NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. SHAKIR JAMELL ROACH, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 869 WDA 2013

Appeal from the Judgment of Sentence Entered January 2, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0003391-2012

BEFORE: BENDER, P.J.E., WECHT, J., and PLATT, J.*

MEMORANDUM BY BENDER, P.J.E.: **FILED JUNE 16, 2014**

Appellant, Shakir Jamell Roach, appeals from the judgment of sentence of an aggregate term of seven to fourteen years' imprisonment. Appellant contends that the evidence offered was insufficient to sustain his convictions for attempted homicide and aggravated assault. We affirm.

On October 4, 2012, Appellant proceeded to a jury trial. The trial court summarized the facts adduced at trial as follows:

> On February 7, 2012, Laneal Phifer was working front door security at Craig's Cocktails, located at 3122 Chartiers Avenue, Allegheny County. (T.T. 19, 37, 54, 57). Phifer was notified at the start of his shift by owner Mallory Craig ("Mallory") that Appellant, a regular at the bar, was not permitted to enter the bar that evening. (T.T. 38-39, 41, 55-57). Mallory's cousin Alaric Craig ("Alaric") was working in the kitchen that night. (T.T. 90). At approximately midnight[,] Appellant attempted to

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* Retired Senior Judge assigned to the Superior Court.

enter the bar, but was denied entrance by Phifer. Appellant asked to speak to the owner. Phifer denied this request and Appellant left. (T.T. 40). After seeing Appellant attempt to enter the bar, Mallory retrieved a shotgun from the basement and hid it behind the bar. Fifteen minutes later[,] Mallory decided to close the bar early. (T.T. 43, 58, 63-64). Phifer helped people inside the bar gather their belongings while Mallory stood in the front foyer, holding the front door open for patrons to exit. (T.T. 43, 58-60, 65).

As Mallory was leaning against the front door to assist the exiting patrons, Appellant approached Mallory and came within twelve inches of his right shoulder. (T.T. 65-66). In response[,] Mallory punched Appellant in the face, and Appellant pulled out a semi-automatic handgun. When Mallory saw the gun[,] he attempted to wrestle it away from Appellant. (T.T. 66-67, 87). Mallory and Appellant struggled over the gun, eventually falling onto Phifer's vehicle[,] which was parked in front of the bar. Mallory told Appellant to drop the gun, but Appellant refused. Appellant kept his finger on the trigger throughout the struggle. (T.T. 68-70). Alaric noticed that the music was off and went outside to look for Mallory. He saw Appellant struggling with Mallory on top of Phifer's vehicle. (T.T. 93). At that point[,] Mallory gave up on the struggle for the weapon and attempted to run back into the bar. (T.T. 72, 93).

Appellant immediately ran behind Phifer's vehicle and started shooting at Mallory from behind the vehicle. Alaric darted behind his wife's nearby vehicle for cover. (T.T. 73, 94). Appellant shot at Mallory as he ran into the bar through the front door and also shot at the car Alaric was hiding behind, discharging his firearm seven times. The people remaining inside the bar took cover as they heard bullets ricocheting and firing through the front door. (T.T. 43-44, 72-74, 94-96). Mallory retrieved the shotgun and hurried back outside, but Appellant had run up the street and disappeared around a corner. (T.T. 74-75, 87).

Police arrived on scene shortly thereafter responding to a call for shots fired in the 3100 block of Chartiers Avenue. Upon arrival, police found seven .9mm shell casings on the street in front of the bar, one .9mm live round on the street, and two .9mm spent bullets inside the bar. There were two bullet holes in the front door of the bar, bullet strikes on the vehicle from behind which Appellant fired at Mallory, and bullet strikes on the vehicle Alaric

> took cover behind. (T.T. 20-21, 31-33, 45, 104-105, 109, 116, 121). Police interviewed witnesses at the bar, and subsequently arrested and charged Appellant as noted hereinabove.

Trial Court Opinion, 1/13/14, 5-7.

