

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

KENNETH LATAURUS BARNER

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1426 WDA 2012

Appeal from the Judgment of Sentence August 21, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015189-2011

BEFORE: PANELLA, OLSON and WECHT, JJ.

MEMORANDUM BY PANELLA, J.:

FILED MAY 23, 2014

Appellant, Kenneth Lataurus Barner, appeals from the judgment of sentence entered on August 21, 2012, in the Court of Common Pleas of Allegheny County. After careful review, we affirm.

Barner was charged with criminal attempt - homicide, aggravated assault and tampering with or fabricating physical evidence in relation to the shooting¹ of Jamal Thomas, his girlfriend's brother. The jury found Barner not guilty of the criminal attempt - homicide charge, but was found guilty of the remaining charges. Subsequent thereto, the trial court sentenced Barner to a period of 5 to 10 years' imprisonment on the aggravated assault charge. No post-sentence motions were filed. This appeal followed.

¹ Thomas sustained injuries to his left elbow, upper arm and his chest cavity. **See** N.T., Jury Trial, 5/8/12-5/9/12, at 56-57, 213.

On appeal, Barner raises the following issue for our review:

- I. WAS THE EVIDENCE SUFFICIENT TO SUSTAIN THE CONVICTION FOR AGGRAVATED ASSAULT WHERE THE COMMONWEALTH FAILED TO DISPROVE BEYOND A REASONABLE DOUBT THAT MR. BARNER ACTED IN SELF-DEFENSE?

Appellant's Brief, at 5.

Our standard of review is well-settled.

We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Mobley, 14 A.3d 887, 889-890 (Pa. Super. 2011)
(citation omitted).

Barner was convicted of aggravated assault. Under the Crimes Code, a person may be convicted of aggravated assault, graded as a felony of the first degree, if he "attempts to cause serious bodily injury to another [.]" 18 PA.CON.S.TAT.ANN. § 2702(a)(1). The Code defines "serious bodily injury" as

“bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss of impairment of the function of any bodily member or organ.” 18 PA.CON.S.TAT.ANN. § 2301. Barner does not dispute the proof of the elements of aggravated assault; instead, he argues that the Commonwealth did not disprove his claim of self-defense.

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). When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt.

Commonwealth v. Bullock, 948 A.2d 818, 824 (Pa. Super. 2008).

In order for the Commonwealth to disprove self-defense, one of the following elements must exist: (1) the defendant used more force than was necessary to save himself from death, bodily injury, or the commission of a felony; (2) the defendant provoked the use of force; or (3) the defendant had a duty to retreat, which was possible to accomplish with complete safety. **See *Commonwealth v. Burns***, 765 A.2d 1144, 1148-1149 (Pa. Super. 2000). However, “[a]lthough 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.” ***Bullock***, 948 A.2d at 824.

Based upon our review of the record, it is evident that Barner has negated one of the elements of self-defense. The evidence presented at trial

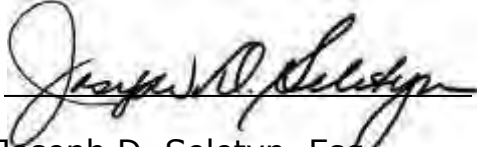
established that Thomas stopped by his sister's house at approximately 11:00 PM on November 10, 2011. Thomas knocked on the front door, identified himself to Barner and, after a few minutes, Barner opened the door, brandishing a gun. Thomas was unarmed. By his own admission Barner denied the intentional or conscious use of force against Thomas. Rather, in his version of the events he and Thomas were "tussling" when the gun simply "went off" during the struggle. N.T. Jury Trial, 5/8/12-5/9/12, at 180-181, 183. In ***Commonwealth v. Mayfield***, 585 A.2d 1069 (Pa. Super. 1991) (en banc), this Court ruled that "where a defendant denies the act of using deadly force in defense of himself, he has negated one of the elements of self-defense; therefore, he may not avail himself of an instruction on justification even though evidence from other sources would be sufficient to put the claim in issue." ***Id.***, at 1075.

Accordingly, we are in agreement with the trial court that the evidence in no way indicated that Thomas was the aggressor or, more importantly, that Barner was defending himself from an assault by Thomas. As such, Barner's sufficiency challenge must fail.

Judgment of sentence affirmed. Jurisdiction relinquished.

Wecht, J., concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/23/2014