NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CLINTON JERRELL HARRIS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 334 EDA 2012

Appeal from the Judgment of Sentence of July 27, 2011
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0002005-2010

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY WECHT, J.: **FILED MAY 17, 2013**

Clinton Jerrell Harris ("Appellant") appeals his July 27, 2011 judgment of sentence for voluntary manslaughter.[1] Specifically, he raises challenges to the Commonwealth's alleged pursuit of two mutually exclusive theories of the case, the sufficiency of the evidence, and the trial court's response to a jury inquiry regarding the applicable legal standard. We affirm.

Appellant's own testimony established the following narrative, which was largely borne out by the other witnesses: In October and November 2009, Appellant had been romantically involved with Erica Pagan. Notes of Testimony ("N.T."), 5/12/2011, at 150-51; ***see also*** N.T., 5/10/2011, at 81-

---

* Retired Senior Judge assigned to the Superior Court.

1 18 Pa.C.S. § 2503.

82 (Ms. Pagan corroborating). Appellant knew that Ms. Pagan had been involved with Joseph Roundtree ("Decedent"). N.T., 5/12/2011, at 150. After Appellant's brief involvement with Ms. Pagan, she resumed her relationship with Decedent. ***Id.*** at 151. Appellant later learned that Decedent was angry about Appellant's involvement with Ms. Pagan; according to Appellant, in December 2009, Decedent contacted Appellant by telephone and said "When I see you it's a wrap. And I'm not playing with you." ***Id.*** at 152; ***see also*** N.T., 5/10/2011, at 92 (Ms. Pagan corroborating). Appellant further testified that he heard from a number of other people that Decedent intended to harm Appellant. N.T., 5/12/2011, at 154. Appellant testified that, in the ensuing months, he modified his social habits to avoid trouble with Decedent. ***Id.*** at 154-55. Appellant also illegally purchased a gun on the street due to his fears regarding Decedent's intentions. ***Id.*** at 165.

On the evening of March 12, 2010, Appellant learned that something had happened to his friend, Jamel Kelley. ***Id.*** at 158-59. He drove to Mr. Kelley's house at around 2:00 A.M. on March 13, 2010. There, Mr. Kelley told Appellant that, at a night club earlier in the evening, Decedent assaulted Mr. Kelley. ***Id.*** at 159-61. Mr. Kelley asked Appellant to drive him to find Decedent so that Mr. Kelley could fight him. Appellant warned Mr. Kelley that Decedent "carries guns and stuff like that," but agreed to drive. ***Id.*** at 161-63. Appellant brought his gun with him that night because he knew that "[he, *i.e.*, Appellant] might fight, and

[Appellant] knew that [Decedent] might bring a gun to the table. So it was just in case." ***Id.*** at 166.

Appellant and Mr. Kelley eventually located Decedent's car near a gathering of people. ***Id.*** at 167. Appellant and Mr. Kelley observed the movements of the numerous people in the area. Eventually, Decedent and others got into Decedent's car and drove away, allegedly motioning toward Appellant's car that he and Mr. Kelley should follow. Appellant and Mr. Kelley followed. ***Id.*** at 169-70. Eventually, Decedent stopped his vehicle and Appellant pulled over his car close by. Decedent exited his car and held his gun up in the air. ***Id.*** at 174-76. While Decedent approached the car brandishing his gun, Mr. Kelley opened the passenger door of the vehicle and exited, intending to flee; however, Decedent stopped him beside the car. ***Id.*** at 176-77. Decedent held his gun to Mr. Kelley's head, whereupon Mr. Kelley said "You got it," and lay face down on the ground. ***Id.*** at 177-78.[2]

Appellant then grabbed the gun from under his seat, and opened his door. When he emerged, Decedent was pointing his gun in Appellant's direction. ***Id.*** at 178-79. Appellant raised his gun and fired first. ***Id.*** at 180. Appellant heard at least one gun shot that did not come from his gun, but was uncertain whether Decedent or another individual had fired. ***Id.*** at

---

[2] Mr. Kelley's testimony by and large corroborated Appellant's on this and other details.

