NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DORLEEN BURKLUND Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3467 EDA 2012

Appeal from the Judgment of Sentence July 3, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0000376-2011

BEFORE: SHOGAN, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.: **FILED APRIL 22, 2014**

Dorleen Burklund appeals the judgment of sentence entered July 3, 2012, in the Bucks County Court of Common Pleas. Burklund was sentenced to a term of life imprisonment following her jury conviction of first degree murder and possession of a weapon[1] for the shooting death of her estranged husband. On appeal, Burklund contends both the trial court and the prosecutor interfered with her right to counsel; the trial court erred in allowing the Commonwealth to admit certain crime scene photographs, in precluding testimony regarding the victim's past violent nature, and in refusing to order sequestration of all witnesses; and the evidence was

---

* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 2702 and 907(b).

insufficient to disprove self-defense.[2] For the reasons set forth below, we affirm.

The facts underlying Burklund's arrest are aptly summarized by the trial court as follows:

> Burklund was charged with killing her husband, Michael Burklund ("victim"). Testimony established that at 3:05 P.M. on October 3, 2010, state police were dispatched to the Burklund home, located at 3209 Mink Road in Kintnersville, Bucks County, to investigate the report of a woman who had shot her husband. State police arrived at the location at approximately 3:30 P.M. At that time, Trooper Edward Theodore encountered Burklund and her [then 18-year-old] son, Garbriel Burklund ("Gabriel"), outside of the residence. Burklund then told Trooper Theodore that she had shot the victim, and explained where victim's body was located in the master bedroom. Burklund also told Trooper Theodore that she had left the gun on the kitchen counter. Burklund told Trooper Theodore that there was an "ongoing domestic situation" and that "the FBI is aware of it." Trooper Theodore noted that Burklund was speaking in a normal tone of voice, she was not yelling, crying or acting upset. Burklund never told Trooper Theodore that victim had attacked her or that he had physically or sexually assaulted her.
>
> When other members of the state police arrived on the scene, Trooper Theodore entered the residence, followed Burklund's directions to the master bedroom, and encountered victim's body. Trooper Theodore checked victim's body but was unable to find a pulse. Corporal [McLean Keyes] Peeke from the Pennsylvania State Police Forensic Services Unit testified regarding the crime scene evidence. Corporal Peeke stated that a trail of clothing items, including socks, t-shirts, underwear and a pilot's shirt started at the closet in the master bedroom leading to the body. No weapons were found on victim's person.

---

[2] Although Burklund sets out nine issues in her appellate brief, we have consolidated those claims for disposition. ***See*** Burklund's Brief at 4-5.

A .38 caliber Smith & Wesson five-shot revolver was recovered from a butcher block in the kitchen of the Burklund residence. Located next to the gun was a letter from victim's divorce attorney addressed to Burklund. The gun was loaded and had three spent shell casings and two live rounds inside. Boxes of .38 caliber ammunition consistent with the handgun were found in the closet of the bedroom furtherest (sic) from the master bedroom and in the trunk of Burklund's car. Burklund had purchased the gun on May 13, 2006. Burklund had acquired a carry permit for the firearm on September 2, 2010. No other weapons were found in the Burklund home.

After police obtained a search warrant for Burklund's clothing, she gave police officers five empty shell casings and one live round from the back pocket of the jeans she was wearing. Investigators checked Burklund for injuries and photographed her body on the day of the shooting, and no injuries were found. Burklund's hands tested positive for gunshot residue.

Victim was shot eight times; three bullets exited his body causing blood spatter patterns on the wall behind the body. The spatter was low to the ground on the wall, indicating that victim was not in an upright position when he was hit with the three bullets that exited his body. Furthermore, the pattern of blood pooling around victim's body indicated that the three shots that entered the middle of victim's back were fired while he was in a horizontal position. Blood drops in the master bedroom indicated that victim was in the northeast corner of the bedroom when he was first struck, moving towards the final location where he fell facedown into the horizontal position.

* * * *

[The medical examiner testified that,] the most likely scenario was that the first shot grazed victim's neck, he then turned to Burklund, got hit with the shoulder shot, and the two shots to the chest. Thereafter he was shot in the flank, at which point he fell onto his face and finally the last three shots were fired while he lay unmoving on the bedroom floor.

* * * *

Burklund presented evidence claiming that she and her husband had fought often, and had been involved in physical

altercations in the past. Burklund's brother testified about an argument between victim and Burklund in 2008 where Burklund tapped or smacked her husband on his forehead and he slapped her leg, leaving a welt. Burklund's brother testified that he encouraged her to apply for a Protection from Abuse order ("PFA"). However, Burklund never attempted to get a PFA, nor were the police … called in response to this alleged incident. Burklund's brother also testified that he had spoken with victim on the day of the shooting and that victim had informed him that he needed to go to the house to pick up his uniform.

Burklund also testified regarding her relationship with victim. She testified that she went with victim and Gabriel to purchase the gun in 2006. The gun came with a laser sight which helps the shooter's accuracy. Burklund also noted that she filed for divorce from victim in June 2007. However, the couple continued living in the marital home until January of 2009 when Burklund moved with Gabriel. Burklund testified that after she filed for divorce, her husband physically intimidated her by charging at her, backing her up against walls and breaking things.

Burklund testified that she eventually moved out of the marital home, but then decided later to move back into the home[.] However, when Burklund attempted to move back in, the locks on the marital home had been changed and the realtor would not give her a new key. Burklund then changed the locks again and moved back into the house in the beginning of September, 2010. Burklund testified that she believed she would get "exclusive rights" over the home if she moved back in, and she intended to "take over the sale." Burklund admitted that she knew victim was living in the home at the time she changed the locks and entered. Burklund also admitted that she knew that victim was at work and that he would be coming home. Victim came to the home after being away at work and couldn't get into the home. Burklund testified that she unlocked the door to let him in, then went and locked herself in another bedroom with her handgun. Burklund had already removed victim's gun from the master bedroom closet, and when he asked her what she had done with it, she told him that it was in a safe place. Although the couple argued that night regarding whether or not Burklund was going to move back into the home, she continued staying there.

