

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

LOIDY G. IRRIZARRI MARTE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2642 EDA 2015

Appeal from the Judgment of Sentence Entered August 21, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006147-2014

BEFORE: BENDER, P.J.E., DUBOW, J., and SOLANO, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED APRIL 05, 2017

Appellant, Loidy G. Irrizarri Marte, appeals from the judgment of sentence of an aggregate term of 5 to 10 years' imprisonment and 15 years' probation, imposed after she was convicted of voluntary manslaughter, 18 Pa.C.S. § 2503(b), and possession of an instrument of crime ("PIC"), 18 Pa.C.S. § 907(a). On appeal, she challenges the sufficiency of the evidence to support her conviction of voluntary manslaughter, and whether the verdict was against the weight of the evidence. After careful review, we reverse in part and affirm in part.

The trial court summarized the procedural history of this case and the totality of the evidence presented at Appellant's trial as follows:

On May 9, 2014, [Appellant] was arrested and charged with third-degree murder, voluntary manslaughter, and possession of an instrument of a crime (PIC). On May 28, 2015, [Appellant] appeared before this [c]ourt and executed a valid waiver of her right to a jury trial. On May 28, 2015 and June 26,

2015, a bifurcated non-jury trial was held in the presence of this [c]ourt. On June 26, 2015, this [c]ourt found [Appellant] guilty of voluntary manslaughter and PIC. On August 21, 2015, this [c]ourt sentenced [Appellant] to 5 to 10 years['] state incarceration plus 10 years['] probation on the voluntary manslaughter charge and 5 years['] probation on the PIC charge, to run consecutive to the sentence imposed on the voluntary manslaughter charge[,], for a total aggregate sentence of 5 to 10 years['] state incarceration plus 15 years['] probation. On August 28, 2015, [Appellant], through counsel, filed a Notice of Appeal to the Superior Court.^[1] On September 24, 2015, Nino V. Tinari, Esquire, entered an appearance as appellate counsel. On October 8, 2015, after receiving all of the notes of testimony, this [c]ourt ordered appellate counsel to file a Concise Statement of Errors pursuant to Pa.R.A.P. 1925(b) and appellate counsel did so on October 29, 2015.

Trial began in this matter on May 28, 2015. [Appellant] was represented at trial by Robert Mozenter, Esquire, while the attorney for the Commonwealth was Peter Lim, Esquire. The Commonwealth called Officer Robert Esack ("Esack") as its first witness. Esack testified that he was currently assigned to the 2nd District and had been a Philadelphia Police Officer for 14 years. Esack testified that, on March 30, 2014 at approximately 5:30 a.m., he received a radio call of a person screaming and two people hurt on the 6100 block of Hasbrook [Avenue].^[2] Esack further testified that he arrived on that block no more than two minutes after receiving the call and that, upon approaching the scene, he observed a heavysset black woman waving her arms, pointing downwards and saying "right here." Esack stated that when he went to that location, [Appellant] sprang up between two cars and was covered in blood. Esack further stated that he got out of his car and saw a Hispanic male[, Luionel Lajara Perez (referred to herein as "Perez" or "decedent"),] covered in blood lying between the two cars. Esack testified that one of the cars was a red Chevrolet with

¹ Our review of the docket shows that Appellant's notice of appeal was filed on August 26, 2015.

² We note that witnesses at trial also referred to this location as Hasbrook Street.

blood all over its hood and that there was also blood on the southbound lane of H[as]brook [Avenue]. Esack further testified that he asked [Appellant] what had happened and whether the male was hit by a car and [Appellant] responded "I don't know" to both questions. (N.T. 5/28/2015 p. 12-16).

Esack testified that there was a limo in the northbound lane of Hasbrook [Avenue] and he asked the driver of the limo whether he had run over the male, to which the driver responded in the negative. Esack further testified that he called for rescue for the male and, when the other officers arrived, they followed a blood trail into a house. Esack stated that the blood trail stopped in the middle of the living room and that he observed a steak knife behind the front door of the house as he was leaving. Esack further stated that no one was in the house and that he did not touch the knife. Esack testified that he learned from the fire board personnel that the male had been stabbed and that he could not see the stab wound until they turned the male's head. *Id.* at 16-18.