181. Appellant testified that he fired four times. ***Id.*** at 182. After the gunfire stopped, Mr. Kelley got up from the ground and ran toward a nearby alley. ***Id.*** at 184.

Ms. Pagan was the Commonwealth's primary eyewitness, and it is her testimony upon which Appellant rests his challenge to the sufficiency of the evidence. On direct examination by the Commonwealth, Ms. Pagan testified that she spent most of the evening leading up to the shooting in Decedent's company. N.T., 5/10/2011, at 39-40. Earlier that evening, at a bar called Drinkies, a series of physical altercations occurred involving Mr. Kelley, Decedent, and their respective groups of friends, both inside and outside the bar. ***Id.*** at 40-44. According to Ms. Pagan, Decedent and his group convened at an address elsewhere in Easton. Decedent remained upset about the fight, and, after he argued with Ms. Pagan's sister, Decedent left. ***Id.*** at 50. Ms. Pagan and several friends then left the party, and drove to a friend's home to drop him off. While sitting in the car on the street, Ms. Pagan observed Decedent's car come around the corner, followed closely by Appellant's green Mustang. Both cars stopped in close proximity to the car that Ms. Pagan was in. ***Id.*** at 52-64.

Ms. Pagan observed Decedent walk toward the front of Appellant's car, whereupon Appellant exited his car. ***Id.*** at 67-68. Appellant remained standing behind the car door. ***Id.*** at 69. Ms. Pagan's testimony continued as follows:

Q. [W]ere you watching what [Decedent] was doing?

A. At the time of the shooting [Appellant] was right next to me. He was more my focus.

* * * *

Q. Okay. And did there come a time when you paid attention again to [Decedent's] position?

A. Yes.

* * * *

Q. And where did you see him?

A. In the front of the car.

Q. And what did you see him doing?

A. First he was standing there, and then he turned his back to run towards the sidewalk.

* * * *

Q. And which direction did you see [Decedent] walking or traversing?

A. He turned away from me. Like, I don't know how to explain it. He was facing [Appellant's] car this way, and he turned to his left to run to the sidewalk.

* * * *

Q. [W]here was [Decedent] when this gunfire erupted?

A. In front of the car.

* * * *

Q. And you saw [Decedent] go to the far end of the car, sort of like on the sidewalk side, so to speak?

A. When he first approached the car, he was more towards the front middle of the car. Then he turned his back to run to the sidewalk.

Q. And did he proceed toward the sidewalk?

A. Yes. He went around – there was a vehicle parked on the curb, by the curb, and he ran around it.

> Q. And what did you see [Decedent] do at that time?
>
> A. We were pulling off. I was – I seen him turn his back, went towards the sidewalk and run around the vehicle, towards the back of whatever car was parked there.
>
> Q. And do you recall what you saw him doing there?
>
> A. No. By the time that happened, [Appellant] had ran towards the back of his car. So when [Decedent] ran around the car, [Appellant] ran towards the back of his vehicle, and they both met at the back of the vehicle facing each other.
>
> Q. Okay. And what happened then?
>
> A. I seen [Decedent] fall.

Id. at 69-72.

On cross-examination, Appellant's attorney managed to highlight a number of significant discrepancies between Ms. Pagan's trial testimony on direct examination and her testimony at the preliminary hearing, particularly with regard to the relative locations and orientations of the parties in the moments before the shooting. ***See, e.g., id.*** at 108-12, 114-16. Decedent was shot only once in the back. Appellant relies upon Ms. Pagan's putative testimony that Decedent's back was never turned to Appellant to argue that he could not have been the shooter.