* * * *

> Victim's divorce attorney testified that … [in September, 2010, he petitioned the court to allow victim to lower the sale price of the marital home, and to enforce a prior order by which Burklund had agreed to vacate the marital home. Victim's attorney also expressed victim's concern that Burklund had taken his gun. Because Burklund had discharged her attorney and was unrepresented, the trial court continued the petition hearing.] Throughout the protracted divorce proceedings, none of Burklund's attorneys ever filed anything alleging physical abuse or threats of physical abuse.
>
> On the day of the shooting, victim went to the house to retrieve his pilot's uniform for work. Victim was staying with friends at that time, instead of staying in the Burklund residence, because Burklund was living there. Burklund testified that she saw victim arrive at the home on October 3, 2010. Burklund claimed that she got the gun while she was putting clothing away upstairs in the home. She grabbed bullets from a box and she claimed she was going to load the gun as she was walking but then she realized it had bullets in it already, and placed the extra bullets in her back pocket. Burklund also put the gun in her front pocket at this time. Victim came into the master bedroom to get his uniform out of his closet, and Burklund testified that they began arguing.
>
> Burklund claims she cannot recall what they were arguing about, however, she stated that "his eyes changed" and that he was very furious at her. Burklund testified that she was trying to walk past victim to the stairs and she "felt something go by [her] head", although she did not know what it was. She testified that victim had nothing in his hands except his clothing at that time. Then Burklund testified that she began shooting him. She claimed that victim was coming forward and then fell in front of her. She then reloaded the pistol and shot him again in the back, although she could not remember how many times. Burklund claimed that he started to rise when she shot him the last time. Burklund then called the FBI who transferred her call to 911.

Trial Court Opinion, 4/16/2013, at 1-7 (record citations omitted).

Burklund was subsequently charged with first degree murder and possession of a weapon. On April 20, 2011, the trial court conducted a hearing to determine the status of Burklund's counsel. At that time, no attorney had entered an appearance on her behalf, and Burklund's application for a public defender had been denied. At the status hearing, counsel for Burklund's son, Gabriel, informed the court that Gabriel was attempting to collect the proceeds from victim's life insurance policy, and that he intended to use part of the policy proceeds to retain an attorney for his mother. Based upon this representation, the trial court granted a 30-day continuance.

When the trial court conducted another status conference on June 17, 2011, Burklund still had not retained counsel. Moreover, the proceeds from the life insurance policy were tied up in litigation, with no indication when they would be released. The trial court found that it would be "improper" for "this matter to just sit until property or other assets are made available to retain counsel." N.T., 6/17/2011, at 6-7. Therefore, the court appointed the Public Defender's Office to represent Burklund, but directed it to keep track of all fees and funds expended so that Burklund could reimburse the office when funds become available.[3] However, the court left open the

---

[3] The court also directed the county solicitor to file the necessary paperwork to place a lien against her property. N.T., 6/17/2011, at 7-8. That lien was subsequently vacated by court order entered on April 22, 2013.

possibility that Burklund could retain private counsel if funds subsequently became available to do so. During the ensuing proceedings, no private attorney ever attempted to enter his or her appearance on Burklund's behalf.

A jury trial followed, and on May 18, 2012, the jury returned a verdict of guilty on both charges. Burklund was sentenced on July 3, 2012, to a mandatory term of life imprisonment for first degree murder, and a consecutive term of one to five years imprisonment for possession of a weapon. She filed post sentence motions, which were denied by operation of law on November 9, 2012.[4] This timely appeal followed.[5]

First, Burklund argues the trial court violated her constitutional right to counsel when it declined to continue her case so that she could retain private counsel, but rather, appointed the Public Defender's Office, and directed her to reimburse the office for its expenses. In a related claim, she

---

[4] The 120th day for deciding the post sentence motions expired on November 9, 2012. However, when Burklund filed her notice of appeal on December 3, 2012, the clerk of courts had not yet entered an order on the docket disposing of the post sentence motions. The docket entry was made the following day, on December 4, 2012. Therefore, "appellate jurisdiction has been perfected and we may proceed to examine the merits of [Burklund's] claims." ***Turney Media Fuel, Inc. v. Toll Bros., Inc.***, 725 A.2d 836, 838 (Pa. Super. 1999), *citing* Pa.R.A.P. 905(a)(5).

[5] On December 6, 2012, the trial court ordered Burklund to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). After receiving an extension of time to await transcription of the notes of testimony, Burklund complied with the court's directive and filed a concise statement on March 15, 2013.

contends the assistant district attorney committed prosecutorial misconduct when she interfered with Burklund's constitutional right to retain counsel by informing the victim's estate that Gabriel intended to use a portion of his inheritance to pay for Burklund's counsel.

It is well-established that a criminal defendant has a constitutional right to counsel of her own choosing:

> The right to counsel is guaranteed by both the Sixth Amendment to the United States Constitution and by Article I, Section 9 of the Pennsylvania Constitution. In addition to guaranteeing representation for the indigent, these constitutional rights entitle an accused "to choose at his own cost and expense any lawyer he may desire." ***Commonwealth v. Novak***, 395 Pa. 199, 213, 150 A.2d 102, 109, *cert. denied*, 361 U.S. 882, 80 S.Ct. 152, 4 L.Ed.2d 118 (1959). The right to "counsel of one's own choosing is particularly significant because an individual facing criminal sanctions should have great confidence in his attorney." ***Moore v. Jamieson***, 451 Pa. 299, 307–08, 306 A.2d 283, 288 (1973).
>
> We have held, however, that the constitutional right to counsel of one's own choice is not absolute. ***Commonwealth v. Robinson***, 468 Pa. 575, 592–93 & n. 13, 364 A.2d 665, 674 & n. 13 (1976). Rather, "the right of the accused to choose his own counsel, as well as the lawyer's right to choose his clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice." ***Id.*** at 592, 364 A.2d at 674 (internal quotations omitted). Thus, this Court has explained that while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably "clog the machinery of justice" or hamper and delay the state's efforts to effectively administer justice. ***Commonwealth v. Baines***, 480 Pa. 26, 30, 389 A.2d 68, 70 (1978). At the same time, however, we have explained that "'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.'" ***Robinson***, 468 Pa. at 593–94, 364 A.2d at 675 (quoting ***Ungar v. Sarafite***, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)).

