NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. HAROLD BARON BOLKEY. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1324 WDA 2013

Appeal from the Judgment of Sentence August 7, 2013
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0003016-2012

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

MEMORANDUM BY JENKINS, J.: **FILED July 1, 2014**

Appellant Harold Baron Bolkey appeals from his August 7, 2013 judgment of sentence. We affirm.

On June 20, 2013, following a three-day trial, a jury found Bolkey guilty of recklessly endangering another person.[1] The jury found Bolkey not guilty of aggravated assault.[2]

In the late hours of July 20, 2012, the victim Devin Medina arrived at a bonfire located on Route 98 in Fairview Township. N.T. 6/18/13, at 39.

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S.A § 2705.

[2] 18 Pa C.S.A § 2702(a)(1). Prior to trial, the Commonwealth withdrew counts charging possessing an instrument of crime and simple assault, and a second aggravated assault count.

Medina was asked to move his vehicle. ***Id.*** Medina pulled onto Route 98 and attempted to follow two other vehicles to a new parking location. ***Id.***, at 42-43. Bolkey's truck got between Medina and the vehicles he attempted to follow and Medina inadvertently followed Bolkey into Bolkey's strawberry field. ***Id.***, at 43-45.

Medina realized he followed the wrong vehicle after he stopped near Bolkey's truck and Bolkey exited his vehicle. N.T. 6/18/13, at 44, 48. Medina apologized and attempted to explain. ***Id.***, at 44-45, 49-50. Bolkey returned to his truck and retrieved his shotgun. ***Id.***, at 50. As Medina attempted to leave, Bolkey pointed the shotgun and shot Medina. ***Id.***, at 50-51. Medina exited the field and later was found lying in the road. ***Id.***, at 56, 58. Medina stated he never drove at Bolkey at a high rate of speed. ***Id.***, at 67.

Two other Commonwealth witnesses testified Medina inadvertently followed Bolkey into the strawberry field, yelled "don't shoot," and did not drive toward Bolkey. N.T. 6/18/13, at 100, 104-105, 126-130.

Bolkey testified that after he pulled into his strawberry field, he exited his truck, pulled a couple of weeds, and re-entered his truck. N.T. 6/19/14 a.m., at 139-41. Bolkey claimed Medina's vehicle then came rushing beside him and immediately reversed. ***Id.***, at 141-44. Bolkey exited his vehicle, with an unloaded shotgun. ***Id.***, at 145-46, 148. Medina's vehicle was approximately 15-18 feet away, pointed at Bolkey, and "posed to go." ***Id.***,

at 147-48. Bolkey stated he panicked, reached into his truck for a bullet and, while loading the shotgun and spinning around:

> Partway though my turn there I just – probably about at the point where I would say the gun barrel was about parallel with the – with the side of the truck, I'm about a arm's distance from the side of the truck and at that time I snapped it up and kind of my thumb pushed up the safety and it discharged there. Because I, you know, it was a swing in which I had enough pressure on the trigger to discharge it.

Id., at 159-160. When asked: "[D]id you consciously pull the trigger on that weapon?", Bolkey responded: "[N]o, I did not." ***Id.*** Bolkey further testified his purpose with "the action of the shotgun" was:

> Well, in seconds - - to stop that car, you know, I was going to shoot the side or tire or something and I don't know if it would have worked or not. But, you know, I just responded – the car was coming at me and I just reacted. I only had about a second or two to decide. I was going to try to aim somewhere on the lower end of the car.

N.T. 6/19/14 p.m. at 24-25. He then stated he was going to defend himself. ***Id.*** On cross-examination, Bolkey confirmed he accidentally discharged the shotgun and did not intend to fire the shotgun "at that time." ***Id.*** at 27-28.

After the shooting, Pennsylvania State Trooper John P. McClain interviewed Bolkey. Bolkey stated he fired at Medina's vehicle in an attempt to damage it and stated he pulled the trigger early. N.T. 6/19/14 a.m., at 28, 30. He did not say he was in fear for his life, claim the vehicle approached him at a high rate of speed, say the shooting was an accident,

or indicate he did not intend to pull the trigger. N.T. 6/18/14, at 151-52; N.T. 6/19/14 a.m., at 29.

The jury found Bolkey guilty of recklessly endangering another person and not guilty of aggravated assault. The court sentenced Bolkey to 6 to 23 months imprisonment. Bolkey filed a timely notice of appeal. Both Bolkey and the trial court complied with Pennsylvania Rule of Appellate Procedure 1925.

Bolkey raises the following issue on appeal:

> Did the trial court err in refusing to instruct the jury on the "Castle Doctrine" self-defense/defense of property where the evidence establishes that the Defendant used and attempted to use deadly force against what he reasonably perceived and believed was a threat of death or serious bodily injury, where in the course of attempting to defend himself, the Defendant's firearm accidentally discharged and struck his attacker?

Appellant's Brief at 5.

A jury charge error "will require the grant of a new trial only where the charge permitted a finding of guilt without requiring the Commonwealth to establish the critical elements of the crimes charged beyond a reasonable doubt." ***Commonwealth v. Hansley***, 24 A.3d 410, 420 (Pa.Super.2011) (quoting ***Commonwealth v. Wayne***, 553 Pa. 614, 632, 720 A.2d 456, 465 (1998)).

The Pennsylvania Crimes Code provision governing self-defense states:

> **Use of force justifiable for protection of the person.**—The use of force upon or toward another person is justifiable 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.