To establish a basis for this defense theory, Appellant's counsel questioned Ms. Pagan as follows:

> Q. [Y]ou today talked about a point in time when [Decedent] walked around the front of [Appellant's] car. Do you remember that?
>
> A. He walked toward the front of [Appellant's] car.
>
> Q. And then he walked across the front of his car to the other side of his car. Isn't that what you told the jury?

A. No. I said he ran around the car that was parked next to where [Appellant] was in the street.

Q. He ran around that car?

A. He ran around the parked car, not around [Appellant's] car.

* * * *

Q. You used the term today that when [Decedent] did that, he turned his back. Do you remember saying that?

A. He turned away from [Appellant] to run to the sidewalk.

* * * *

Q. Okay. No you know, don't you, now, although I don't think you knew back at the preliminary hearing, that [Decedent] died from a bullet wound from the rear? You know that; right?

A. Yes, I know that.

Q. Okay. Did you ever say during the preliminary hearing that he, quote, turned his back, close quote?

A. I said he turned to run to the sidewalk.

* * * *

Q. And you also told us at the preliminary hearing that at this point in time when he's running and his back is turned, as you told the jury today, no shots were fired.

* * * *

A. I didn't say he was running. I said as he was behind – already on the curb behind the other car that was already parked. There was very possibly shooting as he turned. But as he was on the sidewalk, no, there was no shooting.

* * * *

Q. Okay. So tell me. As he turns to his left to run to the car, to his right to run to the back of the car, when is his back toward [Appellant]?

A. When he was running towards the curb.

Q. And you've already told us that there wasn't any gunfire going on while he was running, right?

A. No, I said there was no gunfire when he was already behind the vehicle. . . .

Q. Okay. How about when he is going from where he is in the street to the sidewalk?

A. There could definitely have been shooting then.

* * * *

Q. So whatever may have happened, so far as you were able to see, at the time any shoots [*sic*] were being fired these two men were facing each other; right?

A. They were facing each other in front of the car, and [Decedent] ran to go on the sidewalk, and they met again facing each other in the back of the car.

* * * *

Q. The question at [the preliminary hearing] – and I'm asking you where this is correct – was: "So far as you could tell, all of the shooting occurred with these two men facing each other; correct?" And your answer was: "Yes."

A. That's as far as I can tell.

Q. . . . . What you saw at the time shoots [*sic*] are fired, these two men are facing each other; correct?

A. That's what it appeared. I didn't say all the shooting was directly the whole time facing each other.

* * * *

Q. ["]There was shooting, and it appeared to me that he was hit and fell. . . .["] Do you remember – well, let me ask you. Did he get shot and fall immediately as best you could see, or did you see him get shot and then run for a while?

A. I didn't see when he got shot. It appeared that there was shooting, and I seen him fall. I'm not sure if that's when he was hit.

Id. at 123-32.

The Commonwealth also produced expert testimony at trial by John J. Shane, M.D., a non-board-certified pathologist with extensive forensic experience, and Samuel Land, M.D, a board-certified forensic pathologist. Given the severity of Decedent's injuries, and in particular a two- to three-centimeter perforation of the vena cava, the principal vessel to return deoxygenated blood to the heart, Dr. Land testified that Decedent would have retained at least ten to fifteen seconds of consciousness after sustaining the injury. N.T., 5/10/2011, at 175-76. 179-80. Dr. Land observed that Decedent lived long enough to make it to the hospital. ***Id.*** at 184. He also testified that he was aware of people with similar injuries "who were able to move several blocks, people who were able to talk, people who were able to change positions, walk, run, roll, scream for help, voice concern, activities such as that." ***Id.*** at 186-87. Dr. Shane offered a less open-ended opinion: he testified that, given the injuries, Decedent would have collapsed in two to three seconds. N.T., 5/12/2011, at 101-02. To sustain a narrative of events that support the conviction, it would only have been necessary for Decedent to have remained mobile for the few seconds it would have taken him to reach the sidewalk at the hood of the parked car and to move to the trunk end of that same car.

