

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ANTHONY SHYRONE MORROW

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 256 WDA 2012

Appeal from the Judgment of Sentence January 17, 2012
In the Court of Common Pleas of Erie County
Criminal Division at No(s): CP-25-CR-0000816-2011

BEFORE: PANELLA, J., ALLEN, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J.

Filed: March 19, 2013

Appellant, Anthony Shyrone Morrow, appeals from the judgment of sentence entered on January 17, 2012, in the Court of Common Pleas of Erie County. We affirm.¹

A jury convicted Morrow of attempted homicide, aggravated assault, and possession of an instrument of crime. The convictions stemmed from Morrow's shooting of his cousin, Louis Williams, in a crowded bar.

After the jury returned the verdict, the trial court, Morrow, and the Commonwealth learned that the trial court's tipstaff provided, completely on her own initiative, the jury with a model of a human skeleton. Morrow's

* Retired Senior Judge assigned to the Superior Court.

¹ We commend counsel for Morrow and the Commonwealth for well-crafted, well-researched, and persuasive briefs and arguments.

expert witness used the skeleton demonstratively at trial, but it had not been marked as an exhibit and admitted into evidence. Morrow filed a motion for a new trial based on the jury's possession of the model during deliberations. The trial court denied the motion. Morrow then filed a motion for reconsideration in which he requested an evidentiary hearing in order to establish a record of how the jury used the model during deliberations. The trial court denied the motion for reconsideration. The trial court later sentenced Morrow to a term of imprisonment. This timely appeal followed.

In his first issue presented on appeal, Morrow argues that the Commonwealth presented insufficient evidence to sustain the convictions in that it failed to prove that he was the shooter.² We disagree. Based on eyewitness testimony the jury was free to conclude that Morrow was the shooter.

Our standard of review is as follows:

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 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 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 the fact-finder unless the

² "The only disputed issue at trial was whether or not the Commonwealth could prove beyond a reasonable doubt that appellant was the person who shot the victim." Appellant's Brief, at 7.

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. Helse, 53 A.3d 906, 917, 917-918 (Pa. Super. 2012) (citation omitted).

Morrow's argument, that the Commonwealth failed to establish his identity as the shooter beyond a reasonable doubt, centers on the incontrovertible physical facts doctrine. "Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law." ***Commonwealth v. Robinson***, 817 A.2d 1153, 1158 (Pa. Super. 2003) (citation omitted). A review of the testimony is necessary to show why Morrow cannot rely on the incontrovertible physical facts doctrine.

The victim testified that he ran to the front of the bar, away from where Morrow was standing, and that while running he never looked back. ***See*** N.T., Trial, 11/15/11, at 25, 37. The victim did not see who shot him. ***See id.***, at 37. The bullet entered the victim's front torso to the left of his stomach and lodged in his back. ***See id.***, at 25.

The bar owner, Raymond D. Brothers, testified that he had “no[] question at all” as to who shot the victim as there was “[n]othing” blocking his view. *Id.*, at 67-68. Brothers observed Morrow pursue the victim while holding a handgun in his right hand. *See id.*, at 60-61. He then observed Morrow shoot the victim. *See id.*, at 62, 67. Brothers noted that as the victim ran to the front of the bar the victim “paused to turn around to look behind him, that’s when he was shot.” *Id.*, at 69. Brothers could not say whether the victim looked left or right when he paused. *See id.* On cross-examination, Brothers stated that the victim slightly turned to see who was behind him. *See id.*, at 92.

Morrow presented the testimony of an expert witness, Georgia Pasqualone, an expert in forensic nursing and forensic crime scene reconstruction. Pasqualone testified that based on her review of the medical records and trial testimony that it was not possible for Morrow to have been the shooter. First, she noted that the bullet trajectory, a straight line, does not correspond with Brothers’s testimony that the victim only turned slightly backwards and with his testimony of how Morrow held the weapon when he shot. *See* N.T., Trial, 11/16/11, at 31, 36. Pasqualone noted that the victim “would have had to have turned completely around 180 degrees and stopped and had an upward trajectory from the belly up into the kidney.” *Id.*, at 36.

As the trial court notes, and as Morrow cites in his brief, **see** Appellant's Brief, at 21, the only physical facts not in dispute at trial were the "point of entry, trajectory of the bullet, and where it came to rest in the victim's body[.]" Order, 12/13/11, at 2. The positioning of Morrow and the position of the handgun in relation to the victim when he was shot were certainly in dispute. Indeed, the jury heard conflicting testimony on these matters. These facts were for the jury to decide based on the testimony of the witnesses. The jury obviously credited Brothers's testimony that Morrow shot the victim—and that the victim turned around immediately prior to the shooting. This finding was well within the jurors' purview and cannot be disturbed on appeal.

