

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

PAUL JOSEPH DESPORT

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1745 WDA 2011

Appeal from the Judgment of Sentence September 19, 2011  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0000217-2010

BEFORE: PANELLA, J., DONOHUE, J., and ALLEN, J.

MEMORANDUM BY PANELLA, J.

**FILED JUNE 25, 2014**

Appellant, Paul Joseph Desport, appeals from the judgment of sentence, entered on September 19, 2011, by the Honorable Randal B. Todd, Court of Common Pleas of Alleghany County. Upon careful review, we affirm.

On December 30, 2009, the Brentwood Borough Police Department responded to a 911 call at approximately 1:00 p.m. When officers arrived on the scene they found the victim, Raymond Niebrzydowski, propped up against a couch in the apartment he shared with Desport. Initially, Desport maintained that the victim had been robbed and assaulted the night before by men who stole his wallet. Desport further claimed that he tried to help the victim by pouring water over his head and cleaning him with a wet rag.

Finally, Desport claimed that after he had cleaned the victim, both went to bed and that when Desport had awoken he found his roommate had died.

However, after being confronted with the inconsistencies in his story during police questioning, Desport broke down and admitted that he had lied. Desport admitted that both he and the victim had been drinking heavily that day.<sup>1</sup> Desport then claimed that the confrontation occurred when the victim expressed his intent to visit his girlfriend. Desport, believing that the victim's girlfriend had a PFA order against the victim,<sup>2</sup> blocked the door to the apartment. Desport claimed that at this point the victim placed him in a headlock. While in the headlock, Desport claimed to have trouble breathing and began attacking the victim in an attempt to get away. The entire confrontation lasted three minutes according to Desport's testimony. After the confrontation, Desport claimed the victim was still conscious and that both went to sleep.

During questioning, Desport also admitted that he had attempted to clean the blood from the rug and victim, that he had hid the blood stained clothing he had worn during the incident and finally, that he placed the

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<sup>1</sup> Desport admitted that the victim and he finished a half gallon bottle of vodka. Desport estimated that he had consumed 20 shots and that the victim had consumed a considerable amount more. An autopsy of the victim revealed that he had a BAC of .286.

<sup>2</sup> At trial Desport acknowledged that he knew the victim was no longer dating the aforementioned girlfriend and that the PFA had been dismissed in 2006.

victim's wallet in a trash can in order to support the story he had concocted for the police. At trial, an audio tape of the police questioning was played, in which Desport claimed that when the victim attempted to leave he "blacked out and immediately started punching and kicking him."

During the trial, Dr. Todd Luckasevic of the Allegheny County Medical Examiner's Office, who had conducted the autopsy, testified to the injuries sustained by both the victim and Desport. Dr. Luckasevic described that the victim suffered 18 injuries to the head and neck. These included abrasions to the face that likely occurred from contact with the floor of the apartment. Further, he noted that the victim also had extensive blunt force trauma to the chest, sternum, and right side of his chest and abdomen, which included 20 rib fractures and lacerations of the left lung, spleen, and liver. The rib injuries would have led to a condition known as flail lung, which would have resulted in a noticeable inability to breathe. Dr. Luckasevic said that such injuries were unlikely to be the result of punches, but rather that the bruising and internal injuries were most likely the result of stomping. Further, Dr. Luckasevic also noted that the size 9 shoes worn by Desport were the right size to cause such damage. Finally, in regards to the victim, Dr. Luckasevic noted that the victim's death would have occurred in minutes as a result of the blunt force trauma and would have been extremely painful. In regards to the injuries sustained by Desport, Dr. Luckasevic, who examined a photographs taken of Desport, first noted a lack of defensive

wounds. Moreover, the only injury he seemed to suffer was swelling of his hands. There was also a lack of bruising or other signs of abrasions on the neck of Desport.

After trial, a jury found Desport guilty of third-degree murder, tampering with or fabricating physical evidence, and false reports to law enforcement. Desport was sentenced to 16 to 32 years' imprisonment to be followed by 3 years of probation. This timely appeal followed.

On appeal, Desport challenges the sufficiency of the evidence supporting his conviction of third-degree murder.<sup>3</sup> Desport asserts that the Commonwealth failed to meet its evidentiary burden to defeat his claim of imperfect self-defense. Specifically, Desport claims that the Commonwealth did not establish that he did not subjectively believe he was in danger of death or serious bodily injury. Furthermore, he contends that the Commonwealth failed to establish that he was not acting under an unreasonable belief that the circumstances were such that if they existed, they would have justified the killing. Therefore, Desport avers that the Commonwealth failed to prove the element of malice, which is an element of third-degree murder.

Our standard of review for challenges to the sufficiency of the evidence is as follows.

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<sup>3</sup> Desport has abandoned his sentencing claim.

The standard we apply in reviewing the sufficiency of the 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 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. Knox***, 50 A.3d 749, 754 (Pa. Super. 2012) (citations omitted).

“Third-degree murder occurs when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice.” ***Commonwealth v. Tielsch***, 934 A.2d 81, 95 (Pa. Super. 2007). Malice is not merely ill-will but, rather wickedness of disposition, hardness of heart, recklessness of consequences and a mind regardless of social duty. ***See Commonwealth v. Hardy***, 918 A.2d 766, 774 (Pa. Super. 2007). Moreover, “[m]alice may be inferred after considering the totality of the circumstances”. ***Commonwealth v. Truong***, 36 A.3d 592, 598 (Pa. Super. 2012) (citing ***Commonwealth v. Gonzalez***, 858 A.2d 1219, 1223 (Pa. Super. 2004)).