At the conclusion of Appellant's trial, the jury convicted him of attempted homicide, aggravated assault, discharge of firearm into an occupied structure, and three counts of recklessly endangering another person. On January 2, 2013, the trial court sentenced Appellant to an aggregate term of seven to fourteen years' incarceration. He then filed a timely notice of appeal. On July 1, 2013, the court ordered Appellant to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal. He complied and filed his Rule 1925(b) statement on July 8, 2013, raising the following issues:

> I. Was the evidence at trial insufficient as a matter of law to prove beyond a reasonable doubt the crime of attempted homicide, where the Commonwealth failed to establish that [Appellant] had the specific intent to kill Mr. [Mallory] Craig?
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> II. Was the evidence at trial insufficient as a matter of law to prove beyond a reasonable doubt the crime of aggravated assault, where the Commonwealth failed to establish that [Appellant] had the specific intent to seriously injure Mr. [Mallory] Craig?

Appellant's Brief at 5 (unnecessary capitalization omitted).

Our standard of review of such claims is well-established:

> The standard we apply when 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. Gray, 867 A.2d 560, 567 (Pa. Super. 2005) (citing ***Commonwealth v. Nahavandian***, 849 A.2d 1221, 1229–1230 (Pa. Super. 2004) (citations omitted)).

First, Appellant challenges his conviction for attempted homicide, arguing that he lacked the specific intent to kill because he "erratically fired those shots with wickedness of disposition or reckless disregard for consequences."[1] Appellant's Brief at 13. The legislature has defined "attempt" as follows:

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[1] Appellant's argument seems to imply that, at most, his conduct constituted an attempt to commit third degree murder, which under current case law is not a cognizable offense. ***See, e.g., Commonwealth v. Griffin***, 456 A.2d 171, 177 (Pa. Super. 1983) ("Murder of the second or third degree occurs where the killing of the victim is the unintentional result of a criminal act. Thus, an attempt to commit second or third degree murder would seem to require proof that a defendant intended to perpetrate an unintentional killing — which is logically impossible.") (internal citations and emphasis omitted). We acknowledge that the rationale in ***Griffin*** (and the many other cases stating that there is no such crime as attempted second or third degree murder) have been called into question by our Supreme Court's recent
(Footnote Continued Next Page)

> A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.

18 Pa.C.S. § 901(a). This Court has further explained:

> For the Commonwealth to prevail in a conviction of criminal attempt to commit homicide, it must prove beyond a reasonable doubt that the accused[,] with a specific intent to kill[,] took a substantial step towards that goal. We have held that a specific intent to kill can be inferred from the circumstances surrounding an unlawful killing. Moreover, specific intent to kill may be inferred from the fact that the accused used a deadly weapon to inflict injury to a vital part of the victim's body.

Commonwealth v. Robertson, 874 A.2d 1200, 1207 (Pa. Super. 2005) (internal citations omitted). Additionally, our Supreme Court has stated, "Specific intent to kill can be proven where the defendant knowingly applies deadly force to the person of another." ***Commonwealth v. Hall***, 701 A.2d 190, 196 (Pa. 1997) (internal citations omitted).

This Court has also upheld convictions for attempted homicide in cases where the defendant manifested an intent to kill, through use of deadly force, even where no injury was ultimately suffered by the victim. ***See***

(Footnote Continued) ———————————

decision in ***Commonwealth v. Fisher***, 80 A.3d 1186, 1191 (Pa. 2013) (holding that conspiracy to commit third degree murder is a cognizable offense because "absence of specific intent to kill is not an element of third degree murder; rather, such crime is an intentional act, characterized by malice, that results in death, intended or not"). Because the ***Fisher*** Court did not expressly state that its rationale applied to any offense other than conspiracy to commit third degree murder, its possible impact on the offense of attempted murder is unclear. However, because we conclude, for the reasons stated *infra*, that the evidence was sufficient to prove that Appellant possessed a specific intent to kill, we need not address the effect of ***Fisher*** in this case.