Esack testified that [Appellant] was right next to the body between the two parked cars when she first stood up. Esack further testified that the limo was right next to the scene and that there was another Hispanic wom[a]n sitting in the back of the limo with only her eyes and the top of her head visible. Esack stated that, after he went into the house and came back out, the limo and [Appellant] were both gone. Esack further stated that he did not get the chance to ask the Hispanic woman in the limo [about] what had happened. Esack testified that the scene was secured until the Crime Scene Unit arrived and that no one touched anything. Esack further testified that he had been to the house on a prior occasion for a domestic assault call. Esack stated that [Appellant] was the victim on the night of the assault and that he arrested the decedent as the alleged assailant. Esack further stated [Appellant] claimed that the decedent broke into the house and assaulted her with a stick. The parties then stipulated that the decedent had beaten [Appellant] with a stick and caused her to go to the hospital. The parties further stipulated that this assault took place on December 3, 2013. *Id.* at 19-28.

The Commonwealth called Dr. Sam Gulino ("Gulino") as its next witness. Gulino testified that he had been the Chief Medical Examiner of Philadelphia since April 2008 and that he performed the autopsy on the decedent in this case... Gulino further testified that Perez was a 22-year-old white male, 6' tall and 203

pounds. Gulino stated that Perez was pronounced dead at the scene at 6152 Hasbrook Avenue at 5:52 a.m. on March 30, 2014[,] and that the cause of death was a single stab wound in the region of Perez's left clavicle. Gulino testified that the wound was approximately 1 ½ inches in size, 4-4 ½ inches deep, and had one edge that came to a sharp point and one which came to a blunt edge. Gulino further testified that the wound went downward from left to right and that the blade had cut the left subclavian artery and left subclavian vein. **Id.** at 39-42.

Gulino testified that the knife recovered at the scene was 4 ½ inches from the handle to the tip of the blade and that, if that knife was the one used to stab Perez, that would mean that all or nearly all of the blade would have been inserted into the victim's neck. Gulino further testified that the width of the wound was wider than the blade of the knife, which could mean that the knife was being moved in a particular direction as it was entering or exiting Perez's body. Gulino stated that the wound did not go into the chest cavity, which meant that there was no internal blood loss and that any blood loss Perez experienced would have been lost externally. Gulino further stated that the wound would have started bleeding immediately when the artery was severed and that Perez also had small scrapes on his chin, right knee and left ankle. Gulino testified that a toxicology report was performed on Perez and that he tested positive for alcohol. Gulino further testified that Perez's blood alcohol content was .064 percent, which was below the legal limit to drive. **Id.** at 44-47.

The Commonwealth called Officer Robert Flade ("Flade") as its next witness. Flade testified that he had been with the Crime Scene Unit of the Philadelphia Police Department for approximately 14 years and that, on March 30, 2014, he investigated the crime scene on the 6100 block of Hasbrook [Avenue]. Flade further testified that the Crime Scene Unit was notified by Detective Marano of the Homicide Unit at 7:25 a.m. on that date and they arrived on the scene at approximately 8:55 a.m. Flade stated that it was raining hard when they arrived and that they collected a total of four red-stained blood swabs and one Faberware steak knife with a chip missing from the handle which was found behind the front door. Flade further stated that he photographed a polka dot box which was near

where Perez was found and that inside the box there was a photograph of a young child, female hygiene product and female clothing.^[3] Flade testified that the knife had a blade that was 4.5 inches long and that there was a knife rack in the kitchen which appeared to be where the knife came from. Flade further testified that there was a polka dot box in the house which had the same shape, colors and circles as the box found next to Perez. **Id.** at 50-63.

The Commonwealth called Mary Finnegan ("Finnegan") as its next witness. Finnegan testified that she lived approximately five houses from 6152 Hasbrook [Avenue]. Finnegan further testified that, on the early morning of March 30, 2014, she heard an argument in Spanish and a loud thump. Finnegan stated that she looked out her window and saw somebody fall between two cars. Finnegan further stated she saw two Spanish women in their twenties screaming at each other and that one of the Spanish women was wearing a white tank top and a shower cap and was approximately 5'6". Finnegan testified that the woman was standing on the sidewalk beside the trunk of the red Chevrolet that the body had fallen behind. **Id.** at 77-82.