Imperfect self-defense exists where the defendant actually, but unreasonably, believed that deadly force was necessary and the defendant satisfies the other principles of self-defense. **See Commonwealth v. Broaster**, 863 A.2d 588, 596 (Pa. Super. 2004). These other principles include:

- (a) the slayer was free from fault in provoking or continuing the difficulty which resulted in the slaying;
- (b) that the slayer 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 to save himself therefrom; and
- (c) the slayer did not violate any duty to retreat or to avoid the danger.

**Commonwealth v. Tilley**, 595 A.2d 575, 581 (Pa. 1991) (citations omitted). Finally, a claim of self-defense may also be defeated if the Commonwealth shows sufficient evidence that the defendant used more force than was necessary to defend himself. **See Truong**, 36 A.3d at 599.

“Where there is evidence from which a jury can reasonably infer malice, the Commonwealth has met its burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.”

**Commonwealth v. Carbone**, 574 A.2d 584, 590 (Pa. 1990). The Commonwealth must disprove beyond a reasonable doubt any claim of self-defense, yet a jury is not required to believe a defendant’s testimony to that effect. **See id.** The Commonwealth cannot sustain its burden of proof solely on the basis of a fact-finders disbelief of the defendant’s testimony. **See Commonwealth v. Torres**, 766 A.2d 342, 345 (Pa. 2001). However, “the

fabrication of false and contradictory statements by an accused are evidence from which a jury may infer that they were made with an intent to mislead the police or other authorities, or to establish an alibi or innocence, and hence are indicative of guilt.” **Carbone**, 574 A.2d at 589 (internal quotation marks and citation omitted).

Here, Desport contends that he subjectively, but unreasonably, believed that Raymond Niebrzydowski placed him in imminent harm of death or serious bodily injury, and therefore his use of deadly force was justified. However, our review of the record reveals an abundance of evidence that the jury could have reasonably inferred that Desport possessed the requisite malice to sustain a charge of third-degree murder.

First, Desport *completely fabricated* his original report to the police. As noted previously, this would have allowed the jury to reasonably disbelieve his testimony. The defendant not only changed his story on multiple occasions, but also tampered with evidence and attempted to hide his bloodstained clothes. **See** N.T., Trial, 5/23-24/11, at 51; N.T., Trial 5/25-26/11, at 234-236, 247, 254-55, 268. Further, Desport claimed he conversed with the victim and that the victim was alive when he went to sleep. **See** N.T., Trial, 5/25-26/11, at 265. This directly conflicts with testimony of Dr. Luckasevic who stated the victim would have died in minutes following the confrontation. **See** N.T., Trial, 5/23-24/11, at 175. All

of the inconsistencies would have allowed the jury to disbelieve the statements he made at trial.

Moreover, the physical evidence presented by the Commonwealth also supports the proposition that the Defendant acted with malice. First, although the Defendant claims to have been placed in a choke-hold by the victim, his neck exhibited no bruising or other signs of struggle. **See** N.T., Trial, 5/25-26/11, at 120-22. Furthermore, the Defendant did not possess any defense wounds. In fact, the only major wounds he did sustain were on his hands, which likely resulted from punching the victim. **See** N.T., Trial, 5/23-24/11, at 177-78.

In contrast, the victim's injuries were excessive and likely the result of being stomped by Desport. **See** N.T., Trial, 5/23-24/11, at 168-74. Dr. Luckasevic opined in his testimony that the injuries to the victim's trunk that proved fatal were likely the result of being stomped while lying prostrate on the ground. **See** N.T., Trial, 5/23-24/11, at 172-74. Moreover, the abrasions to the victim's face, which Dr. Luckasevic claimed could have resulted from contact with the carpet, also support that the victim was probably on the ground when he received the fatal injuries. **See** N.T., Trial, 5/23-24/11, at 164-166. Given this, even if Desport's claim that he was only applying force to escape the headlock that the victim allegedly placed him in were accepted, his use of force while the victim was lying on ground could be found to be excessive. Moreover, the taped testimony of Desport's police

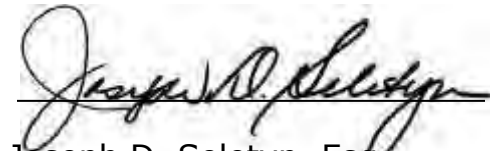


questioning, where Desport claimed to have “black[ed] out” and started kicking and punching the victim, is supported by the physical evidence. N.T., Trial, 5/25-26/11, at 112, 126-27.

Here, based on the totality of the circumstances, the excessive use of force and the contradictory stories of Desport, it is clear that the Commonwealth provided ample evidence for a jury to sustain a charge of third-degree murder. To defeat a claim of imperfect self-defense, the Commonwealth may either show that the killing was committed with malice or that Desport did not complete the other principles of self-defense. Here, the Commonwealth has done both. Accordingly, taking the evidence in a light most favorable to the verdict winner, we affirm the decision of the lower court.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 6/25/2014