Comonwealth v. McAleer, 748 A.2d 670, 673-674 (Pa. 2000).

Moreover, when determining whether a trial court erred in refusing to grant a continuance to a defendant who seeks to retain new counsel, we have, historically, looked at several factors, including:[6] "the number of prior continuances in the matter, the timing of the motion, whether private counsel had actually been retained, and the readiness of private counsel to proceed in a reasonable amount of time." ***Commonwealth v. Prysock***, 972 A.2d 539, 543 (Pa. Super. 2009).[7]

Here, Burklund claims she informed the trial court from the beginning of the case that she intended to retain private counsel, and counsel had even appeared in court during the April 20, 2011, status hearing.[8] However, when Burklund was still unable to secure the funds to retain counsel two

---

[6] "It is settled that the decision to grant or deny a request for a continuance is within the sound discretion of the trial court." ***Commonwealth v. Prysock***, 972 A.2d 539, 541 (Pa. Super. 2009) (citation omitted).

[7] The ***Prysock*** Court also considered whether the trial court had conducted an "extensive inquiry" into the underlying reasons for the defendant's dissatisfaction with his current counsel to determine whether their dispute was "irreconcilable." ***Prysock***, ***supra***, 972 A.2d at 543. That factor is not relevant here since Burklund was not seeking to replace counsel.

[8] Brian Fishman, Esquire, attended the April 20, 2011, status hearing as Burklund's proposed attorney. The court inquired of Fishman whether "once the appropriate arrangements have been made, [was it his] intention to enter [his] appearance on her behalf?" N.T., 4/20/2011, at 8. Fishman responded, "That's correct." ***Id.*** However, Fishman never entered his appearance on behalf of Burklund.

months later, she argues the trial court forced her to proceed **without** counsel of her choice and directed the Public Defender's Office, over its own objection,[9] to represent her. Burklund argues that, at that time (June 17, 2011) there had been only one continuance, and "not even a full year had passed since" the murder. Burkand's Brief at 19, 20. She claims the trial court failed to balance her "constitutional right to retain counsel of her choice versus the Commonwealth's right to the swift administration of justice." ***Id.*** at 20.

Contrary to Burklund's argument, the trial court found that it did properly balance "Burklund's right to counsel of choice against the speedy administration of justice." Trial Court Opinion, 4/16/2013, at 12. The court noted that at the June 17, 2011, status hearing, it was unclear when, if ever, funds would become available to Burklund to retain an attorney. All the parties were aware that an injunction had been filed in the estate case seeking to prevent Gabriel from using a portion of his inheritance to fund Burklund's defense. Moreover, despite the fact that Burklund's indigent application had been denied, the trial court stated that "from all information

---

[9] The Public Defender objected to her appointment as Burklund's counsel "based on the fact [Burklund] didn't apply, she has found an attorney she would like to work with and there is the potential [that] these assets will become available to her." N.T., 6/17/2011, at 5. Further, the Public Defender expressed concern over the "substantial amount of money" and time away from other clients that Burklund's defense would require. ***Id.*** at 6.

presented … there are no liquid assets available." N.T., 6/17/2011, at 7. The trial court was unwilling to "allow this matter to just sit until property or other assets are made available to retain counsel." ***Id.*** Therefore, the court entered an order appointing the Public Defender's Office to represent Burklund.[10] The court further explained:

> Obviously this Order is subject to Ms. Burklund's right to retain counsel of her choice at any time that she has the wish to do that and the ability to do that. But until such time as some other attorney enters their appearance or evidence is presented to me that there are liquid assets available, we will proceed with the public defender representing Ms. Burklund.

Id. at 8.

We find no abuse of discretion on the part of the trial court in declining to delay trial indefinitely, and in appointing the Public Defenders' Office to represent Burklund. Although Burklund's application for a public defender was denied because she did not meet the indigency requirements, the court was unaware of any assets of Burklund's that were not subject to litigation in the Orphans' Court. In fact, shortly after the June 17th hearing, the Bucks County Orphan's Court granted the estate's request for an injunction

---

[10] It bears mention that at the conclusion of the April 20, 2011, status hearing, the trial court warned Burklund that if she did not retain counsel by the next hearing, it "would most likely assign and direct the public defender to enter their appearance with the understanding that they would lien [her] property and lien [her] assets." N.T., 4/20/2011, at 9. ***Compare Prysock***, ***supra***, 972 A.2d at 544 ("There is also **no** indication in the record that Appellant was ever personally warned that he needed to retain counsel by a specific date or that no further continuances would be granted after the trial was initially continued.") (emphasis supplied).

directing that the life insurance company refrain from distributing the policy proceeds to Gabriel, in light of his stated intention to use those proceeds to aid his mother's defense in violation of the Slayer's Act.[11] ***See In re Estate of Burklund***, 2013 WL 327622, *2 (E.D. Pa. 2013). The proceeds were eventually released to Gabriel, ***after*** his mother's criminal trial. ***Id.*** at *6. Moreover, the trial court protected Burklund's right to retain counsel by permitting her to change counsel in the future, should funds become available. There is no requirement that a trial court place a murder trial on hold indefinitely until a defendant secures funds to retain private counsel. Accordingly, no relief is warranted on this claim.[12]

In a related claim,[13] Burklund contends the assistant district attorney (ADA) interfered with her constitutional right to counsel, and committed prosecutorial misconduct, when the ADA "took it upon herself to contact the

---

[11] The Act provides, in relevant part: "No slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following." 20 Pa.C.S. § 8802. The victim's Estate argued that Gabriel's plan to use his inheritance to fund his mother's defense "violates the spirit, if not letter, of [Pennsylvania's] Slayer Act[.]" ***In re Estate of Burklund***, 2013 WL 327622, *1 (E.D. Pa. 2013) (citation omitted).