Finnegan testified that the other woman was crouched over the body but she was unable to further describe her. Finnegan further testified that, as she observed the scene from her upstairs window, she heard the woman wearing the shower cap scream, "My fiancé, my fiancé, I'm going to jail for this[,]" and another person said, "He's not breathing. Call 911." Finnegan stated that she went outside and saw the woman in the shower cap grab a bunch of shopping bags and get into a limo that had arrived at the scene. Finnegan further stated that the police had already started to arrive at the scene and the limo went around a police car parked at Hasbrook and Devereaux, then picked the women up and left. Finnegan testified that the bags had been on the steps of the house and that the woman in the shower cap was walking back and forth from the outside of the house to the inside. **Id.** at 83-88.

³ Officer Flade also testified that a key was found near the rear of the red Chevrolet car parked on Hasbrook Avenue. N.T. Trial, 5/28/2015, at 58. He stated that the key appeared to be a "house key," but did not personally try to see if the key was to the front door of 6152 Hasbrook Avenue, nor did he recall if anyone else did. **Id. See also** Commonwealth's Exhibits 18-20.

The Commonwealth called Lourgina Jerez ("Jerez") as its next witness. Jerez testified that Perez was her cousin and that she found out that he was killed at around 5:00 p.m. on March 30, 2014. Jerez further testified that many people called her that day so she called her uncle, Perez's father, to confirm that Perez had been killed. Jerez stated that her uncle was unable to speak because he was crying so Perez's sister spoke to her. Jerez testified that she knew [Appellant] as Perez's girlfriend and that she reached out to [Appellant] after she heard that Perez had been killed. Jerez further testified that [Appellant] had dated Perez for over a year and that she had texted [Appellant] on occasions prior to the incident. *Id.* at 118-22.

Jerez testified that she texted [Appellant] at the same number that she had used previously and asked her, in Spanish, "Loidy, tell me what happened please." Jerez further testified that [Appellant] replied a minute later and answered, "It was an accident." Jerez stated that she responded to [Appellant], "But why? What are you going to do? You have a daughter. Why didn't you think about that? You don't know the pain that my aunt is going through," to which [Appellant] replied, "He was hitting me. It wasn't my intention to kill him. I am going to turn myself in to the police." Jerez stated that she asked [Appellant], "Why didn't you help him?" and [Appellant] responded, "I love him. How would you think I would be able to kill him? He was hitting me. He almost breaks [*sic*] my arm. I called the ambulance." Jerez further stated that she then texted [Appellant], "For him not to die, but you left him alone," and [Appellant] replied, "I was taking blood out of his mouth with my mouth. I left when the police got there, but the ambulance was already there." *Id.* at 122-29. After Jerez testified, the Commonwealth rested. (N.T. 6/26/2015 p. 3).

The defense called Oralis Hernandez ("Hernandez") as its first witness. Hernandez testified she had known [Appellant] for a couple of years and that she was with [Appellant] at her house on March 30, 2014. Hernandez further testified that the two of them had gone to the Bamboo Bar at Bustleton Avenue and Roosevelt Boulevard that night and that they were at the bar from around 7:00 p.m. to 3:30 a.m., after which they arrived at [Appellant's] house no later than 4:00 a.m. Hernandez stated that neither she nor [Appellant] were intoxicated when they arrived at [Appellant's] house and that there was no one else home with them. Hernandez further stated that she laid on the couch in [Appellant's] living room and watched the television

while [Appellant] went to make soup in the kitchen. Hernandez testified that she knew Perez but had not seen him earlier that day. **Id.** at 8-14.

Hernandez testified that Perez walked through the front door as she was lying on the couch and asked her where [Appellant] was. Hernandez further testified that Perez seemed intoxicated and she told him that [Appellant] was in the kitchen. Hernandez stated that she heard [Appellant] and Perez argue and Perez called [Appellant] a "whore" and "slut". Hernandez further stated that she then heard a boom and walked to the kitchen to see Perez push [Appellant] into the stove and strangle her on the floor. Hernandez testified that she called Perez's name to try to calm him down and when he looked at her[,] [Appellant] was able to get away from him. Hernandez further testified that [Appellant] ran towards the front door and Perez ran after her, caught her and reached out to grab her neck, at which time [Appellant] stabbed him on his left side. Hernandez further stated that Perez began to throw up and she called 911. Hernandez testified that Perez went outside while she went upstairs to grab her purse and, when she came back down, she could not find Perez because it was too dark. Hernandez further testified that she called Perez's name but he did not answer. Hernandez stated that she walked to the sidewalk where she saw him laying on the ground between two cars. Hernandez further stated that [Appellant] was screaming and trying to help him. **Id.** at 14-21.