generally Commonwealth v. Jackson, 955 A.2d 441, 445 (Pa. Super. 2008) (finding sufficient evidence for attempted murder conviction where a defendant, carrying a gun, raised his arm at a detective); ***Commonwealth v. Donton***, 654 A.2d 580, 585 (Pa. Super. 1995) (determining there was sufficient evidence for attempted murder conviction — even though no injuries occurred — where the defendant wrote a letter showing his intent to kill his wife, drove to her residence, and possessed a loaded gun); ***Commonwealth v. Cross***, 331 A.2d 813, 814-15 (Pa. Super. 1974) (ascertaining intent to kill where the defendant discharged a firearm at the victim's vehicle, though the victim was not injured). Further, this Court has found specific intent to kill even where the defendant claimed that the victim was the initial aggressor. ***Commonwealth v. Bedford***, 50 A.3d 707, 711-12 (Pa. Super. 2012) (upholding specific intent to kill where the murder victim confronted appellant prior to appellant's shooting him three times).

Here, the evidence — viewed in the light most favorable to the Commonwealth as the verdict winner — was sufficient for the jury to reasonably conclude that Appellant possessed the specific intent to kill Mallory Craig. The facts of this case are as compelling as, if not more than, the facts of the cases cited, *supra*, where this Court determined specific intent to kill was proven. Appellant knew that the bar had banned him, yet he returned with a semi-automatic handgun shortly thereafter. Bullet holes were found in the front door of the bar where Mallory Craig sought shelter, which supports an inference that Appellant shot directly at Mallory Craig as

he fled. Although Appellant contends that he fired his gun only with a reckless disregard for life, he admitted that he "fired seven bullets in the general direction of Mr. [Mallory] Craig." Appellant's Brief at 19. Further, Alaric Craig testified that, following the tussle, Appellant "started shooting at my cousin [Mallory Craig]…. [The gun] wasn't pointed at me." N.T. Trial, 10/4/12, at 94-96. Thus, the evidence was sufficient for the jury to conclude that Appellant possessed the specific intent to kill.

Second, Appellant claims that the evidence was insufficient to establish his specific intent to cause serious bodily injury to Mallory Craig. The legislature has described aggravated assault as follows:

> **(a) Offense defined.—**A person is guilty of aggravated assault if he:
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> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life;
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> …
>
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon;

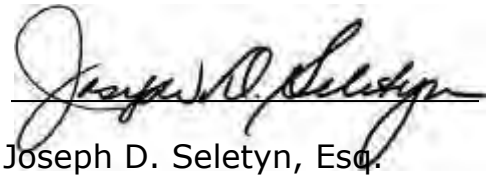
18 Pa.C.S. § 2702(a)(1), (4). This Court has explained, "Attempt, in the context of an assault, is established when the accused intentionally acts in a manner which constitutes a substantial or significant step toward perpetrating serious bodily injury upon another." ***Commonwealth v. Lopez***, 654 A.2d 1150, 1154 (Pa. Super. 1995) (internal citations omitted). Moreover, our Supreme Court has said, "[F]or the degree of recklessness

contained in the aggravated assault statute to occur, the offensive act must be performed under circumstances which almost assure that injury or death will ensue." ***Commonwealth v. Thompson***, 739 A.2d 1023, 1028 (Pa. 1999).

Here, the fact that Appellant fired seven gunshots in the direction of Mallory Craig supports a finding that he had the specific intent to cause serious bodily injury to Craig. The use of a deadly weapon toward Craig allowed the jury reasonably to infer that Appellant intended to cause serious injury, and that he took a substantial step in doing so by opening fire. Even if Appellant acted with the reckless disregard that he alleges, he is nonetheless culpable of aggravated assault because firing multiple gunshots in the direction of another person practically assures that injury or death will result. Appellant even concedes that he "was so fortunate not to kill or injure anybody on the night in question[.]" Appellant's Brief at 12. Thus, we conclude the evidence was sufficient to establish that Appellant acted with the specific intent required to sustain his conviction for aggravated assault.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/16/2014