[12] To the extent Burklund challenges the trial court's decision to permit the county to place a lien on her property to recoup the costs of her representation, we note that the lien was subsequently vacated, and it is unclear from the record whether Burklund was ever required to contribute financially to her defense.

[13] Burklund identifies this claim as issue number two in her brief. ***See*** Burklund's Brief at 22-24.

[victim's] estate, setting into motion litigation that would ultimately cause the assets to be frozen until the criminal case was resolved." Burklund's Brief at 22. She further argues the ADA "[u]nquestionably … directly impeded Ms. Burklund's attempt to hire an attorney[.]" ***Id.*** at 23. Accordingly, she contends that her convictions must be vacated.[14]

The trial court found, however, "[t]here is no evidence in the record that the Commonwealth contacted victim's estate to commence the insurance litigation." Trial Court Opinion, 4/16/2013, at 13. Moreover, the court concluded that even if the ADA had contacted the executor of the estate, her actions would not amount to prosecutorial misconduct. The court explained: "It is clear that allowing Gabriel to use the insurance payout to hire attorneys for his mother would allow Burklund to acquire property and receive benefits as a result of victim's death, in violation of the Slayer's

---

[14] With respect to a claim of prosecutorial misconduct, the Pennsylvania Supreme Court has explained:

> The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process. ***See Greer v. Miller***, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) ("To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.")[.]

Commonwealth v. Cox, 983 A.2d 666, 685 (Pa. 2009) (citation omitted).

Act."[15] ***Id.*** We agree, and accordingly, conclude that Burklund is entitled to no relief on her claim of prosecutorial misconduct.

Next, Burklund contends the trial court erred in admitting four photographs of the victim, which she argues are duplicative and/or inflammatory. Specifically, Burklund objected to photograph C-4, depicting the victim's face, as duplicative of another photograph. She also objected to photograph C-2, which depicted the victim's chest and face prior to the autopsy, as both duplicative and inflammatory. Finally, Burklund objected to photographs C-6 and C-7, which depicted a rod through the victim's body to demonstrate the trajectory of the bullets, as unnecessary and "extremely inflammatory." Burklund's Brief at 25.

"The admissibility of photographs falls within the discretion of the trial court and only an abuse of that discretion will constitute reversible error." ***Commonwealth v. Malloy***, 856 A.2d 767, 776 (2004) (citations omitted).

> [W]hen the Commonwealth proffers photographs of a homicide victim for admission into evidence, the trial court must engage in a two-part analysis:
>
> > First a [trial] court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of

---

[15] Furthermore, as the trial court noted, "the Commonwealth was not a party to the action regarding the insurance litigation, which was eventually removed to Federal Court in the Eastern District of Pennsylvania." Trial Court Opinion, 4/16/2013, at 13. Moreover, the actions of the executor were consistent with the Slayer's Act.

> the facts. If the photograph is inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Commonwealth v. Murray, 83 A.3d 137, 156 (Pa. 2013) (citation omitted).

The admissibility of the photographs at issue was litigated during a pretrial hearing on April 19, 2012. The trial court considered each photograph individually and concluded that each was admissible. With respect to photograph C-4, the Commonwealth argued that the photograph was not duplicative because it "very clear[ly]" showed "stippling from a gunshot." N.T., 4/19/2012, at 8. The court agreed, and concluded that "[t]here is a difference" between photograph C-4 and the photograph that Burklund argued was duplicative. ***Id.*** at 9. With regard to photograph C-2, the Commonwealth noted the photograph depicted the "sideswiping" of the bullet to the victim's neck. ***Id.*** at 13. The court found the photograph was not "particularly inflammatory," and therefore, ruled that it was admissible. ***Id.*** at 14. Lastly, with regard to photographs C-6 and C-7, again, the trial court concluded that the photographs were not "particularly inflammatory" and would be probative to demonstrate the trajectory of the bullet during the pathologist's testimony. ***Id.*** at 15.

While Burklund argues the photographs were inflammatory, self-serving, and cumulative, she fails to set forth any specific basis upon which the trial court abused its discretion. Moreover, the photographs,

themselves, are not included in the certified record. ***See Commonwealth v. Manley***, 985 A.2d 256, 263 (Pa. Super. 2009) ("[I]t is the obligation of the [A]ppellant to make sure that the record forwarded to an appellate court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal.") (citation omitted), *appeal denied*, 996 A.2d 491 (Pa. 2010). Therefore, we are unable to review Burklund's claim that the photographs were inflammatory. Accordingly, her challenge to the admissibility of the photographs fails.

Burklund next raises three related claims challenging the trial court's preclusion of testimony concerning the victim's violent nature.[16] Specifically, Burklund argues the trial court abused its discretion when it (1) sustained objections during Gabriel's testimony as to why he stopped seeing the victim, as well as the victim's past violent behavior toward Burklund; (2) precluded Burklund's testimony regarding an incident that occurred in 1999; and (3) objected, *sua sponte*, to Burklund's testimony regarding victim's propensity for violence and anger. She contends that the testimony regarding the victim's violent nature was relevant to establish her state of mind at the time of the shooting, and support her claim of self-defense.

Preliminarily, we note that:

---

[16] These claims are raised as issues numbered four, five and six in Burklund's appellate brief. ***See*** Burklund's Brief at 27-36.