Hernandez testified that [Appellant] stabbed Perez in the left side of the neck while he was in front of her and she was against the wall. Hernandez further testified that Perez was holding his neck and throwing up blood as he walked out of the house. Hernandez stated that she told [Appellant] where she found Perez and [Appellant] tried to give him CPR. Hernandez further stated that a neighbor came over and checked Perez's pulse. Hernandez testified that she and [Appellant] got into a cab that [Appellant] already had called before Perez came to the house. Hernandez further testified that the ambulance arrived about eight to ten minutes after she had called 911. Hernandez stated that she took the cab to her house, but she did not know where [Appellant] went afterwards. **Id.** at 21-26.

[Appellant] testified on her own behalf. [Appellant] testified that she lived at 6152 Hasbrook Avenue in March 2014 and that she had been dating Perez for two years by that time. [Appellant] further testified that she and Perez used to live

together at a different address but they had separated. [Appellant] stated that, on December 3, 2013, she called the police on Perez after he hit her with a stick and the police arrested him at that time. [Appellant] further stated that Perez hit her on her stomach, where she had recently had surgery, and that she had to go to the hospital to get the surgery again. [Appellant] testified that she later saw Perez in the Dominican Republic when he came to visit her. *Id.* at 48-54.

[Appellant] testified that, on March 30, 2014, she went to the Bamboo Bar with Hernandez and the two of them ate and drank wine until the bar closed at 3:30 a.m. [Appellant] further testified that Perez texted her through the night and accused her of being at the bar with her husband, to whom she was still legally married, but from whom she had separated. [Appellant] stated that Perez told her that he was going to kill her and that she did not want to go home when the bar closed because of the texts.^[4] [Appellant] further stated that the text messages were still on her phone but she left her phone with a friend when she went to jail and did not know what had happened to it. [Appellant] testified that she ultimately went home with her friend, Crystal, because [Appellant] had waited for her outside her house on the prior occasion that he hit her and she was scared that he might do the same thing once again. *Id.* at 54-56.

[Appellant] testified that, after Crystal dropped them off at her home, [Appellant] called a cab for Hernandez and started to make soup. [Appellant] stated that she was not intoxicated and that it was only she and Hernandez at the house. [Appellant] further stated that Perez did not have a key to her house and did not have permission to come over as a result of the earlier incident when she called the police on him. [Appellant] testified that Perez had asked her not to testify against him in court and promised her that he would not hit her again but [Appellant] ended their relationship. [Appellant] further testified that she

⁴ Our review of the record does not show that the Commonwealth proffered evidence refuting Appellant's claim that Mr. Perez texted her that night with threats to kill her. We note, though, that a cell phone was found next to Mr. Perez's driver's license on the steps outside of Appellant's house. *See* Commonwealth's Exhibits 11-14; N.T. Trial, 5/28/2015, at 57.

ultimately did not go to court because Perez had asked her not to. **Id.** at 57-60.

[Appellant] testified that, after she went into the kitchen to make soup, she heard the door and then saw Perez enter her kitchen. [Appellant] further testified that Perez asked her who brought her home and stated that people had told him that she left the bar with her husband. [Appellant] testified that she told Perez that Crystal had taken her home, at which time he grabbed her by her hair and threw her on the floor. [Appellant] further testified that Perez kicked her in the stomach and into the stove while she was on the floor. [Appellant] stated that she did not have a weapon at the time and she grabbed a knife after she heard Hernandez come into the kitchen and tell Perez to let her go. [Appellant] further stated that she picked up the knife because she was afraid for her life and Perez was angrier than she had ever seen him. [Appellant] testified that she ran towards the front door because she wanted to get away from Perez and that, when she saw him coming towards her to grab her neck, she stabbed him. **Id.** at 60-63.

[Appellant] testified that Perez was roughly six inches taller than her and that she did not intend to kill him. [Appellant] further testified that she stabbed Perez once with the knife and he began vomiting blood on her. [Appellant] stated that she was against the wall when she stabbed Perez and that he backed up after she stabbed him. [Appellant] further stated that Perez held his neck while blood came from his mouth. [Appellant] testified she did not see Perez walk out of the house and that she told Hernandez to call an ambulance. [Appellant] further testified that she immediately went to look for her phone in the polka dot box that she had placed it in when she came home. [Appellant] stated that she had packed her possessions in the polka dot box as she was planning on moving to New York to get away from Perez. **Id.** at 63-66.

