

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CALVIN TUCKER,	:	
	:	
Appellant	:	No. 239 WDA 2012

Appeal from the Judgment of Sentence December 13, 2011,
Court of Common Pleas, Allegheny County,
Criminal Division at No. CP-02-CR-0001063-2011

BEFORE: DONOHUE, SHOGAN and WECHT, JJ.

MEMORANDUM BY DONOHUE, J.: Filed: February 26, 2013

Calvin Tucker (“Tucker”) appeals from the judgment of sentence entered on December 13, 2011, by the Court of Common Pleas, Allegheny County, following his conviction of third-degree murder¹ for the stabbing death of James Redshaw (“the victim”). On appeal, Tucker challenges the sufficiency of the evidence to sustain his conviction and to disprove his claim of self-defense and further asserts his conviction was against the weight of the evidence presented. Upon review, we affirm.

Our review of the record reveals the following facts. The victim and Tucker’s son, Calvin Scott, also known as Clarissa or Rissa (“Rissa”) were in a romantic relationship for approximately 14 years prior to the victim’s

¹ 18 Pa.C.S.A § 2502(c).

death.² They lived together, along with Tucker and the victim's mother, on the North Side of the City of Pittsburgh. The victim and Rissa considered themselves to be married, and the victim referred to Tucker as "dad." According to the victim's brother, William Redshaw ("William"), "[e]veryone in the whole house just drank to excess." N.T., 10/12/11, at 48.

On January 15, 2011, William came over to the house to watch the Pittsburgh Steelers football game and to do his laundry. William indicated that Rissa and the victim were drinking alcohol and smoking marijuana. Tucker was also drinking that night.

The victim and Rissa had a tumultuous relationship marked by multiple verbal and physical altercations. William testified that he and Rissa often flirted with each other, which angered the victim. They were flirting that evening, and the victim became upset. William left the residence at approximately 8:10 p.m. and invited Rissa to ride along with him and his mother in an attempt to get her out of the house and to allow Tucker and the victim to watch the football game. The victim became very angry and refused to allow Rissa to leave. William and his mother left without Rissa. At that time, the victim had no visible injuries.

In response to William inviting Rissa to accompany him in the car, the victim became enraged and pushed Rissa on the stairs, palmed her face and

² Rissa is a man who presents as a woman. At trial, Rissa stated her preference to be referred to in the feminine.

pulled out her hairpieces. She was upset by this and did not want to fight, and retreated to the bathroom.

The series of events that arose thereafter were in dispute – Tucker told two versions to the police, while Rissa testified to another at Tucker's trial. Tucker spoke to Detective George Satler the night of January 15 and told him that he walked into the kitchen during the fourth quarter of the game and saw the victim lying on the floor. Without provocation, the victim began to throw things at Tucker, including Christmas decorations, a tomato knife, and a fork. The victim hit Tucker in the chest and shoulder with some of the items but he was not injured; the victim otherwise missed hitting Tucker completely. Tucker told Detective Satler the following:

He said that somehow [] the victim squared off with him and this went from the kitchen into the living room. He had indicated to the victim that he wanted the victim to back off and the victim did not.

He said that at that point that he thought that he was either going to be punched or hit and he didn't want to be punched or hit, so he said that he always carries a knife on him and he pulled that knife out and that he stabbed him once in the chest-torso area. He stood up and indicated to me how he did it, with like a lunging motion, and he made like a fist with his right hand and stabbed him one time in the chest-torso area.

Id. at 138-39. Tucker told Detective Satler that he and the victim had argued in the past but never had a physical fight. Tucker indicated that he was not injured during the confrontation in question and that the victim did not have any weapons other than the items thrown earlier in the altercation.

When asked on cross-examination, Detective Satler stated that he did not recall Tucker stuttering as he spoke or telling him he had a preexisting head injury. Detective Satler indicated he would have noted if Tucker stuttered, as he would have considered it a sign of intoxication.

Detective Satler testified that Tucker also provided a recorded audio statement after his initial verbal statement. Tucker was apologetic during the recorded statement and provided several details that were inconsistent with his first statement. Specifically, Detective Satler testified:

His verbal statement was [...] that he had no clue that there was an argument [between Rissa and the victim] going on, that he just originally walked into the kitchen and saw the victim on the floor[.] [T]hen during the audio statement he had indicated there that he saw some type of altercation going on between the victim and his son[.] [H]e indicated verbally that they were squaring off in the living room and that the victim was standing there and he thought that the victim was going to punch him, so he stabbed him. On the audio statement he is indicating that the victim is coming at him when he stabs him.