Morrow cannot use his expert witness's opinion, based on her reading of the trial transcript, as to the positioning of Morrow and the position of the handgun in relation to the victim to invoke the incontrovertible physical facts doctrine. "It is a well-settled rule in Pennsylvania that incontrovertible physical facts cannot be established by oral evidence as to the position, movement or speed of moving objects." **McGavern v. Pittsburgh Rys. Co.**, 105 A.2d 342, 344 (Pa. 1954). **See also Anderson v. Pittsburgh Rys. Co.**, 225 A.2d 548, 551 (Pa. 1967) ("[W]e have often said that the incontrovertible physical facts rule is never applied where such conclusion depends on estimates of distances and speed of moving objects.").

The Commonwealth presented sufficient evidence, through Brothers's testimony, to identify Morrow as the shooter. As such, Morrow's argument fails.

In his second issue on appeal, Morrow argues that he is entitled to a new trial as he was prejudiced by the jury's possession of a life-sized model of a human skeleton during deliberations. As mentioned, unbeknownst to the trial court, Morrow, or the Commonwealth, a tipstaff provided the jury with the model. The model was never marked as an exhibit and entered into evidence; the expert used it purely for demonstrative purposes.

The trial court, the Commonwealth, and Morrow agree that the jury should not have had the model. They are correct. ***See Commonwealth v. Strong***, 836 A.2d 884, 887 (Pa. 2003) (finding error where diagram was given to jury where it was not marked as an exhibit and offered into evidence). ***See also*** Pa.R.Crim.P. 646. All three agree that the harmless error standard applies. ***See, e.g.***, Appellant's Brief, at 26 ("A harmless error standard applies."). Again, they are correct. ***See Strong***, 836 A.2d at 888 (applying harmless error doctrine). "[H]armless error is a technique of appellate review designed to advance judicial economy by obviating the necessity for a retrial where the appellate court is convinced that a trial error was harmless beyond a reasonable doubt." ***Commonwealth v. Noel***, 53 A.3d 848, 857 n.4 (Pa. Super. 2012) (citation omitted).

In ***Strong***, the Court explained why a jury should not view some items during deliberations:

The underlying reason for excluding certain items from the jury's deliberations is to prevent placing undue emphasis or credibility on the material, and de-emphasizing or discrediting other items not in the room with the jury. If there is a likelihood the importance of the evidence will be skewed, prejudice may be found; if not, there is no prejudice *per se* and the error is harmless.

836 A.2d at 888.

Morrow's expert witness utilized the model primarily to demonstrate a matter not in dispute—the trajectory of the bullet in the victim's body. The expert testified that the trajectory was a straight line inside the body. ***See, e.g.***, N.T., Trial, 11/16/11, at 24-26,31. The demonstrative use of the model also aided the expert in the explanation of her conclusion that Morrow was not the shooter.

Morrow maintains that the jury's possession of the model is not harmless error, as the use of the model requires "ongoing expert witness interpretation and explanation." Appellant's Brief, at 29. Morrow further argues that the jury must have "play[ed] with it in order to see if the bullet entry would and bullet path could somehow fit with the testimony of the Commonwealth's sole eyewitness[]" thereby substituting their "non-expert deductions for the steadfast opinions of the expert witness...." ***Id.***, at 35.

The trial court, however, found the error harmless. The trial court explained that

the skeleton provided little other than a brief visual demonstrative as to the already well-established points of entry and rest of the bullet. [T]his common skeletal model could have played no material part in the jury deliberations. Its purpose at trial was demonstrative, and other than that could not possibly had any discernible effect upon the jury.

Trial Court Opinion, 3/29/12, at 1.

We cannot discern how the model prejudiced Morrow, as we do not find any likelihood that its presence during deliberations skewed the importance of the evidence for the jury. The expert's conclusion and explanation were straightforward concepts for the jury to understand—the trajectory was a straight line in an upward direction; Morrow was not the shooter given the witness testimony. The jury viewed the model for a prolonged period during the trial. The model is, after all, a human skeleton.

Morrow's fear that the jury used the model to make "non-expert deductions" is unavailing. As the Commonwealth aptly notes, "the jury could have made 'non-expert deductions' by merely manipulating themselves or a fellow juror during deliberations." Commonwealth's Brief, at 6. The model's presence in the jury room was harmless error. The eyewitness testimony, by itself, is sufficient evidence to sustain the conviction.

In his final issue, Morrow argues that the trial court erred in failing to hold an evidentiary hearing into the presence of the model in the deliberation room when he raised the matter in his motion for a new trial. Given our disposition of Morrow's second issue, this contention is moot.

Judgment of sentence affirmed.