[Appellant] testified that, after she grabbed the box with her possessions, she went outside and called Perez's name. [Appellant] further testified that she saw Perez face-down between the cars and she grabbed him. [Appellant] stated that she apologized to Perez and tried to take the blood out of his mouth with her mouth. [Appellant] further stated that the police and the ambulance then arrived[,] and she told the policeman that she did not know what had happened to Perez because she was scared. [Appellant] testified that she saw Hernandez get into the cab that she had called[,] and she went with her.

[Appellant] further testified that they went to Hernandez's house but Hernandez told her that she could not stay there and so, after showering, she called her husband and he took her to his house. [Appellant] stated that her husband asked her what happened[,] and she told him and said that she going to turn herself in. [Appellant] further stated that Crystal then called her and told her that Perez had died. [Appellant] testified that Crystal told her not to turn herself in and to go [to] a lawyer instead. [Appellant] further testified that she turned herself in on May 9, 2014[,] after the police informed her lawyer that they were going to put out a warrant for her arrest on that day. **Id.** at 65-69.

[Appellant's] counsel read a stipulation, by and between counsel, that if Adonis Joel, Ashlia Nepomuceno, Tanya Nepomuceno, Ramona Aponte, and Chelissa Gomez were called to testify, they would each testify that they knew [Appellant] and that [Appellant] had a reputation as a peaceful and law-abiding citizen in the community in which she resided and worked. **Id.** at 87-89. After the stipulation, the defense rested. **Id.** at 89.

This [c]ourt found [Appellant] to be guilty of voluntary manslaughter and PIC. In finding [Appellant] guilty of voluntary manslaughter and PIC, this [c]ourt noted that the photographs of the kitchen taken by the Crime Scene Unit showed that the kitchen had not been disturbed. Specifically, this [c]ourt stated that, while an argument might have taken place in the kitchen, the fight that [Appellant] and Hernandez claimed took place there could not have taken place given the kitchen's pristine condition. **Id.** at 119, 124. Thus, this [c]ourt found that it was not credible that there was a struggle in the kitchen and noted that all of the blood was found in the living room and outside the house. This [c]ourt further noted that, during the previous incident in December 2013, [Appellant] also had picked up a knife, swung it at Perez and missed. This [c]ourt also found that based upon Gulino's testimony, Perez was not intoxicated as claimed by Hernandez and [Appellant], as his blood alcohol level was well below the legal limit for driving a vehicle. (N.T. 8/21/2015 p. 41-44).

Trial Court Opinion (TCO), 11/30/2015, at 1-12 (internal headings omitted).

As stated in the trial court's opinion *supra*, Appellant filed a timely notice of appeal. On October 8, 2015, the trial court ordered Appellant to

file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and she timely complied. On appeal, Appellant raises the following issues for our review:

1. Was the evidence sufficient as a matter of law to convict [Appellant] of Voluntary Mans[laughter] – Unreasonable Belief (18 Pa.C.S.[§] 2503[(b)])?
2. Was the verdict against the weight of the evidence?

Appellant's Brief at 5.

We first consider the sufficiency of the evidence to convict Appellant of voluntary manslaughter. Initially, we set forth our standard of review:

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 [finder] 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. Smith, 97 A.3d 782, 790 (Pa. Super. 2014) (citations omitted; brackets in original).

Appellant argues the evidence was not sufficient to convict her of voluntary manslaughter because “Mr. Perez’s unfortunate death was the result of a justifiable act of self-defense.” Appellant’s Brief at 5. Appellant claims that “the issue in the case ... is the reasonableness of [Appellant’s] belief that she was in danger of serious bodily injury[,],” and she maintains that the evidence “was wholly insufficient to prove beyond a reasonable doubt that [Appellant] did not reasonably believe that she was in danger of death or serious bodily injury.” *Id.* at 13, 14 (internal quotation marks, brackets, and citation omitted). We agree.

Voluntary manslaughter is defined by statute, in pertinent part, as follows:

(b) Unreasonable belief killing justifiable.--A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title (relating to general principles of justification),^[5] but his belief is unreasonable.