[* * *]

I thought that one statement that he didn't make to me verbally that I just listened to and I read along that during that audio statement that he indicates that at the end or close to the end that all that he had to do was walk away, and boy, did he wish that he had and he didn't.

Id. at 159-60.

Rissa told the jury a different version of events. She testified that upon exiting the bathroom, she saw the victim throw a shot glass at Tucker, who was sitting in the living room, watching the football game. She then saw the victim lunge at Tucker and a fight ensued. The men were punching each other and she intervened to break up the fight, at which time the victim began throwing Christmas figurines and various kitchen items. The victim grabbed "a big pitchfork" and ran with it into the living room. N.T., 10/13/11, at 182. The victim threw the "pitchfork" from the far end of the living room into the kitchen, where it stuck into a lower kitchen cabinet – a distance of approximately 20 feet. He also threw a knife, a flour bowl, a tea bowl, and a sugar bowl.

Rissa stated that Tucker said he was going to get his cigarettes and leave, but the victim followed Tucker to try to fight with him again. Rissa again intervened. The victim pushed Rissa and then went after Tucker again in the living room. She said she heard Tucker say "quit trying to hit me in my head," which meant to her that the victim was trying to injure Tucker. The victim was aware that Tucker had "tremors and brain seizures and [the victim] knew where to hit him [] if he wanted to hurt him." *Id.* at 185. She ran into the living room to break up the fighting a third time, but Tucker had already stabbed the victim. She identified the knife recovered from Tucker as the knife he used to stab the victim.

When asked about Tucker's preexisting head injury, she stated that he "had some kind of brain surgery [... on] the back of his head" and as a result he has difficulty walking, has "constant headaches" and "has a very, very, very bad stuttering habit," especially when he is nervous. *Id.* at 191-92.

On cross-examination, the Commonwealth identified several inconsistencies between her testimony and the statement she provided to police on the night of the stabbing. She explained that this was because of the events that had just occurred, and that she told police she believed she was leaving some information out at the time of her statement.

The victim died as a result of a stab wound to his trunk and the manner of death was homicide. The weapon penetrated the victim's abdomen, liver, and abdominal aorta. The abdominal penetration would have been fatal within minutes. The knife seized by police from Tucker was consistent with the victim's injury. The victim had several contusions on his body from blunt force trauma, and both offensive and defensive bruises. The victim's blood alcohol content at the time of his death was 0.189 percent.

Police who responded to the scene of the homicide testified that there was glass and broken Christmas ornaments on the floor. There was also a two-prong meat fork stuck in a lower cabinet in the kitchen, approximately three feet from the floor.

After two days of testimony, the jury convicted Tucker of third-degree murder. On December 13, 2011, the trial court sentenced him to 10 to 20 years of imprisonment. Tucker filed a timely post-sentence motion on December 19, 2011, raising challenges to the sufficiency and weight of the evidence to support his conviction. The trial court denied the motion on January 17, 2011, and this timely appeal followed.

Tucker first challenges the sufficiency of the evidence to convict him of third-degree murder instead of voluntary manslaughter based upon his unreasonable belief that the killing was justified (also known as “imperfect self-defense”).³ He bases his arguments on his belief that the Commonwealth failed to prove that he killed the victim with malice.⁴ Our standard of review is well settled:

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

³ We combine the first and second issues raised on appeal, as they are interrelated.

⁴ Tucker also argues on appeal that the jury should have convicted him of voluntary manslaughter instead of third-degree murder because he presented evidence that he killed the victim in “a sudden and intense passion resulting from serious provocation[.]” Tucker’s brief at 22. Tucker did not raise this argument below; to the contrary, he expressly stated he was not raising a “heat of passion” defense. N.T., 10/12/11, at 74 (counsel for Tucker stating that the jury should not be instructed on “heat of passion”). “New legal theories cannot be raised on appeal.” *Commonwealth v. Truong*, 36 A.3d 592, 598 (Pa. Super. 2012) (*en banc*), *appeal denied*, ___ Pa. ___, 57 A.3d 70 (2012) (citations omitted). As such, the argument is waived. Pa.R.A.P. 302(a) (“Issues not raised in the lower court are waived[.]”).

the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Knox, 50 A.3d 749, 754 (Pa. Super. 2012).

“Third degree murder occurs when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice.” ***Commonwealth v. Ventura***, 975 A.2d 1128, 1142 (Pa. Super. 2009) (citation omitted); 18 Pa.C.S.A. § 2502(c). Malice does not merely require a showing of ill will “but, rather, wickedness of disposition, hardness of heart, recklessness of consequences, and a mind regardless of social duty. Malice may be inferred from the use of a deadly weapon on a vital part of the victim’s body.” ***Id.*** (internal citations omitted).

