly at issue at trial, there must be some evidence, from whatever source, to justify a finding of self-defense. If there is any evidence that will support the claim, then the issue is properly before the fact[-]finder.
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> [T]he Commonwealth cannot sustain its burden of proof solely on the fact[-]finder's disbelief of the defendant's testimony. The "disbelief of a denial does not, taken alone, afford affirmative proof that the denied fact existed so as to satisfy a proponent's burden of proving that fact." ***Commonwealth v. Graham***, 596 A.2d 1117, 1118 (Pa. 1991). The trial court's statement that it did not believe Appellant's testimony is no substitute for the proof the Commonwealth was required to provide to disprove the self-defense claim.

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[6] In relevant part, subsection 505(b)(2) specifically authorizes the use of deadly force when, *inter alia*, "the actor believes that such force is necessary to protect himself against death [or] serious bodily injury." Under section 501 of the Crimes Code, the requisite "belief" to establish self-defense is "reasonable belief." 18 Pa.C.S. § 501; ***see Commonwealth v. Perez***, 698 A.2d 640, 646 (Pa. Super. 1997).

Commonwealth v. Torres, 766 A.2d 342, 344-45 (Pa. 2001) (citation modified); ***see Commonwealth v. Carbone***, 574 A.2d 584, 589 (Pa. 1990) ("Although the Commonwealth is required to disprove a claim of self-defense arising from any source beyond a reasonable doubt, a jury is not required to believe the testimony of the defendant who raises the claim."). Thus, in order to establish a basis upon which a jury could convict Harley of third-degree murder, it was incumbent upon the prosecution to prove beyond a reasonable doubt that Harley provoked the use of force; did not reasonably believe that he was in danger of death or serious bodily injury; or failed to avail himself of an opportunity safely to retreat. ***Commonwealth v. Eberle***, 379 A.2d 90, 93 (Pa. 1997); ***Commonwealth v. Helm***, 402 A.2d 500, 503 (Pa. 1979).

In its Rule 1925(a) opinion, the trial court highlighted medical evidence and testimony from an impartial eyewitness as sufficient to disprove self-defense beyond a reasonable doubt. T.C.O. at 4-8. The impartial eyewitness, Janvier Thomas, testified that he saw Harley approach the unarmed decedent and shoot her from behind. ***Id.*** at 2-3. The trial court also found that the medical evidence militated in favor of the Commonwealth in its effort to disprove self-defense: The graze wound to the decedent's buttock indicated that she was shot at least once while lying on the ground. ***Id.***

Viewing the evidence in the light most favorable to the Commonwealth as verdict-winner, it was reasonable for the fact-finder to conclude that

Harley did not reasonably believe that he was in danger of death or serious bodily injury, or failed to avail himself of an opportunity safely to retreat.[7] The evidence in this case certainly supported such a conclusion. Consequently, Harley's challenge to the sufficiency of the Commonwealth's evidence to disprove that he acted in self-defense fails.

Having established that the verdict was supported by sufficient evidence, we now turn to Harley's challenge to the jury's weighing of the evidence. To properly preserve a weight of the evidence claim, that claim must be raised orally before sentencing, or by written motion prior to sentencing, or in a post-sentencing motion. Pa.R.Crim.P. 607(A); ***see Commonwealth v. Palo***, 24 A3.d 1050, 1055 (Pa. Super. 2011). In this case, Harley properly raised the issue in his post-sentencing motion.

In reviewing whether the trial court erred in ruling that the verdict was not contrary to the weight of the evidence, we must "review[] the [trial court's] exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence." ***Commonwealth v. Smith***, 985 A.2d 886, 897 (Pa. 2009) (quoting ***Commonwealth v. Diggs***, 949 A.2d 873, 879 (Pa. 2008)). The jury is free to believe all, part, or none of the evidence, and an appellate court will not make its own assessment of the credibility of the evidence. ***Commonwealth v. Ramtahal***, 33 A.3d 602,

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[7] The trial court explained its rejection of Harley's sufficiency challenge primarily based upon Harley's failure to retreat.

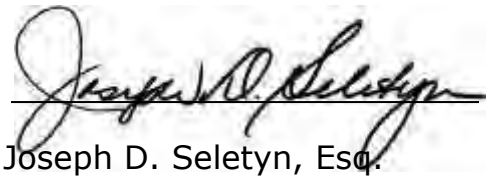
609 (Pa. 2011). "The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice." ***Id.*** (quoting ***Diggs***, 949 A.2d at 879-80). In turn, we will only reverse a trial court's refusal to do so when we find that it reflected an abuse of discretion for the trial court not to conclude that the verdict was so contrary to the evidence as to shock one's sense of justice. In effect, the trial court's denial of a motion for a new trial based on a weight of the evidence claim is "the least assailable of its rulings." ***Id.***

As set forth above, the evidence established a basis upon which the jury could conclude that Harley initiated the conflict, approaching the decedent from behind. Harley shot at the decedent seven times, hitting her five times, before she could return fire. The trial court further opined that Harley's testimony "made no sense, except as a feeble attempt to reconcile his story that his life was endangered by an attacker who already had a loaded handgun pointed at him . . . with the established fact that he was able to shoot at [the decedent] seven times, striking her five times in the front, side, and back, and preventing her from firing a single shot," T.C.O. at 7, and based upon our review of the evidence we share the trial court's view that the jury's rejection of Harley's claim of self-defense was not inconsistent with the weight of the evidence presented. Nothing in Harley's arguments or in our review of the evidence suggests that the jury verdict should shock one's sense of justice, or that the trial court abused its discretion in ruling that Harley had failed to establish the sort of injustice that would require a

new trial. Consequently, Harley's challenge to the weight of the evidence must fail.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/19/2014