⁵ Chapter 5 of this title provides, in relevant part, the following:

(a) Use of force justifiable for protection of the person.—

The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(b) Limitations on justifying necessity for use of force.—

(2) The use of deadly force is not justifiable under this section unless the actor believes that such force is
(Footnote Continued Next Page)

18 Pa.C.S. § 2503(b). Under this statute, “a homicide is reduced from murder to voluntary manslaughter if the defendant subjectively believed circumstances justifying the killing existed, but objective reality negates that existence.” **Commonwealth v. Carter**, 466 A.2d 1328, 1332 (Pa. 1983). Thus, “[i]n order to procure a conviction for voluntary manslaughter[,] the Commonwealth must prove, beyond a reasonable doubt, that the homicide was not justified. A killing that occurs under the mistaken belief that it was justified constitutes voluntary manslaughter.” **Commonwealth v. Weston**, 749 A.2d 458, 462 (Pa. 2000) (citations omitted). Consequently, courts have commonly referred to unreasonable belief voluntary manslaughter as “imperfect self-defense,” because the “self-defense claim is imperfect in only one respect—an unreasonable rather than a reasonable belief that deadly

(Footnote Continued) _____

necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating, except the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.

18 Pa.C.S. § 505(a), (b)(2).

force was required to save the actor's life." **Commonwealth v. Tilley**, 595 A.2d 575, 582 (Pa. 1991).⁶

⁶ Our Supreme Court has described the relationship between the general principles of justification and imperfect self-defense as follows:

To prevail on a justification defense, there must be evidence that the defendant "(a) ... 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** 18 Pa.C.S. § 505; **see also Commonwealth v. Harris**, 550 Pa. 92, 703 A.2d 441, 449 (1997). "The Commonwealth sustains its burden [of disproving self-defense] 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).

The derivative and lesser defense of imperfect belief self-defense "is imperfect in only one respect—an unreasonable rather than a reasonable belief that deadly force was required to save the actor's life. All other principles of justification under 18 Pa.C.S. § 505 must [be satisfied to prove] unreasonable belief voluntary manslaughter." **Bracey**, 795 A.2d at 947 (quoting **Commonwealth v. Tilley**, 528 Pa. 125, 595 A.2d 575, 582 (1991)). Thus, for example, if the defendant was not free from fault, neither self-defense nor imperfect self-defense is a viable defense.

Commonwealth v. Sepulveda, 55 A.3d 1108, 1124-25 (Pa. 2012) (footnote omitted; brackets in original).

With respect to whether a defendant reasonably believed that he or she was in imminent danger of death or serious bodily injury, our Supreme Court has used a two-prong inquiry:

The requirement of a reasonable belief encompasses two aspects, one subjective and one objective. First, the defendant “must have acted out of an honest, bona fide belief that he was in imminent danger,” which involves consideration of the defendant’s subjective state of mind. Second, the defendant’s belief that he needed to defend himself with deadly force, if it existed, must be reasonable in light of the facts as they appeared to the defendant, a consideration that involves an objective analysis.

Commonwealth v. Mouzon, 53 A.3d 738, 752 (Pa. 2012) (citation omitted). **See also Sepulveda**, 55 A.3d at 1125 (noting that “a defendant’s subjective state of mind does not establish the objective factor of the reasonableness of his belief, *i.e.*, the belief of the need to defend oneself (or others) that he genuinely held must be reasonable in light of the facts as they appeared”) (citation omitted). We have also observed that:

A number of factors, including whether [the] complainant was armed, any actual physical contact, size and strength disparities between the parties, prior dealings between the parties, threatening or menacing actions on the part of complainant, and general circumstances surrounding the incident, are all relevant when determining the reasonableness of a defendant’s belief that the use of deadly force was necessary to protect against death or serious bodily injuries. **See Commonwealth v. Soto**, 441 Pa. Super. 241, 657 A.2d 40 (1995) (concurring opinion by Olszewski, J.) (collecting cases for this general proposition). No single factor is dispositive. **Id.** Furthermore, a physically larger person who grabs a smaller person does not automatically invite the smaller person to use deadly force in response. **Commonwealth v. Hill**, 427 Pa. Super. 440, 629 A.2d 949 (1993).

Smith, 97 A.3d at 788.

We point out that, “[a]lthough the Commonwealth is required to disprove a claim of self-defense arising from any source beyond a reasonable doubt, a [fact-finder] is not required to believe the testimony of the defendant who raises the claim.” **Id.** (citation omitted). However, “[w]hen the defendant’s testimony is the only evidence of self-defense, the Commonwealth must still disprove the asserted justification and cannot simply rely on the jury’s disbelief of the defendant’s testimony[.]” **Id.** Likewise, “[t]he trial court’s statement that it did not believe [the defendant’s] testimony is no substitute for the proof the Commonwealth was required to provide to disprove the self-defense claim.” **Id.** (citations omitted). Additionally, “[i]f there are other witnesses ... who provide accounts of the material facts, it is up to the fact finder to reject or accept all, part or none of the testimony of any witness.” **Id.** (citation omitted).