18 Pa.C.S. § 505(a).[3] "Before the issue of self-defense may be submitted to a jury for consideration, a valid claim of self-defense must be made out as a matter of law, and this determination must be made by the trial judge." ***Hansley***, 24 A.3d at 420 (quoting ***Commonwealth v. Mayfield***, 585 A.2d 1069, 1070–71 (1991) (en banc)). To establish the self-defense claim "it must be shown that[:] a) the [defendant] was free from fault in provoking or continuing the difficulty which resulted in the slaying; b) that the [defendant] must have reasonably believed that he was in imminent danger of death or great bodily harm, and that there was a necessity to use such force in order to save himself therefrom; and c) the [defendant] did not violate any duty to retreat or to avoid the danger." ***Id.*** (quoting ***Mayfield***, 585 A.2d at 170-71) (emphasis deleted); ***accord Commonwealth v. Sanchez***, 82 A.3d 943, 980 (Pa.2013).[4] "If there is any evidence from

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[3] The legislature amended the self-defense statute in 2011, adding stand your ground and castle doctrine provisions.

[4] The self-defense statute provides the use of force is not justifiable if: "the actor knows that he can avoid the necessity of using such force with complete safety by retreating, except the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be." 18 Pa.C.S. § 505(a)(2)(ii). Because the strawberry fields were Bolkey's place of work, he did not have a duty to retreat.

whatever source that will support these three elements then the decision as to whether the claim is a valid one is left to the jury and the jury must be charged properly thereon by the trial court." ***Id.*** (quoting ***Mayfield***, 585 A.2d at 170-71) (emphasis deleted).

The Pennsylvania Supreme Court has found the defense of self-defense is available only where a defendant admitted he intentionally shot the victim to protect himself. ***See, e.g., Commonwealth v. Philistin***, 53 A.3d 1, 12 (Pa.2012); ***Commonwealth v. Harris***, 665 A.2d 1172, 1175 (1995) ("the defense of self-defense necessarily requires that the appellant admit that the shooting was intentional in order to protect one's self").

In ***Commonwealth v. Harris***, the defendant testified he went upstairs and secured his unloaded shotgun from the bedroom, came downstairs and informed his wife he just wanted the victim to leave. 665 A.2d at 1173. The defendant then went back upstairs, retrieved ammunition, loaded the gun, and went downstairs to confront the victim. He admitted he cocked the shotgun, but claimed the gun accidentally fired when his wife and the victim attempted to grab the gun. The Supreme Court found the evidence established the defendant was not in fear of imminent danger of death or great bodily injury and further found the defendant admitted his life was not in jeopardy. The Court then noted the defense of self-defense "necessarily requires that the defendant admit the shooting was intentional in order to protect one's self." ***Id.*** at 1175. The defendant denied the shooting was intentional, claiming it was an accident.

The court found the defense of self-defense unavailable because it "is mutually exclusive of the defense of accident or mistake." ***Id.***

Similarly, in ***Philistin***, the Pennsylvania Supreme Court again noted the defendant must admit "he intentionally shot the [victim] to protect himself." 3 A.3d at 12. The Court found the defense of self-defense unavailable because the defendant claimed he fired at the ground, not at the victims. ***Id.***[5]

In ***Commonwealth v. Mayfield***, the defendant denied causing the injury but testified he pulled his knife in preparation to use it against the victim in self-defense. 585 A.2d at 1077. This court found the defendant's testimony sufficient to warrant a self-defense instruction. ***Id.*** The court, however, also noted a defendant "may not provide testimony or evidence inconsistent with [a self-defense] claim and still avail himself of the defense." ***Id.***

In ***Commonwealth v. Gonzales***, 483 A.2d 902, 903-04 (Pa.Super.1984), the defendant testified he did not shoot the victims. He claimed the victims, who were plain-clothes police officers, did not identify themselves as police and did not display a warrant. He reached for his gun

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[5] In ***Commonwealth v. Scott***, this court found the trial court erred in not issuing both a mistake of fact and self-defense instruction. 73 A.3d 599, 605 (Pa.Super.2013). In ***Scott***, however, there were two separate victims. The defendant claimed he shot one victim in self-defense and the second victim by mistake. ***Id.*** at 604-05.

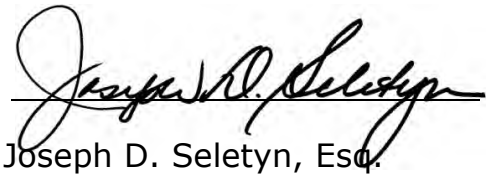
because he had been robbed two weeks prior and thought the men were attempting to rob him. ***Id.*** The defendant said he did not use the gun because he saw the uniformed officers behind the plain-clothes officers. ***Id.*** at 904. The court found this testimony supported a self-defense claim, reasoning the defendant claimed he pointed a gun at the victims and "the mere act of pointing a gun at an individual is sufficient conduct to constitute an assault." ***Id.*** The trial court, therefore, should have instructed on self-defense, even though the defendant denied shooting the gun. ***Id.***

Here, the trial court acted within its discretion in denying the self-defense instruction. Bolkey testified he shot the gun accidentally and never intended to hurt Medina. Bolkey testified he intended to shoot the truck. Because Bolkey did not intend to shoot the victim, the trial court properly refused to instruct the jury on self-defense. ***See Harris***, 665 A.2d at 1175; ***Philistin***, 53 A.3d at 12.

Unlike the defendants in ***Mayfield*** and ***Gonzalez***, Bolkey did not claim he used the gun against the victim in self-defense. He testified the gun accidentally discharged when he was preparing to shoot the truck, not the victim. This testimony does not support a self-defense claim. ***Compare Philistin***, 53 A.3d at 12 (self-defense claim unavailable where defendant claimed he fired at the ground), ***with Mayfield***, 585 A.2d at 1078 (self-defense claim available where defendant admitted he pulled a knife to defend himself but denied causing the injury).

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014