

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JEROME BANKS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2454 EDA 2011

Appeal from the Judgment of Sentence March 28, 2008
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR—0008665-2007

BEFORE: GANTMAN, OLSON and FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: January 29, 2013

Appellant, Jerome Banks, appeals from the judgment of sentence entered March 28, 2008, sentencing him to life imprisonment, together with a concurrent term of two and one-half to five years' incarceration, for convictions of murder in the first-degree¹ and possession of an instrument of crime,² respectively. We affirm.

The trial court summarized the relevant factual and procedural history of this matter as follows:

It is uncontroverted that [A]ppellant shot and killed the victim, Andre Johnson (the victim). Commonwealth witness Carl Martin, a security guard on his way home from work, testified that, on May 12, 2007, at approximately 11:15 PM, he was ascending the

¹ 18 Pa.C.S.A. § 2502.

² 18 Pa.C.S.A. § 907(a).

*Former Justice assigned to the Superior Court.

stairs to the eastbound SEPTA Market-Frankford elevated station (EI) at 52nd and Market Street in the City and County of Philadelphia, when he heard two males, later identified as [A]ppellant and the victim, facing each other arguing. When he reached the E[I] platform, Martin heard two or three gunshots, looked down from the EI platform and observed [A]ppellant standing close to the victim with his arm outstretched, a gun in his hand. Appellant was saying, "You threatening me? You threatening me?" The victim appeared to be attempting to back away from [A]ppellant. A few minutes later, Martin heard an additional two shots and saw the victim fall to the ground. Just then, a police patrol car rode by traveling northbound on 52nd Street. As the patrol car drove by, [A]ppellant raised his arms in the air, stating "self defense, self defense." However, the patrol car did not stop. Appellant then walked to a nearby vehicle, got in, and drove away, traveling southbound on 52nd Street. Martin waited until the vehicle was gone, called 911, then came down from the EI platform to check the victim. He observed two gunshot wounds on the victim, one to the right shoulder area and one to the stomach area. He searched the victim but did not find a weapon. Martin was taken to the Homicide Unit where he gave a statement consistent with his testimony.

Commonwealth witness Robert E. Johnson, Sr., testified that he got off the EI at 52nd and Market Street and walked down the up escalator onto the southwest corner of 52nd and Market. He observed two males, [A]ppellant who he identified in court, and the victim, who he knew from the area, holding a conversation. As he walked by, he heard the victim tell [A]ppellant, "So, I said, you know what, put a hit out on your butt." Appellant responded, "What, you still talking stuff." When Johnson was about twenty-five feet away, he heard three gunshots. He took cover, called 911 and looked back to see [A]ppellant facing west up Market Street. He heard two more shots, saw flashes from [A]ppellant's hand, and observed the victim, who had been out of his view, fall to the ground. Johnson then watched as [A]ppellant raised his hands as a police patrol car drove by. When the patrol car drove away, Johnson observed [A]ppellant get into a minivan and drive away. He was able to give a description of the vehicle and the tag number to the 911 operator. Johnson gave a statement to [h]omicide [d]etectives.

Philadelphia Police Officers arrived at the scene at approximately 11:18 PM, to find the body of the victim, lying on the southwest corner of 52nd and Market Street, by the SEPTA elevated

escalator. Medics tried to revive the victim, but pronounced him dead at the scene at 11:15 PM. The medical examiner determined that the victim died of blood loss as a result of multiple gunshot wounds; a perforating gunshot wound to the chest that entered the right chest, traveled through the heart, the right lung, the aorta, and the left lung, then exited the left back, and a penetrating gunshot wound that traveled through the pelvis and into the left buttock where a bullet was retrieved. The bullet was turned over to the Firearms Identification Unit (FIU) for analysis.

Meanwhile, in response to a radio call that the shooter involved in the incident at 52nd and Market Street wanted to surrender, Police Officer Hector Rodriguez of the 18th Police District went to the District Headquarters at 55th and Pine Streets where he found [A]ppellant in a burgundy minivan with the flashers on. As Officer Rodriguez removed [A]ppellant from the minivan and placed him in the police vehicle, [A]ppellant told Officer Rodriguez that he shot the victim, that it was self defense, that the victim put a hit out on him, and that they both were drunk. Appellant also told the Officer that his gun was in the vehicle, in the console between the two seats. A search of [A]ppellant's person recovered a pocket knife, a six-round speed loader loaded with six live .357 rounds and an ankle holster. Appellant was placed in a police vehicle and transported to the Homicide Unit.

After being ***Mirandized***,^[3] [A]ppellant gave Homicide Detective David Baker a statement indicating that he felt that his life was threatened because the victim told [A]ppellant that he had put a contract out on him. Appellant took the threat seriously. Appellant indicated that he lifted his shirt to show the victim that he was not carrying a gun and the victim became more aggressive.⁴ Appellant then retrieved his gun from the ankle holster and placed it in his pocket. The victim lunged at [A]ppellant and [A]ppellant shot him in his left leg then in his right leg. The victim made another step and called [A]ppellant a name. Appellant then shot the victim in his chest. He tried to

³ Referring to ***Miranda v. Arizona***, 384 U.S. 436 (1966).