> The admission of evidence is solely within the province of the trial court, and a decision thereto will not be disturbed absent a showing of an abuse of discretion. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias[,] or ill-will discretion ... is abused.

Commonwealth v. Murray, 83 A.3d 137, 155-156 (Pa. 2013) (citations and internal punctuation omitted).

Evidence concerning a victim's violent nature may be relevant and admissible in a murder trial when the defendant is claiming self-defense.

> [I]n a homicide trial, where self-defense is asserted, the defendant may introduce evidence of the turbulent or dangerous character of the decedent. ***See Commonwealth v. Clemmons***, 505 Pa. 356, 479 A.2d 955 (1984). This type of character evidence is admissible on either of two grounds: 1) to corroborate the defendant's alleged knowledge of the victim's violent character in an effort to show that the defendant reasonably believed that her life was in danger; and/or 2) to prove the allegedly violent propensities of the victim to show that the victim was in fact the aggressor. ***Id.***; ***see also Commonwealth v. Amos***, 445 Pa. 297, 284 A.2d 748 (1971) (testimony as to the victim's character is admissible to corroborate the defendant's alleged knowledge of the victim's violent character to corroborate the defendant's testimony that he had a reasonable belief his life was in danger and to prove the allegedly violent propensities of the victim to show he was the aggressor); ***Cf. Commonwealth v. Romanic***, 311 Pa. 415, 166 A. 902 (1933) (single statement by victim that he killed a man is not relevant to establish violent character in effort to show victim was aggressor in encounter with defendant).

Commonwealth v. Carbone, 707 A.2d 1145, 1154 (Pa. Super. 1998). However,

> [w]here the evidence sought to be admitted is a prior act of violence not reduced to a criminal conviction, the law requires that the violent act or acts be known to the defendant at the time of the homicide. The incidents of violence cannot be

> remote in time and must be indicative of the victim's aggressive and dangerous behavior.

Commonwealth v. Stewart, 647 A.2d 597, 598-599 (1994) (footnote and internal citations omitted), *aff'd*, 690 A.2d 195 (Pa. 1997).

Burklund first contends the trial court abused its discretion when it sustained objections to the following questions posed to Gabriel during his cross-examination:[17] why Gabriel stopped seeing his father (N.T., 5/16/2013, at 24-25); asking Gabriel to describe how his father yelled at his mother in the past (***id.*** at 29); whether his father struck his mother in the past (***id.*** at 32); whether his father had threatened him in the past (***id.*** at 34); and whether he was "aware" that his father had abused his mother in the past and that she was afraid of him (***id.*** at 36-37). Burklund argues that Gabriel's testimony was relevant to "corroborate [her] "fearful state of mind." Burklund's Brief at 27.

In its 1925(a) opinion, the trial court provided the following cogent explanation for its rulings:

> In the instant case, the Court prevented Gabriel from testifying as to why he had stopped seeing his father. Gabriel's testimony on that issue does not tend to establish a material fact nor does it make a material fact more of less likely. Therefore, it bears no relevancy on whether Burklund reasonably believed that she was in imminent danger of death or serious bodily injury and that it was necessary to use deadly force against

---

[17] Gabriel was called by the Commonwealth to testify during its case-in-chief.

> victim to prevent such harm.[18] Gabriel was initially precluded from testifying about prior incidents when he had heard his father yell. However, when the defense rephrased the question to ask whether or not Gabriel had heard his father yell at his mother before, he was allowed to testify. In that instance, the Court was again containing Gabriel's answer to the matters relevant to his mother's reasonable belief about being in danger on the date of the shooting. The same rationale applied to why the Court sustained objections to questions regarding whether victim had ever threatened Gabriel.
>
> The Court initially sustained an objection when defense counsel asked Gabriel about whether he was aware of a specific incident when victim had struck Burklund. Gabriel had not been present when the incident occurred. Therefore, Gabriel could not testify as to the details of an event to which he had no personal knowledge. However, on cross-examination defense counsel asked Gabriel if he had ever heard instances of abuse, and he testified that he had. When Gabriel testified that he had heard the incident, he was allowed to testify as to what exactly he had heard. Furthermore, Gabriel testified that he had never seen victim abuse Burklund. Therefore, when defense counsel asked whether Gabriel was aware of past abuse, and whether Burklund was afraid of victim, the objections were correctly sustained. Such testimony would be outside of Gabriel's personal knowledge. As discussed above, Gabriel was permitted to testify as to the specific threats and incidents he had actually heard. Thus, the limitations on Gabriel's testimony were proper and not an abuse of discretion.

Trial Court Opinion, 4/14/2013, at 16-17 (record citations omitted).

---

[18] During a sidebar discussion, Burklund argued the Commonwealth had opened the door to this testimony by implying during opening statements that Burklund had prevented Gabriel from seeing his father. N.T., 5/15/2012, at 25. She asserted that Gabriel should be permitted to testify that he stopped seeing his father after an incident that occurred one and a half years earlier, and that he should be able to describe that incident. ***Id.*** The trial court sustained the Commonwealth's objection concluding that opening statements are not evidence, but permitted Gabriel to testify that Burklund did not prevent him from seeing victim, and that it was his choice not to do so. ***Id.*** at 26.

Our review of the trial transcript reveals no abuse of discretion on the part of the trial court in limiting Gabriel's testimony (1) to matters of which he had personal knowledge, and (2) to matters which were relevant to the question of whether Burklund reasonably believed she was in danger on the day of the shooting. Indeed, Gabriel was permitted to testify that: his father had been "harassing" his mother for some time and that he kept returning to the house to argue with her (N.T., 5/15/2012, at 31-32); Gabriel feared that if his father "had somehow won in the altercation, that [he] might be next;" (***id.*** at 33-34); although Gabriel had never observed any physical violence between his parents, he had heard it and knew his father had struck his mother "in an argument years before;" (***id.*** at 42-43); and Gabriel had seen his father threaten his mother (***id.*** at 57). Further, Gabriel was permitted to describe an incident he heard coming from his parents' bedroom, in which his mother was pleading to his father to stop, and his father was calling her demeaning names. ***Id.*** at 46-48. Gabriel testified that, after the incident, he began sleeping in their bedroom because he was afraid for his mother. ***Id***. at 49. Therefore, the trial court properly limited Gabriel's testimony regarding his father's violent nature to incidents of which he had personal knowledge and of which were relevant to demonstrate Burklund's alleged fear of victim. Accordingly, no relief is warranted on this claim.