Imperfect self-defense is defined by statute: “A person who intentionally or knowingly^[5] 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 [pertaining to justification], but his belief is unreasonable.” 18 Pa.C.S.A. § 2503(b). Our Supreme Court has explained the interplay between traditional self-defense (also known as 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. [S]ee 18 Pa.C.S. § 505. 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 himself therefrom; or that the slayer violated a duty to retreat or avoid the danger.

The derivative and lesser defense of imperfect [] 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. §

⁵ “A person acts knowingly with respect to a material element of an offense when [...] he is aware that it is practically certain that his conduct will cause such a result.” 18 Pa.C.S.A. § 302(b)(2)(ii).

505 must be satisfied to prove unreasonable belief
voluntary manslaughter.

Commonwealth v. Sepulveda, ___ Pa. ___, 55 A.3d 1108, 1124-25 (2012)
(internal case citations and quotations omitted). “Unlike the affirmative
defense of self-defense, which is a justification for the crime and, if
accepted, results in acquittal, a finding of imperfect self-defense results in
conviction of the offense of voluntary manslaughter.” ***Commonwealth v.
Rivera***, 603 Pa. 340, 373 n.6, 983 A.2d 1211, 1231 n.6 (2009).⁶

Here, Tucker asserts that the Commonwealth failed in its burden of
disproving his imperfect self-defense claim, thereby failing in its burden of
proving his culpability of third-degree murder. Tucker’s Brief at 31-32. In
support of his argument, he presents the facts in the light most favorable to
himself, relying on testimony and inferences in support of his position. ***See
id.*** at 27-31. Viewed in the light most favorable to the Commonwealth, as
our standard requires, we agree with the trial court that the Commonwealth
presented evidence that Tucker did not believe deadly force was required
when he stabbed the victim. ***See*** Trial Court Opinion, 5/7/12, at 9.

The most damaging information to his claim of imperfect self-defense
came from Tucker himself through the testimony of Detective Satler.⁷

⁶ Tucker did not raise a traditional self-defense claim below, nor does he
argue in support of its finding on appeal.

⁷ Tucker’s statement was not included in the certified record on appeal.
Detective Satler’s accuracy in reporting what Tucker said is not at issue, and

Detective Satler testified that he interviewed Tucker at the police station. Tucker stated that the victim, without provocation, began throwing items at him, including Christmas ornaments, a tomato knife, and a fork. N.T., 10/12/11, at 137-38. Tucker was not injured by any of these items. *Id.* at 138. Subsequently, Tucker and the victim “squared off” in the living room. *Id.* Tucker told the victim to “back off,” but the victim did not. *Id.* Tucker then told Detective Satler that because “he didn’t want to be punched or hit,” he pulled out the knife he always has on his person and stabbed the victim in the chest/torso area by lunging at the victim. *Id.* at 138-39. Tucker was not injured in his fight with the victim, and the victim was unarmed at the time of the stabbing. *Id.* at 141. Tucker did not tell Detective Satler that he had a preexisting head injury, that he was concerned about the victim striking him in the head and aggravating that injury, or that he was in fear that the victim was going to seriously injure or kill him – he stabbed the victim because “he didn’t want to be punched or hit.” *Id.* at 138, 144.

The record further reflects that Tucker gave an audio-recorded statement to Detective Satler after his initial verbal statement, during which he told a slightly different version of events.⁸ Although during the audio

thus the absence of Tucker’s statement does not affect our ability to decide the issues raised on appeal.

⁸ Neither the audio recording nor a transcript of the statement was included in the certified record on appeal. Detective Satler, however, testified to

recorded statement Tucker told Detective Satler “that the victim [was] coming at him when he stab[bed] him,” this statement is belied by another statement Tucker made during the audio recording: “that all he had to do was walk away, and boy, did he wish that he had and he didn’t.” *Id.* at 159-60.

Detective Satler’s testimony regarding the information provided to him by Tucker contradicts Tucker’s assertion on appeal that he had any belief, reasonable or unreasonable, that he was in fear of serious bodily injury or death at the time he stabbed the victim. Furthermore, as the trial court observed, Tucker “used a deadly weapon, a knife, on a vital part of the victim’s body,” providing sufficient evidence of malice for purposes of his conviction of third-degree murder.⁹ Trial Court Opinion, 5/7/12, at 9; *Ventura*, 975 A.2d at 1142. Thus, no relief is due.

pertinent portions of the statement, and Tucker has not contested the detective’s accuracy.