At the close of the evidence, the jury was charged at length. The trial court emphasized that Appellant was charged with homicide, as to which the jury might reach guilty or not guilty verdicts of first-degree murder; third-

degree murder; voluntary manslaughter; or involuntary manslaughter. N.T., 5/13/2011, at 107, 113-17, 119-21. As well, the trial court explained to the jury the principles and burdens of self-defense and justification. ***Id.*** at 108-13, 117-19. The trial court also instructed the jury as to the elements of attempted murder. ***Id.*** at 121-23.

Following deliberations, and immediately before the jury returned to render its verdict, the trial court indicated to counsel that a jury question had emerged and that the court had answered that question. At that point, the court provided counsel with copies of the question. ***Id.*** at 139-40.[3] Appellant raised no objection at that time to the instruction or to the fact that it was provided to the jury without prior consultation of the parties.

The jury found Appellant guilty of voluntary manslaughter. ***Id.*** at 140-41. On July 27, 2011, the trial court sentenced Appellant to six to twelve years' incarceration. On July 28, 2011, Appellant filed post-sentence motions, seeking, *inter alia*, a judgment of acquittal on the basis that the evidence was insufficient to support the verdict beyond a reasonable doubt

---

[3] The jury's question was: "Please clarify the definition of provocation as pertaining to Voluntary Manslaughter." The trial court responded first by reciting 18 Pa.C.S. § 2503(a)(1), and then (accurately) as follows: "Whether provocation was sufficient to support the defense of voluntary manslaughter is determined by an objective standard – whether a reasonable man, confronted by the same series of events, would become impassioned to the extent that his mind was incapable of cool reflection." T.C.O. at 6-7 (citing ***Commonwealth v. Galloway***, 485 A.2d 776, 783 (Pa. 1984)).

or to establish beyond a reasonable doubt that Appellant did not act in self-defense; and that the Commonwealth impermissibly presented mutually inconsistent theories of the case. By order entered November 22, 2011, the trial court denied Appellant's post-sentence motions. This appeal followed.[4]

Appellant raises the following issues:

> 1. Was [Appellant] entitled to a Judgment of Acquittal based on the failure of the Commonwealth to establish that [Appellant] caused the death of [Decedent] as the Commonwealth improperly presented evidence of multiple mutually inconsistent theories, resulting in the proving of neither.
>
> 2. Was [Appellant] entitled to a new trial after the Court failed to properly respond to a jury question by giving an incomplete definition of provocation.

Brief for Appellant at 2.

Appellant's first argument focuses upon the proposition that the Commonwealth could not seek to prosecute Appellant simultaneously for homicide and attempted homicide. ***Id.*** at 5-6. Appellant posits that this effectively conceded Appellant's argument that, while Appellant fired at Decedent, he could not have hit him in the back, because "Ms. Pagan's testimony could not have been any clearer that [Decedent] and [Appellant]

---

[4] On December 1, 2011, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On December 2, 2011, however, the trial court filed a Rule 1925(a) statement indicating that it believed its November 22, 2011 order provided sufficient guidance as to the court's reasoning for its various conclusions. Notwithstanding this second order, Appellant timely complied with the trial court's order, filing a Rule 1925(b) statement on December 20, 2011. The trial court issued no further response to Appellant's statement.

were facing each other the entire time they were shooting each other." ***Id.*** at 6.