⁴ Appellant had a valid license to carry a firearm in Pennsylvania.

get the attention of an officer who road by in his patrol car, but when the officer did not stop, [A]ppellant decided to drive himself to the police station and called 911 to let the police know. He drove to 55th and Pine Streets and put his flashers on. Appellant stated that he did not see the victim with a weapon, but he was "reaching" as if he had one. Appellant did not retreat because he thought he had no reason to, and because he had a gun. Appellant's testimony at trial was substantially consistent with the statement he gave Detective Baker.

The Crime Scene Unit (CSU) arrived at 52nd and Market Streets at approximately 12:13 AM, on May 13, 2007 to process the crime scene, which had been secured, taking numerous photographs of the area, collecting ballistic evidence and preparing a scale sketch. After obtaining a search warrant for [A]ppellant's minivan, CSU recovered a Rossi .357 revolver containing four fired cartridge casings and two live rounds from inside the middle console. All of the evidence recovered at the scene, two lead fragments and one copper bullet jacket, and the firearm recovered from the minivan was placed on property receipts and turned over to FIU for analysis. The lead fragments were found to be unsuitable for microscopic examination. The copper bullet jacket, as well as the bullet recovered from the victim's left buttock were determined to be a .38/9 caliber, but had insufficient markings to permit positive identification when compared to each other and the firearm. However, the FIU noted that the lands and gro[oves] on the bullet were consistent with [A]ppellant's firearm. Additionally, FIU determined that the four fired cartridge casings were fired in the revolver recovered from [A]ppellant's vehicle.

Following a jury trial, [A]ppellant was found guilty of first degree murder and possession of an instrument of crime, and sentenced to life imprisonment. He now appeals the judgment of sentence after his direct appeal rights were reinstated *nunc pro tunc* to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 [("PCRA")].

Trial Court Opinion, 12/30/2011, at 1-6.⁵

⁵ The requirements of Pennsylvania Rule of Appellate Procedure 1925 have been satisfied in this matter.

Appellant presents three issues for appeal:

Whether the evidence was insufficient to prove the [Appellant] guilty of first[-]degree murder and possession of an instrument of crime because the Commonwealth did not prove the element of intent and there was evidence that the decedent was the aggressor.

The trial judge erred by denying the motion for acquittal because there was sufficient evidence of self[-]defense and there was insufficient evidence to prove first degree murder.

Whether the verdict of guilty for first[-]degree murder and possession of an instrument of crime was against the weight of the evidence because there was evidence from the Commonwealth eyewitnesses that the decedent was the aggressor and there was evidence that the decedent was threatening the [Appellant] and the [Appellant] was protecting himself and acted in self[-]defense. The [Appellant] had previously been the victim of a serious aggravated assault and he suffered from debilitating physical and psychological injuries from this assault.

Appellant's Brief at 2.⁶

Appellant's first two issues on appeal are related; we therefore consider the issues together. Both issues challenge the sufficiency of the evidence presented for Appellant's convictions of first-degree murder and

⁶ We have reordered Appellant's issues for ease of disposition. Furthermore, we note that the certified record forwarded to this Court does not include the January 2008, trial transcript, which is necessary for our review of Appellant's issues. However, upon formal inquiry by this Court, the trial court provided the transcript as a supplemental record. We remind counsel that the appellant bears the burden of ensuring that the certified record is complete for appellate review. *See Commonwealth v. Andre*, 17 A.3d 951, 958 n.8 (Pa. Super. 2010).

possession of an instrument of crime, arguing that the Commonwealth failed to establish that Appellant possessed the requisite intent for either conviction. Rather, Appellant argues that he sufficiently established that he acted in self-defense, therefore justifying his actions.

We consider sufficiency of the evidence claims under a well-accepted standard of review:

The standard we apply in reviewing the sufficiency of 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 factfinder 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 that of 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 a 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. Muniz, 5 A.3d 345, 348 (Pa. Super. 2010) (internal citations and quotations omitted), *appeal denied*, 19 A.3d 1050 (Pa. 2011).

Under Pennsylvania law,

[t]o find a defendant guilty of first-degree murder a jury must find that the Commonwealth has proven that he or she unlawfully killed a human being and did so in an intentional, deliberate and premeditated manner. It is the element of a willful, premeditated and deliberate intent to kill that

distinguishes first-degree murder from all other criminal homicide. **Specific intent to kill may be inferred from the defendant's use of a deadly weapon upon a vital party of the victim's body.**

Commonwealth v. Sattazahn, 763 A.2d 359, 363 (Pa. 2000) (emphasis added); 18 Pa.C.S.A. § 2502 (“A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.”)

With regard to possession of an instrument of crime, “[a] person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.” 18 Pa.C.S.A. § 907(a).