⁹ Tucker cites case law suggesting that the deadly weapon inference to support a finding of malice is inapplicable in this case because of his claim of imperfect self-defense. Tucker’s Brief at 16-17 (citing *Commonwealth v. McGuire*, 487 Pa. 208, 214, 409 A.2d 313, 316 (1979)). Our review of *McGuire* and other similar cases reveals that the deadly weapon inference is only unavailable if it “is clearly negated by the other evidence presented in this case **by the Commonwealth.**” *Id.* (emphasis added); *cf. Commonwealth v. Carbone*, 524 Pa. 551, 562-63, 574 A.2d 584, 590 (1990) (using the deadly weapon inference to support a finding of malice where the defendant raised a claim of self-defense). The record reflects that Tucker, not the Commonwealth, presented the only evidence of self-defense arguably tending to negate the deadly weapon inference. Tucker does not point to evidence presented by the Commonwealth that would render the

Next, Tucker asserts that his conviction of third-degree murder was against the weight of the evidence presented. Tucker's Brief at 33-39. The trial court found that the evidence supported the verdict, as "[Tucker] stabbed the victim with a five inch long knife, and did so with wanton and willful disregard of an unjustified and extremely high risk that his conduct would result in death or serious bodily injury to another." Trial Court Opinion, 5/7/12, at 10.

We review a weight of the evidence claim according to the following standard:

A claim alleging the verdict was against the weight of the evidence is addressed to the discretion of the trial court. Accordingly, an appellate court reviews the exercise of the trial court's discretion; it does not answer for itself whether the verdict was against the weight of the evidence. It is well settled that the [jury] is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses, and a new trial based on a weight of the evidence claim is only warranted where the [jury's] verdict is so contrary to the evidence that it shocks one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion.

Commonwealth v. Karns, 50 A.3d 158, 165 (Pa. Super. 2012) (citation omitted).

deadly weapon inference inapplicable. As such, we disagree that the deadly weapon inference is not available in this case.

Tucker argues that the jury should have believed his witness, Rissa, who testified to Tucker's preexisting head injury, that the victim was specifically targeting Tucker's head during the fight, and that Tucker only stabbed the victim when the victim attacked him a third time, having been restrained by Rissa twice before. **See** Tucker's Brief at 36-38. Although Tucker is correct that she was the only eyewitness to the stabbing and the events prior thereto (**see** Tucker's Brief at 39), our review of the record reveals that the jury had reason to question Rissa's credibility. Before taking the stand to testify for Tucker, the Commonwealth called her to testify *in camera* regarding its concern that her grandmother (Tucker's mother) had violated the sequestration order and spoke to her about testimony presented during the Commonwealth's case. N.T., 10/12/11, at 81-82. Unbeknownst to her, her grandmother had already testified that she in fact did violate the sequestration order by telling Rissa that Officer O'Neil lied during his testimony about the quantity of alcohol he observed in the house. **Id.** at 79. During her *in camera* testimony, Rissa denied that her grandmother spoke to her about anything related to the trial or testimony provided. **Id.** at 82.

The jury was informed of the violation of sequestration by stipulation, and was instructed that it was for the jury "to decide what, if any, testimony from witnesses including but not limited to Officer O'Neil, [Tucker's mother] relayed to the sequestered witness[.]" N.T., 10/13/11, at 166. During

cross-examination by the Commonwealth, Rissa no longer denied that her grandmother provided her information about trial testimony, but stated she thought the information her grandmother was giving her was from the preliminary hearing, and that she was not paying attention to what her grandmother said. *Id.* at 195-96.

Furthermore, Rissa's testimony differed from Tucker's statements to police about what occurred (*compare* N.T., 10/12/11, at 136-39 *with* N.T., 10/13/11, at 178-85), and differed from her own recorded statement provided to the police on the day of the victim's death (*see* N.T., 10/13/11, at 211-12, 215-16, 222-26¹⁰). Although Rissa considered the victim to be her husband, the victim had assaulted her that night; moreover, she was Tucker's child, and certainly had a motive to testify favorably in his defense.

As we previously stated, the Commonwealth presented evidence that Tucker committed third-degree murder when he stabbed the victim using a deadly weapon on a vital part of the victim's body. *See Ventura*, 975 A.2d at 1142. Based upon our review of the record, we find no abuse of discretion in the trial court's determination that the verdict was not against the weight of the evidence. *See Karns*, 50 A.3d at 165.

Judgment of sentence affirmed.

¹⁰ Once again, neither the recorded statement nor a transcript of the recording appears in the certified record on appeal. These differences, however, are uncontested by Tucker and were presented to the jury.