Here, by convicting Appellant of voluntary manslaughter under 18 Pa.C.S. § 2503(b), the trial court determined that Appellant subjectively believed that the killing was justified under the circumstances, but that this belief was objectively unreasonable in light of the facts. Specifically, the trial court reasoned:

In the case at bar, it was undisputed that [Appellant] killed Perez by stabbing him in the neck with a steak knife. [Appellant] claimed at trial that she did so in the belief that the killing was justifiable self-defense and therefore the central issue presented at trial was whether [Appellant’s] belief was reasonable. Gulino[, the medical examiner,] testified at trial that Perez’s blood alcohol content was below the legal limit to drive, thereby contradicting [Appellant] and Hernandez’s testimony that Perez was noticeably intoxicated. The Commonwealth introduced

photographs of the crime scene taken by [Officer] Flade[,] which showed no signs of a struggle in the kitchen, further contradicting [Appellant's] testimony that she stabbed Perez out of fear for her life after he assaulted her in her kitchen. Thus, the Commonwealth presented sufficient evidence at trial that, had [Appellant] stabbed Perez in the neck in the belief that deadly force was necessary[,] such belief was nonetheless unreasonable given the complete lack of evidence of any struggle between the two of them and the fact that Perez could not have been intoxicated in the manner that [Appellant] testified to at trial. Therefore, the evidence was sufficient to find [Appellant] guilty of voluntary manslaughter.

TCO at 14.

We cannot agree that the evidence presented at trial established beyond a reasonable doubt that it was not reasonable for Appellant to believe that she was in imminent danger of death or serious bodily injury under the circumstances. While the trial court emphasizes that Mr. Perez's blood alcohol level was below the legal limit and that there were "no signs of a struggle in the kitchen," it does not point to any evidence disproving what Appellant says occurred in the living room at the time the stabbing took place. Both Appellant and Ms. Hernandez testified that, right before Appellant stabbed Mr. Perez near the front door in the living room, he was reaching out to grab her neck as Appellant was against the wall. **See** TCO at 8, 10. Because "[i]t is beyond question that manual strangulation can result in serious bodily injury, if not death[,]” **see *Commonwealth v. Watson***, 431 A.2d 949, 952 (Pa. 1981), it was objectively reasonable for Appellant to believe, at that moment, that she was in imminent danger of death or

serious bodily injury.⁷ This is especially true given that Mr. Perez was taller than Appellant, he entered her house without being invited in the early morning hours of the day at issue, and less than four months prior, he had beaten Appellant with a stick to the extent she had to go to the hospital.⁸

⁷ Ms. Hernandez stated that Mr. Perez “didn’t get to choke [Appellant]. He was putting his hands towards her neck like he wanted to choke her and that’s when she stabbed him.” N.T. Trial, 6/26/2015, at 40. We note that, even though Mr. Perez had not yet grabbed Appellant’s neck, Appellant could still reasonably believe she was in imminent danger of death or serious bodily injury. **See Commonwealth v. Zenyuh**, 453 A.2d 338, 340 (Pa. Super. 1982) (“The fact that [the] appellant was not being beaten at the exact moment she stabbed her husband does not prove beyond a reasonable doubt that her belief that she was in serious danger was unreasonable.”).

⁸ The prior assault with the stick, which took place at 5:25 a.m. on December 3, 2013, bears a striking resemblance to the circumstances surrounding the stabbing on March 30, 2014; they both begin with Mr. Perez showing up at Appellant’s home in the early morning to confront Appellant about her relationship with another man, and result in Appellant arming herself with a knife. The Philadelphia Police Department’s domestic violence report of the December 3, 2013 incident (entered into evidence at Appellant’s trial in this case) provides the following:

[Appellant] stated her cousin (witness) let [Mr. Perez] into their residence. [Mr. Perez] entered the home with a stick in his hand, approached [Appellant] and shoved her to the ground demanding to know the where abouts [*sic*] of her current boyfriend. [Appellant] ran into the kitchen and armed herself with a knife. She swung the knife at [Mr. Perez] but did not cut him.