In this matter, Appellant does not deny that he shot and killed Mr. Johnson. Appellant’s Brief at 15. Therefore, considering that Appellant used a deadly weapon upon a vital part of Mr. Johnson’s body, resulting in Mr. Johnson’s death, we agree with the trial court that the record contained sufficient evidence of Appellant’s intent to kill and intent to use his gun criminally. Trial Court Opinion, 12/30/2011, at 6-7.

Appellant, however, disputes the trial court’s finding of intent by arguing that, while he indeed shot and killed Mr. Johnson, he did so in self-defense. Therefore, Appellant argues that his use of that deadly weapon upon the vital part of Mr. Johnson’s body was justified, and lacking the criminal intent necessary to establish either first-degree murder or possession of an instrument of crime. Appellant’s Brief at 20-22. Appellant believes that he should have been acquitted of both crimes. *Id.*

Self-defense is statutorily defined in Pennsylvania as follows:

(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 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 or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take [...].

18 Pa.C.S.A. § 505(a), (b)(2)(i)-(ii); ***see also Commonwealth v. Rivera***, 983 A.2d 1211, 1221 (Pa. 2009). Furthermore, our Court has explained that:

[w]here there is a claim of self-defense, the Commonwealth has the burden to prove beyond a reasonable doubt that the killing was not committed in self-defense. In order to disprove self-defense, the Commonwealth must prove beyond a reasonable doubt one of the following elements: (1) that the defendant did not reasonably believe it was necessary to kill in order to protect himself against death or serious bodily harm, or that the defendant used more force than was necessary to save himself from death, great bodily harm, or the commission of a felony; (2) that the defendant provoked the use of force; or (3) that the defendant had a duty to retreat and that retreat was possible with complete safety. If the Commonwealth establishes any one of these three elements beyond a reasonable doubt, then the

conviction is insulated from a defense challenge to the sufficiency of the evidence where self-protection is at issue.

Commonwealth v. Burns, 765 A.2d 1144, 1149 (Pa. Super. 2000) (citations omitted).

In this matter, Appellant testified that he and Mr. Johnson engaged in an intense argument that escalated to the point that Appellant felt that his life was threatened. Appellant's Brief at 20-22. According to Appellant, Mr. Johnson threatened him, telling him that he had a contract out on his life, and that his "young boys" were going to do the job for him. N.T., 1/7/2008, at 148-150. Appellant testified that he then saw four or five males he believed were friends of Mr. Johnson's, and that he thought that he was being set-up. ***Id.*** Therefore, Appellant argues that he "reasonably believed that deadly force was necessary to protect himself from imminent danger of death or great bodily harm." Appellant's Brief at 22.

However, despite his testimony, there was no evidence presented at trial connecting the other males observed by Appellant to Mr. Johnson. Furthermore, Appellant testified that he did not see Mr. Johnson with a weapon. Additionally, evidence was introduced that showed that Appellant chose not to exercise his duty to retreat because he felt that it would indicate that he would not use his gun to protect himself. N.T., 1/7/2008, at 236-239. Therefore, considering the evidence in the light most favorable to the Commonwealth, we find no error in the trial court's determination that the Commonwealth met its burden of disproving Appellant's claim of self-

defense. After presentation of conflicting evidence, the jury was entitled to reject Appellant's claim that he reasonably believed that his life was in imminent danger, and, even if he did, Appellant did not attempt to retreat before using deadly force. Consequently, Appellant's first two issues on appeal lack merit.

Appellant's final issue on appeal argues that the jury's rejection of his claim of self-defense was against the weight of the evidence in that the jury inexplicably believed the Commonwealth's version of the facts, rather than Appellant's explanation. Appellant's Brief at 17-20. Appellant, however, failed to preserve his weight claim with the trial court. The issue is therefore waived.

Specifically, Pennsylvania Rule of Criminal Procedure 607:

(A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:

- (1) orally, on the record, at any time before sentencing;
- (2) by written motion at any time before sentencing; or
- (3) in a post-sentence motion.

Pa.R.Crim.P. 607.

In this matter, the certified record indicates that Appellant initially filed a post-sentence motion, but withdrew that motion before it was considered

by the trial court.⁷ Thereafter, Appellant filed a PCRA petition, requesting *nunc pro tunc* relief to file post-sentence motions and a direct appeal. Though a copy of the order is not included within the certified record, review of the docket indicates that on August 12, 2011, the trial court granted Appellant's PCRA petition with respect to his request to file a *nunc pro tunc* direct appeal. The docket makes no mention of the trial court's disposition of that portion of Appellant's PCRA petition requesting *nunc pro tunc* relief to file post-sentence motions, and Appellant filed no such motions. Consequently, Appellant did not litigate his weight of the evidence claim before the trial court, and the trial court never considered that claim. Therefore, Pursuant to Rule 607, Appellant's weight of the evidence claim is waived.

Judgment of sentence affirmed.

⁷ Though it is unclear from the record, Appellant's post-sentence motion was likely withdrawn because it appears to have been patently untimely.