We recognize that, although this is cast as a mutually inconsistent theory argument, it is at least as much an attack on the sufficiency of the evidence. To the extent that Appellant challenges the sufficiency of the evidence, our standard of review is as follows:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt . . . . When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Sullivan, 820 A.2d 795, 805 (Pa. Super. 2003) (quoting ***Commonwealth v. Widmer***, 744 A.2d 745, 751 (Pa. 2000)). Regarding the evidence necessary to sustain unreasonable belief voluntary manslaughter,[5] we have explained as follows:

---

[5] We focus upon this variation on voluntary manslaughter, because it appears to be consistent with the factual history of this case and also dovetails with Appellant's focus upon a theory of self-defense (in the alternative to his claim regarding a third shooter). Nonetheless, by implication Appellant also invokes the issue of provocation manslaughter in challenging the trial court's response to the jury's request for further elaboration regarding the definition of provocation. We have delineated the legal standard for sudden and intense passion voluntary manslaughter under section 2503(a) as follows:

(Footnote Continued Next Page)

> Unreasonable belief voluntary manslaughter requires that the defendant have the subjective belief that the killing is justified. For a person to have justifiably used deadly force in defense of himself, three factors must be found to have existed:
>
> First, the actor must have reasonably believed himself to be in imminent danger of death or serious bodily harm, and that it was necessary to use deadly force against the victim to prevent such harm. Second, the actor must have been free from fault in provoking or continuing the difficulty which resulted in the slaying. Third, the actor must have violated no duty to retreat.

Commonwealth v. Galloway, 485 A.2d 776, 783 (Pa. Super. 1984) (quoting ***Commonwealth v. Brown***, 421 A.2d 660, 662 (Pa. 1980)).

(Footnote Continued) ———————————

> A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation . . . .
>
> The passion which will reduce an unlawful killing to voluntary manslaughter must be caused by legally adequate provocation. The test for determining the existence of legally adequate provocation is an objective test.
>
> * * * *
>
> If and when sufficient provocation is found, then the focus of inquiry shifts to the defendant's response to that provocation.
>
> If sufficient provocation exists, the fact finder must also determine whether the defendant actually acted in the heat of passion when he committed the homicide and thus whether the provocation led directly to the killing or whether there was sufficient "cooling" period so that a reasonable man would have regained his capacity to reflect.

Commonwealth v. Carr, 580 A.2d 1362, 1364 (Pa. Super. 1990) (internal quotation marks, citations, and modifications omitted).

Appellant presses two points. First, he argues that the Commonwealth impermissibly presented two mutually exclusive theories at trial. Citing ***Commonwealth v. Woong Knee New***, 47 A.2d 450, 468 (Pa. 1946), he argues that the trial court erred when it cast the Commonwealth's evidence as presenting one theory, "that [Appellant] shot and killed Decedent." Brief for Appellant at 5 (quoting T.C.O. at 6). Appellant contends that "[t]he Trial Court, inexplicably, seems to ignore the fact that the Commonwealth also presented the theory that [Appellant] *attempted* to shoot and kill [Decedent], but someone else fired the fatal shot." ***Id.*** at 6 (emphasis in original).

Appellant's argument is patently at odds with the Commonwealth's conduct of the case: The Commonwealth sought exclusively to establish that Appellant fatally shot Decedent. This much is plain from the testimony of the Commonwealth's lay and expert witnesses. **Appellant** sought to establish that there had been a third shooter on the scene. Had Appellant prevailed upon this theory, he might well have been convicted of attempted murder, given that he testified that he fired four shots at Decedent. It was likely for this reason alone that the Commonwealth noted in closing that the jury could convict Appellant of attempted murder. N.T., 5/13/2011, at ("[I]f you conclude that somehow [Appellant] did not kill him, that he at least tried to kill him . . ., somehow that a mystery shooter did this, you will have the right to find him guilty of attempted homicide."). It would have been careless of the Commonwealth **not** to address this prospect, given

Appellant's trenchant effort to implant in jurors' minds the possibility that a third individual fired the single fatal shot.

Woong Knee New is not to the contrary. Appellant cites this case for the proposition that, "[w]hen two equally reasonable and mutually inconsistent inferences can be drawn from the same set of circumstances, a jury must not be permitted to guess which inference it will adopt . . . . When a party on whom rests the burden of proof . . . offers evidence consistent with two opposition propositions, he proves neither." 47 A.2d at 468; ***see*** Brief for Appellant at 5. In ***Woong Knee New***, the evidence patently was thin and wholly circumstantial; the Commonwealth did not have anything approaching the extensive eyewitness testimony present in this case.