Burklund also argues the trial court erred in precluding her from testifying about "particular acts of violence against [her] by her husband"

that occurred in 1999, which "irreparably and permanently changed" their relationship. Burklund's Brief at 31. Further, she contends "[t]estimony regarding these experiences that occurred in 1999 would have explained to the jury why [she] believed that she was in danger and would have supported that belief." ***Id.*** at 31-32.

Preliminarily, we note that Burklund does not provide this Court with a citation to where she attempted to introduce this evidence at trial. The failure to provide a record citation is grounds for finding waiver. ***See Commonwealth v. Harris***, 979 A.3d 387, 393 (Pa. Super. 2009) ("When an allegation is unsupported by any citation to the record, such that this Court is prevented from assessing this issue and determining whether error exists, the allegation is waived for purposes of appeal"), *citing* Pa.R.A.P. 2119(c). Nevertheless, because the trial court provides a record citation in its opinion, we are able to review Burklund's claim.

At trial, defense counsel made the following offer of proof regarding the 1999 incident: "She alleges she was struck and it definitely changed – just definitely changed their relationship." N.T., 5/16/2013, at 124. When the trial court inquired how the relationship changed, defense counsel stated: "They just had a lot more problems after that. There was a lack of trust and it created a lot of strain on the marriage." ***Id.*** at 125. The trial court commented: "The fact that the relationship was strained isn't relevant to any proceeding or matter that is before this Court." ***Id.***

Ultimately, the court sustained the Commonwealth's objection to the testimony because the incident was too remote in time to be relevant to the circumstances involving the shooting, or, more specifically, Burklund's purported belief that she was in danger on the afternoon of the shooting. ***See*** Trial Court Opinion, 4/14/2013, at 18-19. We agree. The only offer of proof with the incident, which occurred 11 years prior, was that victim struck Burklund. Burklund did not provide any details regarding the circumstances of that incident that would have made it particularly relevant more than a decade later. Furthermore, Burklund was permitted to testify that victim struck her in 2007, and forced her to have sexual relations with him in 2008. Accordingly, we find no abuse of discretion on the part of the trial court in precluding this testimony.

In her final challenge to the trial court's preclusion of evidence, Burklund contends the trial court erred when it, *sua sponte*, stopped defense counsel from questioning her about victim's "propensity for violence and the long-standing history of actual abuse[.]" Burklund's Brief at 33. She argues "[t]his testimony would have provided a timeline of [victim's] extensive patterns of violence towards [her] and the generally degrading way he treated her to the jury." ***Id.***

Once again, Burklund failed to provide this Court with a record citation to the allegedly improper actions of the trial court. For that reason, we could find this issue waived. ***See Harris***, ***supra***. However, because the

trial court has, again, graciously provided the citation to the ruling in its opinion, we are able to review this claim.

During Burklund's direct examination, she testified regarding an incident after she had filed for divorce when victim forced her to have sex. N.T., 5/16/2012, at 137-138. Counsel then inquired whether there were times, after she had filed for divorce, when victim became angry if she refused to have sex with him. ***Id.*** at 138-139. The Commonwealth objected on relevancy grounds. Defense counsel argued the testimony was relevant to "her state of mind, the fear of her husband[,]" and the trial court agreed to give counsel "some latitude." ***Id.*** at 139. Counsel then asked Burklund about the incident Gabriel had overheard, when victim belittled her in their bedroom, and Burklund testified that Gabriel's account was accurate. Counsel then asked Burklund how many times, after she filed for divorce, the victim would belittle or be angry with her. At that point, the trial court instructed counsel to sidebar, where the following exchange took place:

> THE COURT: There was an objection to the question and I indicated I would give you some latitude –
>
> [Defense Counsel:] I'll move on.
>
> THE COURT: The defense, as I understand you have raised it, is one of justification and that her mental state at the time of this killing was that she was in fear of death or serious bodily injury, not that she was subject to being degraded or embarrassed or humiliated.
>
> [Defense Counsel:] I'll move on, Judge.
>
> THE COURT: Focus on the matters which are relevant and not intended solely to elicit sympathy.

Id. at 140-141.

First, we agree with the trial court's characterization of its interruption of Burklund's testimony as "merely a continuation of the prior ruling on the Commonwealth's objection, not a *sua sponte* action." Trial Court Opinion, 4/16/2013, at 19-20. Second, we find the court's ruling properly limited Burklund's testimony to matters relevant to her defense. Indeed, the fact that victim may have belittled her or become angry with her in the past did not lend credence to her claim that she was in fear for her life on the day of the shooting. Therefore, Burklund is entitled to no relief on her claims that the trial court abused its discretion when it precluded evidence concerning the victim's violent nature.[19]

Next, Burklund contends the trial court erred in denying her request to sequester victim's mother. Burklund argues that because the witness sat in the courtroom during the entire trial, she "had the opportunity to unconsciously conform her testimony in a way that would benefit the Commonwealth and discredit [Burklund]." Burklund's Brief at 36.