See Commonwealth’s Exhibits 43-44. The parties stipulated at trial that, on December 3, 2013, Mr. Perez “had beaten [Appellant] with a stick and caused her to go to the hospital.” TCO at 4. Officer Esack, who arrived on the scene after the March 30, 2014 stabbing and was also the police officer who responded to the December 3, 2013 incident, stated that the stick used by Mr. Perez was a “spindle[] that you install on a deck so you don’t fall
(Footnote Continued Next Page)

Moreover, although the trial court found Appellant and Ms. Hernandez to be incredible and discounted their testimony as a result, the Commonwealth was still required to disprove Appellant's claim. **See Smith**, 97 A.3d at 788 ("The trial court's statement that it did not believe [the defendant's] testimony is no substitute for the proof the Commonwealth was required to provide to disprove the self-defense claim.").

Finally, we fail to see how Appellant's actions following the stabbing demonstrate that her belief that she was in imminent danger of death or serious bodily injury was **objectively** unreasonable. In its brief, the Commonwealth contends that,

there was significant evidence of [Appellant's] consciousness of guilt: she fled the scene after the murder once the police arrived on the scene; she also lied to Officer Essack [*sic*] when he asked her what happened and whether the victim was hit by a car, responding "I don't know" to both questions[.] (N.T. 5/28/2015 p. 12-16). Each of these acts demonstrated [Appellant's] consciousness of guilt. **See Commonwealth v. Rios**, 684 A.2d 1025, 1035 (Pa. 1996) (evidence that a defendant flees or conceals himself indicates consciousness of guilt) (citation omitted); **Commonwealth v. Carbone**, 574 A.2d 584, 589 (Pa. 1990) ... ("[t]he 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 indicatory of guilt") (internal quotation and citation omitted). This evidence further supported the theory that [Appellant] knew she was not justified in stabbing the unarmed victim.

(Footnote Continued) _____

through the railing. So it is a 1-by-1 stick, probably 2-1/2 to 3 feet in length." N.T. Trial, 5/28/2015, at 29.

Commonwealth's Brief at 13-14.⁹ This argument challenges Appellant's subjective belief that the killing was justified. Evidence of Appellant's guilty conscience is irrelevant to the only issue before us, which is whether objective reality negated Appellant's subjective belief that circumstances existed to justify the killing. **See Carter**, 466 A.2d at 1332 ("A homicide is reduced from murder to voluntary manslaughter if the defendant subjectively believed circumstances justifying the killing existed, but objective reality negates that existence.").

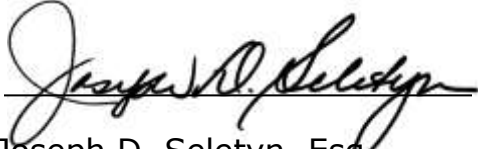
In conclusion, the evidence presented at trial, including the evidence regarding the condition of the kitchen and Mr. Perez's blood alcohol level, simply does not prove that Appellant's belief that she was in imminent danger of death or serious bodily injury at the time of the stabbing was unreasonable, given the particular circumstances of this case. Therefore, we determine that the evidence presented at trial was insufficient to sustain Appellant's conviction of unreasonable belief voluntary manslaughter. Because Appellant does not challenge her conviction for PIC on this basis, we affirm her judgment of sentence for that offense.¹⁰

⁹ We admonish the Commonwealth for filing its appellee brief nearly three months after it was due. The Commonwealth was ordered to file its appellee brief on or before December 5, 2016. Nevertheless, it filed its brief on March 2, 2017.

¹⁰ Because of our decision, we need not address Appellant's second issue regarding the weight of the evidence, for which she advances arguments specifically pertaining to her conviction of unreasonable belief voluntary (*Footnote Continued Next Page*)

Judgment of sentence for voluntary manslaughter reversed. Judgment of sentence for PIC 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: 4/5/2017

(Footnote Continued) _____

manslaughter. We note that although Appellant's weight claim could possibly encompass a challenge to her remaining conviction of PIC, she did not file any motion contesting the weight of the evidence before the trial court, nor does it appear that she raised it orally, on the record, at any time before sentencing. **See** Pa.R.Crim.P. 607. As a result, to the extent Appellant's weight of the evidence claim could be construed as encompassing her PIC conviction, that claim would be waived. **See generally Commonwealth v. Washington**, 825 A.2d 1264 (Pa. Super. 2003).