Here, the Commonwealth at all times sought a conviction for homicide. It was Appellant who put attempted murder in play. Indeed, Appellant undermines his own argument by citing our Supreme Court's decision in ***Commonwealth v. Duncan***, 373 A.2d 1051 (Pa. 1977), in which this Court held that conflicting stories between the defendant and those testifying for the Commonwealth must be reconciled by the jury. That is precisely the circumstance the jury faced here: The Commonwealth did not abandon its theory when it noted that, even if the jury believed Appellant's theory that another shooter was responsible for the killing, it nonetheless could convict him of attempted murder.

We reach the same result with regard to the sufficiency challenge implicit in Appellant's contention that Ms. Pagan testified unequivocally that Appellant and Decedent were facing each other when all of the shots were fired. Ms. Pagan's testimony speaks for itself: While she provides some fodder for Appellant's contention that he never fired upon Decedent while Decedent's back was turned, there is more than enough testimony by Ms. Pagan to suggest that, when Decedent fled directly away from Appellant, and before Decedent ducked behind a parked car, Decedent turned his back on Appellant. Ms. Pagan further testified that Appellant may have fired at least once during the brief period when Decedent's back was turned. N.T., 5/10/2011, at 123-32. Thus, the jury had sufficient evidence from which to conclude beyond a reasonable doubt that Appellant shot Decedent in the back. Appellant's arguments fail.

In his second issue, Appellant challenges the trial court's response to a jury inquiry regarding the definition of provocation as it relates to voluntary manslaughter under 18 Pa.C.S. § 2503. Appellant contends that "[t]he response improperly excluded a repeat of the definition of self-defense and principles of justification." Appellant also notes that his counsel was not consulted before the court gave its response to the jury. Consequently, he argues that he "was denied the opportunity to object to the response, or see[k] redress for the Court's error." Brief for Appellant at 7.

Appellant cites no supporting legal authority. This suffices to establish waiver of his argument on appeal. ***See*** Pa.R.A.P. 2119(a). Appellant

provides nothing more than rhetorical support for his argument that the trial court was obligated to append a reiteration of the law pertaining to self-defense and justification to its definition of provocation, when the court already had instructed the jury at length regarding those principles. N.T., 5/13/2011, at 108-13, 117-19. Our standard of review for challenges to jury instructions requires that we "look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper." ***Commonwealth v. Trippett***, 932 A.2d 188, 200 (Pa. Super. 2007) (quoting ***Commonwealth v. Kerrigan***, 920 A.2d 190, 198 (Pa. Super. 2007)). We will not find error "so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." ***Id.***

Moreover, although Appellant contends that the question was answered and the verdict rendered before Appellant had the opportunity to object, our review of the transcript reveals that the court explained the jury's question and its answer, and furnished copies of each to Appellant before the jury entered the courtroom to deliver its verdict. N.T., 5/13/2011, at 139-40. It is incumbent upon Appellant to object to any aspect of a jury charge in the trial court to preserve the issue for appeal. ***Commonwealth v. Pressley***, 887 A.2d 220, 223-24 (Pa. 2005); ***see*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Appellant failed to do so.

We grant that the trial court's failure to consult with counsel before responding to the jury's question was irregular and troubling. At a

minimum, it was inconsistent with best practices in avoiding the creation of appealable issues. ***See*** Pa.R.Crim.P. 647(C) (providing for additional or corrective instructions to be given to the jury by the trial court "in the presence of all parties"). However, the fact remains that even absent time for reflection, Appellant at a minimum could have objected to the trial court's choice to respond to the jury's inquiry in the absence of counsel before the jury rendered its verdict. For this reason, too, we believe that the issue was waived.

Judgment of sentenced affirmed. Jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: 5/17/2013