Pennsylvania Rule of Evidence 615 permits a trial court to order sequestration of witnesses at the request of a party, or on the court's own motion. Pa.R.E. 615. We review a trial court's ruling on the sequestration of

---

[19] We note that both Burklund and Gabriel provided extensive testimony regarding victim's violent, threatening, and aggressive nature. ***See*** N.T., 5/15/2012, at 31-34, 42-44, 46-49, 57, 61-62; 5/16/2012, at 133-138, 139, 141-142, 150-152, 154-155, 158, 160, 169, 174.

witnesses for an abuse of discretion. ***Commonwealth v. Stevenson***, 894 A.2d 759, 767 (Pa. Super. 2006) (citation omitted), *appeal denied*, 917 A.2d 846 (Pa. 2007). However, "an appellant must demonstrate that he or she was **actually prejudiced** by a trial judge's sequestration order before any relief may be warranted." ***Id.*** (citations omitted and emphasis supplied).

In the present case, on the first day of trial, Burklund requested that the trial court order sequestration of all witnesses. The Commonwealth objected only to the sequestration of victim's mother, Marilyn Burklund, arguing that she would be testifying "very briefly" on a "very narrow issue." N.T., 5/15/2012, at 85. Specifically, the Commonwealth intended to have her identify the victim in a photograph in which he is wearing his pilot's uniform. Based upon the Commonwealth's offer of proof, the court ruled victim's mother would "not be subject to the sequestration order." ***Id.*** at 86-87. Later that day, the Commonwealth clarified its offer of proof and explained that victim's mother might also be called as a rebuttal witness. At that point, Burklund renewed her request for sequestration. The trial court, however, allowed victim's mother to remain in the courtroom. ***See id.*** at 101.

On May 17, 2012, the Commonwealth called victim's mother as a rebuttal witness. Burklund objected on the basis that she had been permitted to sit in the courtroom for the entire trial. The Commonwealth informed the court, however, that victim's mother had provided an earlier statement on the subject of her testimony — which concerned an incident in

September of 2010, when she accompanied victim to the house after Burklund had moved back in — and that defense counsel had a copy of her statement. The trial court, thereafter, permitted her to testify as a rebuttal witness. Victim's mother testified that Burklund acted aggressively toward the victim that day, and was rude to her.[20] ***See*** N.T., 5/17/2012, at 53-56.

Burklund argues the trial court's refusal to sequester victim's mother was an abuse of discretion. Specifically, she contends victim's mother had the benefit of hearing Burklund's testimony regarding the incident in question, and therefore, the opportunity to shape her testimony so as to discredit Burklund. ***See*** Burklund's Brief at 36.

The trial court found Burklund was entitled to no relief on this claim:

> In this instance, given the limited nature of [victim's mother's] testimony, and the fact that she was the mother of the victim, the Court held sequestration of [victim's mother] was not necessary. There is no evidence that Burklund was prejudiced in any way by [victim's mother's] presence. Furthermore, no specific argument regarding possible prejudice was raised during the trial. Additionally, [victim's mother] had given a previous statement, and therefore, her testimony on rebuttal was subject to evaluation under that prior statement. Therefore, the Court did not abuse its discretion in allowing [victim's mother] to be exempt from the sequestration order.

Trial Court Opinion, 4/16/2013, at 23. We note Burklund does not dispute the Commonwealth's contention that victim's mother's testimony was

---

[20] During her direct examination, Burklund had testified that victim acted aggressively toward her the day he brought his mother to their house. Specifically, she stated that he "came charging at me and got chest to chest with me and said this is my house." N.T., 5/16/2012, at 154-155.

consistent with a prior written statement. Accordingly, we agree with the analysis of the trial court, and adopt its well-reasoned basis.

In her final claim, Burklund challenges the sufficiency of the evidence disproving her claim of self-defense.[21] Specifically, she argues that she was reasonably in fear of imminent danger considering the "cumulative effects [of] enduring years of psychological, physical and even sexual abuse at the hands of her husband," which included his threats of making her disappear so that her body would not be found. Burklund's Brief at 39. Moreover, she contends the Commonwealth failed to establish she provoked the use of force since victim arrived at the house uninvited and initiated the argument that culminated in the shooting. ***Id.*** at 40. Lastly, Burklund asserts that the Commonwealth failed to establish that she would have been able to retreat safely from the argument, considering victim was twice her size. ***Id.***

Our well-settled standard of review of a challenge to the sufficiency of the evidence is as follows:

> As a general matter, our standard of review of sufficiency claims requires that we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Widmer,*** 560 Pa. 308, 744 A.2d 745, 751 (2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." ***Commonwealth v. Brewer,*** 876 A.2d

---

[21] Burklund's challenge to the sufficiency of the evidence was raised in issues eight and nine in her appellate brief. ***See*** Burklund's Brief at 37-41.

> 1029, 1032 (Pa.Super. 2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." ***Id.; see also Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa.Super. 2000) ("[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence"). 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. ***See Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super. 2001).

Commonwealth v. Pedota, 64 A.3d 634, 636 (Pa. Super. 2013) (citation omitted), *appeal denied*, 74 A.3d 126 (Pa. 2013). Moreover, it is important to bear in mind that "[t]he 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. Feese***, 79 A.3d 1101, 1119 (Pa. Super. 2013) (quotation omitted).

Here, Burklund was convicted of first degree murder and possession of a weapon. To sustain a conviction for first degree murder, the Commonwealth must prove: "(1) a human being was killed; (2) the accused caused the death; and (3) the accused acted with malice and the specific intent to kill." ***Commonwealth v. Sanchez***, 82 A.3d 943, 967 (Pa. 2013). Furthermore, a person is guilty of possession of a weapon if she "possesses a firearm or other weapon concealed upon [her] person with intent to employ it criminally." 18 Pa.C.S. § 907(b).

Burklund argues, however, that the shooting was justified because she acted in self-defense. Our Supreme Court explained the necessary elements

of a self-defense claim in ***Commonwealth v. Mouzon***, 53 A.3d 738 (Pa. 2012):

> By way of background, a claim of self-defense (or justification, to use the term employed in the Crimes Code) requires evidence establishing three elements: "(a) [that the defendant] reasonably believed that he was in imminent danger of death or serious bodily injury and that it was necessary to use deadly force against the victim to prevent such harm; (b) that the defendant was free from fault in provoking the difficulty which culminated in the slaying; and (c) that the [defendant] did not violate any duty to retreat." ***Commonwealth v. Samuel***, 527 Pa. 298, 590 A.2d 1245, 1247–48 (1991). ***See also Commonwealth v. Harris***, 550 Pa. 92, 703 A.2d 441, 449 (1997); 18 Pa.C.S. § 505.2 Although the defendant has no burden to prove self-defense … before the defense is properly in issue, "there must be some evidence, from whatever source, to justify such a finding." Once the question is properly raised, "the burden is upon the Commonwealth to prove beyond a reasonable doubt that the defendant was not acting in self-defense." ***Commonwealth v. Black***, 474 Pa. 47, 376 A.2d 627, 630 (1977). The Commonwealth sustains that burden of negation "if it proves any of the following: that the slayer was not free from fault in provoking or continuing the difficulty which resulted in the slaying; that the slayer did not reasonably believe that [he] was in imminent danger of death or great bodily harm, and that it was necessary to kill in order to save [him]self therefrom; or that the slayer violated a duty to retreat or avoid the danger." ***Commonwealth v. Burns***, 490 Pa. 352, 416 A.2d 506, 507 (1980).

Id. at 740-741. Furthermore, "[i]t remains the province of the jury to determine whether the accused's belief was reasonable, whether he was free of provocation, and whether he had no duty to retreat." ***Commonwealth v. McClendon***, 874 A.2d 1223, 1230 (Pa. Super. 2005) (citation omitted).

The trial court thoroughly addressed Burklund's challenge to the sufficiency of the evidence in its opinion as follows:

In the instant case, considering the evidence in the light most favorable to the Commonwealth, it is clear that the Commonwealth sustained its burden of negation. The Commonwealth presented substantial evidence that Burklund was "not free from fault in provoking or continuing the difficulty which resulted in the slaying." Burklund admitted that she moved back into the home while victim was away at work, despite the Court Order that victim would live in the house until it was sold. Burklund also changed the locks to the home, locking victim out while he was at work, despite knowing that victim would return and would be unable to enter his home. Burklund then continued living in the home, despite the volatile situation, and in direct contravention of the Court Order.

Burklund testified that she got her gun after seeing victim at the home on October 3, 2010 She claimed she "felt more secure if [she] had it" while she was unpacking belongings in the master bedroom. Burklund also stated that she didn't remember if the gun was loaded, so she grabbed extra ammunition. Therefore, when she opened the gun up and saw the gun was loaded, she put the extra bullets in her pocket. When victim entered the house and came into the master bedroom to retrieve his uniform and clothing for his work trip an argument ensued, according to Burklund. Burklund claimed that she started to shoot because as she was walking out of the room she "felt something fly by or swing by [her] head, and [she] turned and [she] started to shoot." No item was found at the scene of the crime which appeared to have been thrown at Burklund. Burklund could not identify what the alleged object was. Burklund also testified that victim had the clothing found at the scene in his hands at the time.

There was also sufficient evidence to allow a reasonable jury to find that Burklund did not reasonably believe that she was in imminent danger of death or great bodily harm. The Commonwealth established that Burklund never filed or sought a PFA order, despite the fact that she claimed the victim abused her. No filings in the divorce action between victim and Burklund mentioned the alleged physical or sexual abuse. Furthermore, Burklund exhibited no injuries on the day of the shooting.

Expert testimony regarding blood spatter indicated that victim was not in an upright position when he was hit with at least the three bullets which exited his body. Further expert

> testimony established that the pattern of stippling on victim's body indicated a protective posture, as if he were trying to cover his face or head. Evidence also established that at least three of the gunshot wounds were inflicted after victim was lying face down on the carpet. Burklund also had to take the time to reload the gun after shooting victim five times, before she fired the final three shots.
>
> Given the fact that Burklund had moved back into the home in contravention of a Court Order, and had changed the locks to the home, all while her husband was away working, a jury could easily find that Burklund was not acting in a manner which rendered her free of blame. Furthermore, there was more than sufficient evidence that Burklund did not reasonably believe she was in imminent danger of death or great bodily harm. There was no evidence that victim had physically attacked her on the date of the shooting. No weapons were found on victim's person, nor were any other guns located in the home. Given the number of times victim was shot, and the fact that Burklund felt comfortable taking time to reload her pistol with extra bullets she had previously put in her pocket, a rational jury could easily find beyond a reasonable doubt that Burklund was not acting in self-defense when she killed victim. …
>
> [Furthermore,] Burklund testified that she retrieved the gun from her home and stuck it in her front pocket on the afternoon of the shooting, before victim had even entered the home. Given the fact that the jury rejected her self-defense theory, the jury could find that Burklund concealed the weapon on her person with intent to employ it criminally.

Trial Court Opinion, 4/16/2013, at 23-25 (record citations omitted).

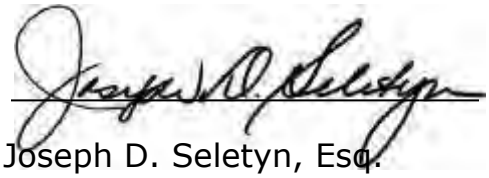
After an independent review of the record, the parties' briefs and the relevant case law, we find that the trial court cogently addressed Burklund's challenge to the sufficiency of the evidence, and we, therefore, adopt its well-reasoned basis. We note that while Burklund's testimony regarding victim's prior emotional and physical abuse could have supported a finding of self-defense, the jury was free to reject her testimony in whole or in part.

See Feese, ***supra***; ***McClendon***, ***supra***. Regardless, the evidence presented by the Commonwealth — particularly the fact that the victim was unarmed and the fact that Burklund took the time to reload her weapon and continued shooting the victim after he was incapacitated — was sufficient to disprove her claim of self-defense beyond a reasonable doubt.

For all the foregoing reasons, we affirm Burklund's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014